

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

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S.C. Supreme Court

JHUNE HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001349

JOHNSON PETITION FOR WRIT OF CERTIORARI

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 defense counsel was ineffective in failing to preserve a Belcher issue for appeal?

STATEMENT

Petitioner was convicted of murder and assault and battery with intent to kill after a jury trial held before the Honorable Reginald I. Lloyd on November 7 – 10, 2005, in Richland County. Jack B. Swerling, Esquire, was trial counsel. John P. Meadows, Esquire, and Erin S. Gaddy, Esquire, were the assistant solicitors. Petitioner was given respective sentences of forty (40) years and twenty (20) years. (App. p. 1 – p. 748). Petitioner appealed his convictions and they were affirmed by the South Carolina Court of Appeals on March 4, 2009. Certiorari to the South Carolina Supreme Court was denied on April 8, 2010. (App. p. 782).

Petitioner filed an application for post-conviction relief on May 6, 2010. (App. p. 774 – p. 780). Respondent filed a return dated July 19, 2010. (App. p. 781 – p. 788). An evidentiary hearing was held on October 4, 2011, before the Honorable G. Thomas Cooper, Jr. Petitioner was present and was represented by Tommy Thomas, Esquire. Respondent was represented by Brian Petrano, Assistant Attorney General. Petitioner testified in his own behalf and called Jack Swerling, Esquire, and Katherine Hudgins, Esquire, to testify. (App. p. 789 – p. 881).

On February 2, 2011, Judge Cooper issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 882 – p. 893).

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to preserve a *Belcher* issue for appeal.

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 defense to the murder charge and the assault and battery with intent to kill charge was self-defense and accident. He shot the victims with a pistol. In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the South Carolina Supreme Court held the following:

- (1) jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide;
- (2) the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill)

prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill);

(3) trial court's error in charging jury that malice could be inferred by the use of a deadly weapon could not be considered harmless; and
(4) Supreme Court's ruling would be effective for all cases which were pending on direct review or not yet final where the issue was preserved.

Defense counsel did not preserve this Belcher issue at petitioner's trial. While petitioner's case was tried in November of 2005 and Belcher was not decided until October of 2009, Belcher's trial was held in July of 2006. So the attorney in Belcher had the foresight to preserve this issue for appeal. There is no reason why defense counsel could not have made this an issue at petitioner's trial. It is obvious that criminal defense lawyers had been kicking this issue around for awhile. Defense counsel should be held ineffective for not preserving this issue for appeal.

CONCLUSION

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

Respectfully submitted,

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
G. THOMAS COOPER, CIRCUIT COURT JUDGE

JHUNE HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001349


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jhune Harris 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 4, 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 Jhune Harris.

Respectfully submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of November, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

JHUNE HARRIS,

PETITIONER,

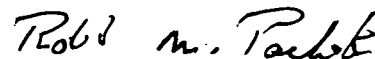
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

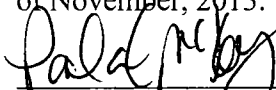
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jhune Harris, #312568, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of November, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of November, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.