

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Sep 15 2021**

S.C. SUPREME COURT

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Certiorari to Sumter County

Honorable R. Kirk Griffin, Circuit Court Judge

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FAVIAN A. HAYES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000445

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Sarah E. Shipe  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err finding appellate counsel was not ineffective for failure to adequately communicate with petitioner in order to keep him informed regarding the status of his appeal?

## STATEMENT

On June 1, 2009, petitioner pled guilty to possession of cocaine base, criminal conspiracy, and armed robbery before the Honorable Howard P. King. App. 1. David Sullivan represented petitioner and Catherine Fant, assistant solicitor, represented the state. App. 1. Judge King sentenced petitioner to concurrent terms of five years' imprisonment for possession of cocaine base, five years' imprisonment for criminal conspiracy, and twenty-five years' imprisonment for armed robbery.

Defense counsel filed a notice of appeal but failed to provide an explanation as required under Rule 203(d)(1)(B), SCACR. On September 3, 2009, the Court of Appeals issued an order dismissing petitioner's appeal. App. 189.

On September 22, 2009, petitioner filed an application for PCR alleging, among other things, defense counsel was ineffective where counsel had a conflict of interest because he concurrently represented a potential witness for the state in petitioner's case. After an evidentiary hearing, on May 16, 2012, the court signed an order denying PCR. App. 59-67; 190. On March 9, 2015, petitioner filed a second PCR application alleging newly discovered evidence. On October 28, 2015, the court signed an order of dismissal. App. 68-69; 191. Petitioner then filed a petition for habeas corpus in the United States District Court for the District of South Carolina. The Honorable Richard Gergel entered a conditional order granting the writ of habeas corpus and directed the state to restore petitioner's direct appeal rights. App. 191. In response to that order, on motion by the state, the South Carolina Supreme Court issued an order for the Court of Appeals to recall the remittitur in petitioner's direct appeal and reinstate the appeal. App. 192.

Appellate Defender, John Strom, filed a brief raising the following issue:

The trial court abused its discretion in finding [petitioner] freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied [petitioner's] motion to relieve counsel without conducting an adequate inquiry into [petitioner's] complaint that counsel had an actual conflict of interest, due to his simultaneous representation of state's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

App. 71; 192. The Court of Appeals affirmed petitioner's convictions and sentences. *State v. Hayes*, 2018-UP-025 (filed January 17, 2018). Appellate Defender, Lara Caudy, filed a petition for rehearing, which was later denied by the Court of Appeals. App. 108-21; 192. Deputy Chief Appellate Defender, Wanda Carter, filed a petition for a writ of certiorari to the South Carolina Supreme Court, which was denied on May 24, 2018. App. 123-42; 192.

Thereafter, petitioner filed this application for PCR on January 14, 2019. App. 143-49. An evidentiary hearing was held before the Honorable R. Kirk Griffith on March 11, 2021. App. 186. Timothy Griffith represented petitioner, and Brianna Schill, assistant attorney general, represented the state. App. 186.

On April 15, 2021, Judge Griffith signed an order denying PCR. App. 225-52. The judge granted the state's partial motion to dismiss all of petitioner's claims except the allegation of ineffective assistance of appellate counsel. App. 234-41. As to that claim the court found neither Strom, Caudy, or Carter were ineffective. The court found petitioner failed to allege how additional preparation or communication of appellate counsels would have helped his case or how specifically appellate counsels should have prepared more. App. 249-51.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred finding appellate counsel was not ineffective for failure to adequately communicate with petitioner in order to keep him informed regarding the status of his appeal.

### **Relevant facts**

At petitioner's evidentiary hearing he testified that, on appeal, he was initially represented by John Strom. Petitioner said he was pleased with Strom's representation and he was satisfied with the communication between he and Strom. App. 198-99; 205. Petitioner testified that after Strom filed the brief in his case the Court of Appeals granted oral argument in the case. App. 199. He said that a short time later he received notice that Strom was leaving, and Lara Caudy would be his attorney going forward. App. 199. A few months later petitioner received a letter from Lara Caudy informing him she was his attorney. Not long after, he was notified that Caudy would be out on maternity leave and his case was again assigned to another attorney, Wanda Carter. App. 199-200.

Petitioner said that he felt like his case became a "hot potato" being passed from attorney to attorney. He testified that communication between himself and his ever-changing counsel was inadequate. App. 200; 206. Petitioner believed that Strom had done a good job and that the Court of Appeals was interested in hearing his case but when Strom left everything changed and petitioner was bounced from attorney to attorney. App. 206; 210. Petitioner said that although he called, he was never able to speak on the telephone with either Caudy or Carter. App. 206; 210. Petitioner stated that due to Carter's position, Deputy Chief Appellate Defender, his case did not get "her full attention." App. 206-07. Petitioner testified he felt like appellate counsel was ineffective because "communication was poor" and there was a "lack of interest" in his case.

App. 207; 209.

John Strom testified at the hearing and said that he was assigned the case following petitioner's successful petition for federal habeas. App. 212. Strom worked at the South Carolina Commission on Indigent Defense, Appellate Division for three years before moving to Washington D.C. App. 212. Strom wrote the brief filed with the Court of Appeals. App. 212. Strom recalled that petitioner was an "active and engaged client," with whom he had "regular communication." App. 213. Strom also testified that oral argument had been scheduled in petitioner's case but were never held. App. 214.

Wanda Carter testified that she was given the case after Caudy went on maternity leave. 216. Carter admitted that she did not recall ever speaking to petitioner on the telephone. App. 219. Carter testified that she filed a petition for a writ of certiorari in petitioner's case. App. 217. Regarding the merits of petitioner's case, Carter said she believed that the issue presented to the Court was preserved for appeal and that she and Caudy both argued that to the Court in their respective petitions. She stated, she believed "the case had merit," although unfortunately the Court did not agree. App. 218.

### **Discussion**

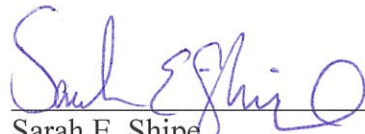
"A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel." *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing *Evitts v. Lucey*, 469 U.S. 387, 398 (1985)). "First, the burden of proof is upon petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms." "Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999).

The PCR court incorrectly found appellate counsel was not ineffective where she admittedly failed to communicate with petitioner regarding the status of his appeal. Carter acknowledged she did not recall ever having talked to petitioner on the telephone regarding his appeal. Petitioner testified he never spoke with appellate counsel, Carter on the telephone and in contrast talked with former appellate counsel, Strom, about his case often. Strom corroborated petitioner’s testimony and stated that they had regular communication and that petitioner was an “engaged client.” The rules of professional conduct provide that a lawyer shall “reasonably consult with a client about the means by which the client’s objectives are to be accomplished;” “keep client reasonably informed about the status of the matter;” and “promptly comply with reasonable requests for information.” S.C. App. Ct. R. RULE 407 RPC 1.4. The testimony at the PCR hearing demonstrates that Carter did not “keep [petitioner] reasonably informed about the status” of his case in accordance with the rules of professional conduct. *See Id.* Accordingly appellate counsel was ineffective for failure to communicate with petitioner regarding the status of his appeal.

**CONCLUSION**

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2021.

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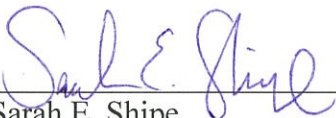
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Counsel for Favian Alphonzo Hayes states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Kirk Griffin, which was held on March 11, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Favian Alphonzo Hayes.

Respectfully Submitted,



\_\_\_\_\_  
Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2021.

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**CERTIFICATE OF COUNSEL**

**S.C. SUPREME COURT**

The undersigned certifies that to the best of her 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."



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This 15th day of September, 2021.