

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ORIGINAL

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

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SEP 16 2019

CHARLES T. MYERS,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000427

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Victor R Seeger  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did trial counsel provide ineffective assistance of counsel when he failed to advise Petitioner on his right to testify, where trial counsel directed Petitioner into deciding not to testify?

## STATEMENT

During the June 2013 term, the Charleston County Grand Jury indicted Petitioner for trafficking cocaine and possession with intent to distribute marijuana. App. 623 – 626.

On October 6 – 8, 2014, Petitioner proceeded to trial before the Honorable R. Knox McMahon. App. 1. Benjamin Lewis represented Petitioner. Id. Lauren Mulkey and Lindsey Byrd represented the state. Id.

Petitioner was found guilty as indicted. App. 498, l. 21 – 499, l. 16. Judge McMahon sentenced Petitioner to twenty-five years' imprisonment for trafficking cocaine and five years' imprisonment for possession with intent to distribute marijuana. App. 513, l. 13 – 514, l. 3.

On June 9, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 516 – 523. The state filed its return on September 19, 2017. App. 532 – 542.

On July 28, 2018, Petitioner's PCR hearing was held before the Honorable Deadra L. Jefferson. App. 543. Christopher L. Murray represented Petitioner. Id. Kelly Openheimer represented the state. Id.

In an order filed on February 12, 2019, Judge Jefferson denied Petitioner relief. App. 603 – 622. Judge Jefferson found that the record indicated that trial counsel did discuss with Petitioner his right to testify and that Petitioner made a knowing and intelligent decision not to testify. App. 620 – 621.

## ARGUMENT

Trial counsel provide ineffective assistance of counsel when he failed to advise Petitioner on his right to testify, where trial counsel directed Petitioner into deciding not to testify.

### **Relevant Facts**

On October 26, 2012, police in North Charleston executed a search warrant at the residence of Shirley and Crystal Nelson based on an anonymous tip that Petitioner sold drugs out of the home. App. 95, l. 7 – 97, l. 13; App. 112, ll. 14 – 16. There were two bedrooms in the home and the state alleged Petitioner resided in one of them. App. 117, ll. 11 – 23; App. 304, l. 24 – 305, l. 1. As a result of the search of that bedroom, the officers found “thirty-four grams of cocaine, two hundred grams of marijuana” and a handgun in a box under the bed App. 342, ll. 2 – 20.

During trial, Petitioner’s girlfriend Crystal Nelson testified that the gun found was hers, but the drugs were not. App. 305, l. 21 – 309, l. 8. She stated that when she put the gun in the box under the bed there was nothing else in it. Id.

After the state rested, Petitioner told the court, at trial counsel’s urging, that he did not want to testify in his on defense. App. 434, l. 16 – 439, l. 25. Petitioner was found guilty as indicted. App. 498, l. 21 – 499, l. 12.

At Petitioner’s PCR hearing, he informed the PCR court that he did want to testify at his trial. App. 567, ll. 12 – 21. Petitioner stated that it was trial counsel’s decision for him to not testify. App. 560, ll. 6 – 23. He testified that he told the trial judge that he did not want to testify because trial counsel directed him to say that. App. 567, ll. 12 – 21. Accordingly, Petitioner did not knowingly and voluntarily decline to testify in his defense. Id.

Trial counsel testified at the PCR hearing as well. Trial counsel stated that he preferred that Petitioner not testify at trial. App. 587, l. 21 – 588, l. 20. Trial counsel was afraid that Petitioner’s testimony would open the door to inculpatory statements that were suppressed pretrial. Id.

Trial counsel said it was Petitioner’s decision not to testify. Id. Trial counsel also testified that he discussed Petitioner’s right to testify; however, he admitted that he could only say he “believed” Petitioner understood that right. Id.

### **Discussion**

In the current case, Petitioner did not knowingly and voluntarily decide not to testify in his own defense because trial counsel directed him into not testifying.

“The right of a criminally accused to testify or not to testify is a fundamental right.” State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52 (1987)). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” Id. at 241, 741 S.E.2d at 702 (quoting Rock, 483 U.S. at 53) (internal quotations omitted). “It is one of the rights that are essential to due process of law in a fair adversary process.” Rivera, 402 S.C. at 242, 741 S.E.2d at 703 (quoting Faretta v. California, 422 U.S. 806, 819 n. 15 (1975)) (internal quotations omitted).

“A defendant’s decision to testify or not must be made with knowledge of the consequences of either choice.” Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). A waiver of the constitutional right to testify must be knowing and voluntary. See State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687 – 688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and that there was a reasonable probability that, but for counsel’s unprofessional errors, the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117 – 118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Trial counsel provided ineffective assistance of counsel because, while trial counsel told Petitioner why he should not testify, trial counsel failed to advise Petitioner of his absolute right to testify. See Strickland, 466 U.S. at 687 – 688. Based on the testimony presented at PCR, it appeared that trial counsel convinced Petitioner not to testify, but failed to ensure that Petitioner’s decision not to testify was made knowingly and voluntarily. App. 567, ll. 12 – 21; App. 587, l. 21 – 588, l. 20.

Although there was an on the record waiver of Petitioner’s right to testify, that decision was not voluntary because it was not Petitioner’s decision. App. 560, ll. 6 – 23. Trial counsel made the decision for Petitioner not to testify. App. 434, l. 16 – 439, l. 25; App. 560, ll. 6 – 23; See Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) (“An on-the-record waiver of a

constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right.”).

Trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Petitioner was prejudiced because trial counsel’s failure to properly advise Petitioner of his constitutional right to testify led Petitioner to not testify in his own defense without sufficient knowledge or understanding of that fundamental right. App. 567, ll. 12 – 21 Accordingly, Petitioner did not knowingly and voluntarily waive his right to testify.

Therefore, this Court should find trial counsel ineffective for failing to ensure Petitioner knowingly and voluntarily waived his right to testify and that Petitioner suffered prejudice as a result of that ineffective assistance of counsel.

**CONCLUSION**

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.

A handwritten signature in cursive script, reading "Victor R. Seeger", written over a horizontal line.

Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16<sup>th</sup> day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

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CHARLES T. MYERS,

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---


PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Charles Tramayne Myers states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Deadra L. Jefferson, which was held on July 26, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve him as counsel for Charles Tramayne Myers.

Respectfully Submitted,



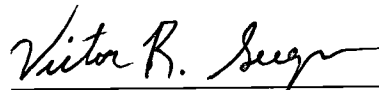
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Victor R Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16<sup>th</sup> day of September, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Victor R Seeger  
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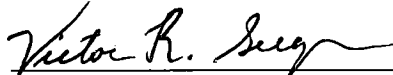
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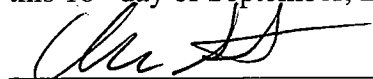
RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Charles Tramayne Myers, #294203, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16<sup>th</sup> day of September, 2019.

  
\_\_\_\_\_  
Victor R Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 16<sup>th</sup> day of September, 2019.

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

Notary Public for South Carolina  
My Commission Expires: October 26, 2019