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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

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LAYMON DAVIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002023

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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 counsel was ineffective in failing to subject the State's case to meaningful adversarial testing?

## STATEMENT

On January 16, 2013, petitioner appeared before the Honorable Edgar W. Dickson in Orangeburg County and pled guilty to driving under suspension and felony driving under the influence – death results. Petitioner was sentenced to time served for driving under suspension and to twenty (20) years suspended on service of eight (8) years imprisonment and five (5) years probation for felony driving under the influence. Jillian D. Ullman, Esquire was plea counsel. David Pascoe, Esquire was the solicitor. (App. p. 1 – p. 17.)

Petitioner filed an application for post-conviction relief on April 15, 2013. (App. p. 18 – p. 23.) Respondent filed a return dated September 12, 2013. (App. 24 – p. 29.) An evidentiary hearing was held on May 29, 2014, before the Honorable Maite Murphy. Petitioner was present and was represented by Jonathan D. Walker, Esquire. Respondent was represented by Megan E. Harrigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 30 – p. 69.) On August 10, 2014, Judge Murphy issued an order denying and dismissing the application for post-conviction relief. (App. p. 70 - p. 80.)

This petition follows.

## ARGUMENT

Counsel was ineffective in failing to subject the State's case to meaningful adversarial testing.

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).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E. 2d 878 (2006).

At the evidentiary hearing in this case, petitioner testified to the following:

Q. Were there any statements given that the State planned to use against you?

- A. I really don't understand what you saying right now.
- Q. Okay. I apologize, I'll withdraw that question. When you were first arrested did the officer conduct field sobriety tests?
- A. Yes.
- Q. Okay. Was there a recording or a report made from those?
- A. I don't think so.
- Q. Okay. Did you ever discuss that with Ms. Ullman?
- A. No.
- Q. Okay. Did the officer or someone at a hospital take some blood from you?
- A. Yes.
- Q. Okay. Did you ever discuss that with Ms. Ullman?
- A. No.
- Q. Did you and Ms. Ullman discuss the penalties that your charge carried?
- A. No.
- q. Okay. Did you and Ms. Ullman discuss the elements of the crime of Felony D-U-I where death results?
- A. No.

(App. p. 35, line 11 – p. 36, line 8).

As can be seen from the above, counsel was ineffective in failing to subject the State's case to meaningful adversarial testing.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,

*Robert M. Pachak*

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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO ORANGEBURG COUNTY  
MAITE MURPHY, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

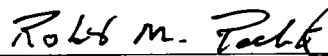
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Counsel for Laymon Davis states:

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 May 29, 2014. 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 Laymon Davis.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of January, 2015

STATE OF SOUTH CAROLINA

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APPELLATE CASE NO. 2014-002023

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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 J. Clayton Mitchell, Esquire and Laymon Davis, #244742, at Wateree River Correctional Institution this 16th day of January, 2015.

Robert M. Pachak

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day  
of January, 2015.

Brendy Robinson Brown (L.S.)  
Notary Public for South Carolina

My Commission Expires: December 9, 2024.