

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Cherokee County  
Roger L. Couch, Circuit Court Judge  
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RECEIVED

APR 26 2013

S.C. Supreme Court

JONATHAN BYERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213076  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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BREEN RICHARD STEVENS  
Appellate Defender

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

INDEX

INDEX.....1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT

**Counsel provided constitutionally deficient performance where he failed to  
    prepare Petitioner to testify at his trial.....6**

CONCLUSION .....9

PETITION TO BE RELIEVED AS COUNSEL.....10

ISSUE PRESENTED

Whether Counsel provided constitutionally deficient performance where he failed to prepare Petitioner to testify at his trial?

## STATEMENT

Petitioner Jonathan Byers was indicted by the Cherokee County grand jury on June 7, 2007, for three counts of first degree burglary, and three counts of first degree criminal sexual conduct (CSC 1st). App. 513—App. 514; App. 516—App. 517; App. 519—App. 520; App. 523—App. 524; App. 525—App. 526; App. 528—App. 529. He was further indicted on August 2, 2007 with one count of armed robbery, and three counts of possession of a firearm or knife during the commission of a violent crime (Possession of a Firearm). App. 531—App. 532; App. 534—App. 535; App. 537—App. 538; App. 540—App. 541.

His case proceeded to trial from October 8 through 10, 2007, before the Honorable J. Derham Cole and a jury. Donald A. Thompson (Counsel) represented Petitioner, while Harold W. Gowdy, III, and Cindy Crick represented the State. App. 1. Immediately after the lunch recess on October 9, 2007, Petitioner informed the trial court that he was going to testify in his own defense, which he did shortly after. App. 285, lines 5-18; App. 288, line 2—App. 333, line 16.

The jury found Petitioner guilty as charged on all counts. App. 405, line 13—App. 407, line 7. The trial court imposed the following sentences: consecutive terms of life imprisonment for each count of first degree burglary; concurrent thirty year terms for each count of CSC 1st and armed robbery; and five years for each count of Possession of a Firearm.<sup>1</sup> App. 415, line 18—App. 418, line 20; App. 515; App. 518; App. 521; App. 522; App. 527; App. 530; App. 533; App. 536; App. 539; App. 542.

Petitioner appealed, and Appellate Counsel Elizabeth Franklin-Best filed the Final Brief of Appellant on November 12, 2008. App. 420—App. 436. On February 22, 2010, the South Carolina Court of Appeals filed an unpublished per curiam opinion affirming Petitioner's

convictions and sentences. App. 452—App. 453; State v. Byers, Op. No. 2010-UP-139 (S.C. Ct. App. filed February 22, 2010).

Petitioner then filed his application for post-conviction relief (PCR) on March 7, 2011. App. 454—App. 460. On June 11, 2012, an evidentiary hearing was held before the Honorable Roger L. Couch. Alexander P. Lewis represented Petitioner, while Suzanne H. White represented the State. App. 465.

Petitioner testified at the hearing, and indicated that Counsel did not prepare him on what to do when Petitioner came to trial, especially because it was the first time Petitioner faced a trial. App. 469, lines 18-21; App. 471, lines 13-18. Petitioner further asserted that Counsel never prepared him to testify before the jury:

Q. Did [Counsel] tell you—did he try to teach you about looking people in the eye or, or try to teach you how to, how to converse with the jury?

A. No sir.

.....

Q. And, so, do you feel as if those things had been done that your case might have gone differently?

A. Yes, sir.

App. 471, line 24—App. 472, line 8. As a result, Petitioner specifically sought the remedy of a new trial. App. 472, lines 16-20.

Counsel also testified at the PCR hearing. He indicated that his trial strategy was to attack the DNA evidence, but acknowledged that Petitioner indicated to him in meetings prior to trial that he wanted to assert the defense of consent to the encounters he had with the complaining witnesses.

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<sup>1</sup> Upon motion of Counsel, the trial court vacated the five year sentences for Possession of a Firearm pursuant to Section 16-23-490(a). App. 418, lines 5-18.

App. 479, line 8—App. 480, line 6. Counsel further stated that he “tried [his] best to keep [Petitioner] from testifying cause his testimony sabotaged everything we had done in the trial.” App. 481, lines 15-22.

As to Counsel’s preparation of Petitioner to testify at trial, Counsel admitted that he did not prepare Petitioner. Although Counsel was aware that Petitioner desired to present a defense of consent based upon the prior meetings with him, and despite the fact that the colloquy regarding whether petitioner would testify occurred immediately after the lunch break on October 9, 2007, Counsel indicated to the PCR court that there was no time to prepare Petitioner because ‘that decision was made in the courtroom as the judge had taken the bench and was about to call the jury back out as to whether or not he was gonna testify.” App. 482, lines 10-17. Counsel again restated this position on cross-examination when he said, “As far as the conduct of the trial, he was advised of that. As to what he should do while he was testifying, that was on the fly when he decided he was gonna testify.” App. 486, lines 4-7.

The PCR court filed an Order of Dismissal on August 9, 2012. App. 497. As to Counsel’s failure to prepare Appellant to testify before the jury, the court held that Petitioner “failed to prove that Counsel was deficient in his strategy or that [Petitioner] was prejudiced as a result of this strategy. The [Petitioner] made the decision to testify during the trial; therefore, Counsel had no opportunity to prepare him for taking the witness stand.” App. 501—App. 502. The court further held that Petitioner was not prejudiced by Counsel’s representation due to the presence of overwhelming evidence of guilt. As a result, the PCR court dismissed Petitioner’s application with prejudice. App. 503. PCR counsel filed a Motion for Reconsideration on August 17, 2012, which the PCR court denied on September 21, 2012. App. 506—App. 507; App. 511—App. 512.

This petition follows.

## ARGUMENT

### **Counsel provided constitutionally deficient performance where he failed to prepare Petitioner to testify at his trial.**

Counsel's failure to prepare Petitioner to testify in his own defense amounted to a failure of Counsel to adequately prepare for trial. This was especially pertinent where: (1) petitioner indicated in meetings with Counsel prior to trial that he wanted to present a defense other than what Counsel desired; (2) Counsel had the opportunity to prepare Petitioner over a lunch break in the trial that occurred immediately before the trial court held its on-the-record colloquy with Petitioner confirming his decision to testify; and (3) where Counsel failed to even ask for a short break or continuance in the proceedings to properly prepare Petitioner to testify before the jury. In short, Counsel's failure to prepare Petitioner to testify before the jury despite prior indicators that he would want to testify, or to utilize breaks in the trial to prepare Petitioner, or to even ask for a short break to prepare Petitioner after the on-the-record colloquy with the trial court affirming his decision to testify "clearly shows that [Counsel] inadequately prepared for trial." Lounds v. State, 380 S.C. 454, 462, 670 S.C. 646, 650 (2008).

The applicable standard to the present case is whether Counsel's performance fell below an objective standard of reasonableness, and the performance prejudiced Petitioner to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." Florida v. Nixon, 543 U.S. 175,

187, 125 S.Ct. 551, 560 (2004). Further, counsel has a fundamental duty to prepare for trial. Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’”) (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)).

In the present case, Counsel failed to adequately prepare for trial by failing to prepare Petitioner to testify before the jury despite the fact that: (1) he knew or should have known of Petitioner’s desire to testify prior to the beginning of trial; (2) he had time to prepare Petitioner to testify during the lunch break before his testimony; and (3) even if he was unaware of his own client’s desire to testify in his own defense until Petitioner affirmed his decision to the trial court, Counsel could and should have asked for a break or continuance in order to adequately prepare Petitioner.

Yet, by Counsel’s own admissions, he did not prepare Petitioner to testify before the whatsoever. This was apparently due to Counsel’s desire to ignore Petitioner’s stated desire to present a defense of consent, and proceed instead on Counsel’s own strategy of questioning whether Petitioner was involved in the incidents at all. As a result, Petitioner was never counseled or prepared on how to testify before the jury. For example, Petitioner was never counseled “about looking people in the eye or, or try to teach you how to, how to converse with the jury.” App. 471, line 24—App. 472, line 8. This failure by Counsel was critical where, as here, Petitioner’s decision to testify placed the emphasis of the defense upon the credibility of Petitioner: in order for the defense to succeed, the jury had to believe Petitioner that the encounters were consensual. However, Counsel never explained to Petitioner the best way to present his demeanor and testimony to the jury in a credible manner. Such information would readily be known and its importance

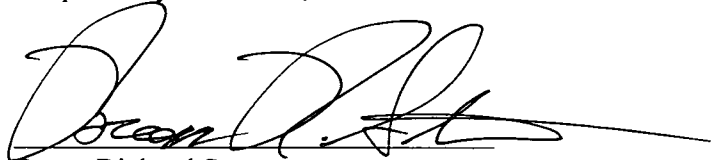
understood by an experienced trial attorney, such as Counsel, but not readily known or understood by a defendant with no prior record, such as Petitioner at the time of his trial. App. 414, lines 11-12.

Accordingly, Counsel failed to adequately prepare for trial by failing to prepare Petitioner to testify before the jury. Furthermore, as previously indicated, the credibility of Petitioner's trial testimony was critical to the defense of consent. As a result, Counsel's failure to prepare Petitioner to testify likewise prejudiced Petitioner because it created "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

CONCLUSION

For the foregoing reasons, Petitioner Jonathan Byers respectfully requests that the Court grant his Petition for Writ of Certiorari, reverse the PCR court's Order of Dismissal, and grant Petitioner a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHEROKEE COUNTY  
ROGER L. COUCH, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

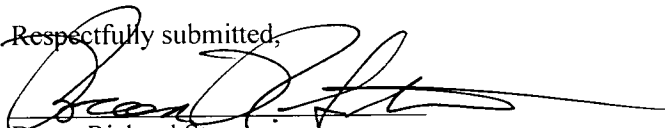
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Counsel for Jonathan Byers states:

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 June 11, 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 Jonathan Byers.

Respectfully submitted,



Breen Richard Stevens  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 26th day of April, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Cherokee County  
Roger L. Couch, Circuit Court Judge

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JONATHAN BYERS,

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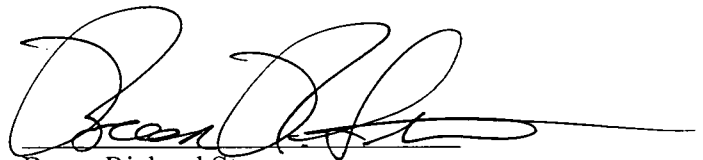
APPELLATE CASE NO. 2012-213076

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CERTIFICATE OF SERVICE

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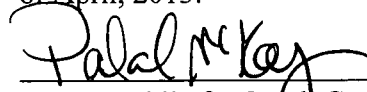
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jonathan Byers, #324474, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of April, 2013.



Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day  
of April, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.