

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Union County

JAN - 7 2014

Edgar W. Dickson, Circuit Court Judge

S.C. Supreme Court

LUTHER BERNARD PEARSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001116

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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DAVID ALEXANDER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was trial counsel ineffective in derogation of petitioner's Sixth Amendment right to counsel because he failed to call favorable witnesses on petitioner's behalf?

## STATEMENT

On April 5, 2007, petitioner was indicted for second degree criminal sexual conduct with a minor and lewd act upon a child. App. 535-37. On February 12, 2008, petitioner was tried before the Honorable R. Knox McMahon and a jury. App. 1. John Anthony and Misty Horton represented the State. App. 1. N. Douglas Brannon and David Collins represented petitioner. App. 1. The jury acquitted petitioner of criminal sexual conduct. App. 453, ll. 18 – 22. The jury convicted petitioner of lewd act. App. 453, ll. 23 – 25. Judge McMahon sentenced petitioner to fifteen years' imprisonment. App. 476, ll. 13 – 18. Petitioner's conviction was affirmed on appeal. App. 525. State v. Pearson, 2010-UP-216 (S.C. Ct. App. Mar. 15, 2010).

On November 8, 2010, petitioner filed a PCR application. On October 8, 2012, a hearing was held before the Honorable Edgar W. Dickson. App. 494. J. Rutledge Johnson represented the State. App. 494. Shawn Campbell represented petitioner. App. 494. On May 9, 2013, Judge Dickson denied petitioner's application. App. 524. This petition follows.

## ARGUMENT

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel because he failed to call favorable witnesses on petitioner's behalf.

### **Relevant Facts**

The complainant ("Minor") and her mother moved out of Minor's father's house on Christmas Day in 2004. App. 305, ll. 18 – 24. Minor wanted to live with her father. App. 331, ll. 11 – 12. Minor's mother, Delmar Johnson ("Johnson"), "knew she didn't want to live with me." App. 332, ll. 13 – 15. Johnson began dating petitioner in October 2004, before separating from Minor's father. App. 325, ll. 13 – 20. Two months after Johnson separated from Minor's father, she was making plans to buy a trailer with and live with petitioner. App. 306, ll. 12 – 19.

On February 28, 2005, a weeknight, petitioner spent the night at Johnson and Minor's apartment. App. 306, ll. 12 – 19. Previously, petitioner only spent the night at Johnson's apartment on the weekends when Minor stayed with her father. App. 326, ll. 9 – 25. Johnson and petitioner had sex that morning. App. 316, l. 23 – 317, l. 1. App. 372, ll. 1 – 7. Petitioner did not use a condom. App. 317, ll. 2 – 3. Johnson used her panties and a towel to clean herself. App. 317, ll. 4 – 10. Petitioner also used the towel to clean himself. App. 317, ll. 4 – 10. Johnson then put the soiled panties and towel into the dirty clothes hamper she shared with her daughter. App. 317, ll. 11 – 21. Johnson and her daughter also shared undergarments. App. 319, ll. 5 – 15. Johnson got ready and left for work. App. 372, ll. 1 – 7.

Petitioner went back to sleep. App. 372, ll. 1 – 7. When he awoke, he went to the apartment's only bathroom, but Minor was occupying it. App. 372, ll. 8 – 14. Minor came out about fifteen minutes later fully dressed. App. 372, ll. 8 – 14. Minor usually rode to school with petitioner's sons. App. 373, ll. 1 – 8. Because his son was running late, petitioner called him, but

he was already in the parking lot. App. 373, ll. 1 – 15. Minor gave petitioner “a little hug” and told him she would see him later. App. 373, ll. 16 – 20.

At trial, Minor gave a different version of that morning’s events. Minor claimed that after her mother left, petitioner came into her room and raped her. App. 91, ll. 4 – 21. Minor said that petitioner had sexual intercourse with her. App. 91, ll. 4 – 21. Petitioner wore a condom. App. 91, ll. 12 – 21. Petitioner told her not to tell anyone and then sent her off to school with his son. App. 92, ll. 5 – 13.

Minor related her claims to school personnel and she was taken by her mother to the hospital where a rape kit was performed. App. 165, l. 16 – 166, l. 23. The doctor did not find any semen or seminal fluid on Minor’s body. App. 166, ll. 17 – 23. Nor did the doctor find any evidence of physical injuries to Minor’s vaginal area. App. 167, ll. 5 – 8. DNA testing was performed on panties seized from the shared laundry bin and the state’s expert testified that sperm found on the panties matched petitioner’s DNA. App. 250, l. 16 – 253, l. 10. After an Allen charge, the jury acquitted petitioner of criminal sexual conduct, but convicted him of committing a lewd act. App. 453, ll. 18 – 25.

### **Discussion**

Trial counsel was ineffective because he failed to call several witnesses who would have testified favorably to petitioner. Trial counsel failed to call a band teacher who would have testified that Minor had misbehaved in school. App. 516, ll. 2 – 24. Trial counsel could not articulate a good reason why he did not call the band teacher. App. 516, ll. 22 – 24. Trial counsel also failed to call petitioner’s sons who would have testified they had sex with Minor. App. 516, l. 25 – 517, l. 7. Trial counsel said he did not call the sons because they “would have been admitting to the same crime that [petitioner] was on trial for.” App. 517, ll. 8 – 13. Trial counsel admitted that he did not

represent them and only represented petitioner, but said he “didn’t believe that I needed to threaten the liberty of another individual to defend my client. . . .” App. 517, ll. 8 – 19.

In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel’s ineffective performance. See Strickland v. Washington, 466, U.S. 668 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel’s errors, the result of the proceeding would be different. See Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A “reasonable probability” is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997).

Had the jury heard these witnesses and, consequently, disbelieved Minor the result of the trial would have been different. The band teacher would have demonstrated that Minor was not credible. The sons’ testimony would have shown a further motive to make these claims against petitioner. The failure to present these witnesses constituted deficient performance.

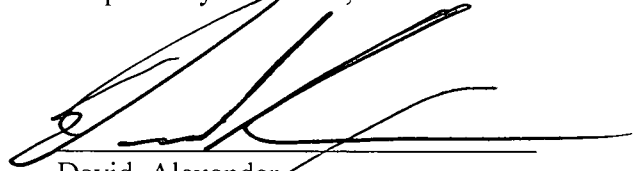
This Court has recognized the importance of trial counsel investigating and locating favorable fact witnesses. In Martinez v. State, 304 S.C. 39, 41, 403 S.E.2d 113, 113-14 (1991), this court held trial counsel ineffective for failing to subpoena a witness who could have testified favorably for the defense. In Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998), trial counsel was held ineffective for failing to call a triage nurse in a rape case.

In this case, trial counsel did not understand that his fiduciary duty was to put petitioner’s welfare above all others, which necessitated calling these witnesses. As the jury’s acquittal of petitioner on the CSC charge shows, this was a close case. Therefore, the PCR court should be reversed and petitioner granted a new trial.

CONCLUSION

For the foregoing reasons, the Court should grant the petition with the ultimate relief of a new trial for petitioner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO UNION COUNTY  
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

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LUTHER BERNARD PEARSON,

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APPELLATE CASE NO. 2013-001116

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PETITION TO BE RELIEVED AS COUNSEL

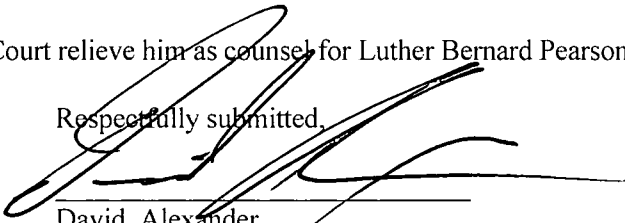
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Counsel for Luther Bernard Pearson, Jr. states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 8, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Luther Bernard Pearson, Jr..

Respectfully submitted,



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David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 7th day of January, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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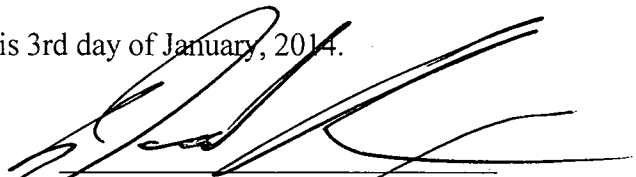
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CERTIFICATE OF SERVICE

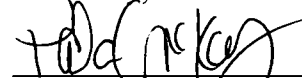
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Luther Bernard Pearson, Jr., #327560, at Ridgeland Correctional Institution this 3rd day of January, 2014.

  
\_\_\_\_\_  
David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day  
of January, 2014.

  
\_\_\_\_\_  
(L.S.)

Notary Public for South Carolina  
My Commission Expires: July 24, 2022.