

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. Supreme Court

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Certiorari to Allendale County

D. Craig Brown, Circuit Court Judge  
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ERIC HEMINGWAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001465  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective in failing to request a proper jury instruction on circumstantial evidence?

## STATEMENT

Petitioner was convicted of murder and criminal sexual conduct in the first degree after a jury trial held before the Honorable J. Michelle Childs on April 22 – 26, 2007, in Allendale County. Respective sentences of thirty (30) years and fifteen (15) years were imposed. Steven Plexico, Esquire, was trial counsel. Tameaka Legett, Esquire, was the assistant solicitor. (App. p. 1 – p. 631).

Petitioner appealed his convictions and the appeal was dismissed by the South Carolina Court of Appeals on November 23, 2009, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Hemingway, Op.No. 2009-UP-563. (App. p. 661 – p. 662). Petitioner filed an application for post-conviction relief together with a memorandum to support the application on February 9, 2010. (App. p. 632 – p. 660). Respondent filed a return dated June 11, 2010. (App. p. 661 – p. 665). An evidentiary hearing was held on September 1, 2011, before the Honorable D. Craig Brown. Petitioner was present and was represented by John H. Pinckney, Esquire. Respondent was represented by Matthew J. Friedman, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. 667 – p. 694).

On October 6, 2011, Judge Brown issued an order denying and dismissing the application for post-conviction relief. (App. p. 695 – p. 701).

This petition follows.

## ARGUMENT

Trial counsel was ineffective in failing to request a proper jury instruction on circumstantial evidence.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution 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. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. 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. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

Petitioner's case was tried on the basis of very weak circumstantial evidence. The trial court gave a jury instruction on circumstantial evidence. (App. p. 597, line 12 – p. 599, line 8). Trial counsel, however, failed to request a proper jury instruction on circumstantial evidence. In State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), the Court suggested that the following charge should be given:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

405 S.C. at 99, 747 S.E.2d at 452.

Trial counsel's failure to request the above jury instruction constituted ineffective assistance of counsel.

CONCLUSION

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of November, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO ALLENDALE COUNTY  
D. CRAIG BROWN, CIRCUIT COURT JUDGE

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ERIC HEMINGWAY,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001465

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PETITION TO BE RELIEVED AS COUNSEL

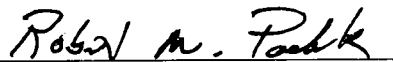
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Counsel for Eric Hemingway states:

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 September 1, 2011. 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 Eric Hemingway.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 6th day of November, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Allendale County  
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ERIC HEMINGWAY,

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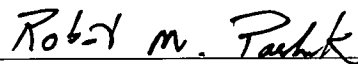
APPELLATE CASE NO. 2013-001465

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CERTIFICATE OF SERVICE

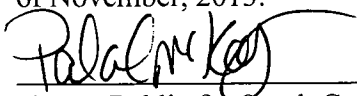
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Eric Hemingway, #290037, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of November, 2013.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day  
of November, 2013.

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