

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Roger L. Couch, Circuit Court Judge  
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S.C. Supreme Court

KENNETH WAYNE CHILES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001079  
\_\_\_\_\_

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

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## ISSUE PRESENTED

Did the PCR judge err by finding counsel provided effective representation where counsel failed to move for a severance prior to Petitioner's joint armed robbery trial with his codefendant, Carnie Norris, III., where Petitioner and Norris had inconsistent defenses, and the jury could not make a reliable judgment about Petitioner's guilt, which prejudiced Petitioner?

## STATEMENT OF FACTS

On September 19, 2008, the Spartanburg County Grand Jury indicted Petitioner and his co-defendant, Carnie Norris, III., for armed robbery. App. 429. On July 6, 2009, Petitioner's case proceeded to a jury trial before the Honorable J. Derham Cole. App. 1. J. Roger Poole represented Petitioner and Beverly Dorine Jones represented Norris. Barry J. Barnette represented the State. App. 1.

At trial, Andrew Bond claimed that around 11:00 p.m. on July 16, 2008, he and his friends Zack Blankenship, Herbert Blankenship, Kellen Mayfield, Joseph Holder, and Kyle Quinn were playing "Frisbee golf" near the First Baptist Church parking lot on North Dean Street in Spartanburg, South Carolina. App. 113, ll. 4 – 23. According to Bond, the Frisbee accidentally landed on top of the building behind the church. Zack Blankenship climbed a tree near the building, picked up the Frisbee, and threw it down to Bond, who was still standing on the ground. App. 114, ll. 8 – 24. As he walked over to pick up the Frisbee, Bond claimed that he was "pushed down from behind by a man." App. 115, ll. 1 – 3.

The man, who Bond identified as Carnie Norris, allegedly asked Bond for identification and told him that he was a security officer and that Bond was under arrest. App. 115, ll. 1 – 3. Norris allegedly pulled Bond's wallet out of his pocket and began pulling cards out. App. 115, ll. 4 – 6. Bond claimed that when he asked to see Norris' badge to prove that he was a security officer, Norris pulled out a knife and held it to Bond's throat. App. 116, ll. 1 – 9. When Bond's friends walked up to see what was happening, Norris allegedly pointed the knife at them "and told them to get on the ground also." App. 117, ll. 2 – 4. Bond's friends ran away, while Petitioner walked closer to where Bond and Norris were. App. 117, ll. 10 – 12.

Norris allegedly handed the wallet to Petitioner, who started looking through it. App. 117, ll. 19 – 20. The police responded “a couple of minutes” later. Norris and Petitioner walked back across the street to Petitioner’s house. App. 120, ll. 20 – 25. After speaking with Bond, officers walked across the street to speak with Petitioner and Norris, who were both standing on the front porch observing the officers. App. 122. Petitioner and Norris were arrested on the porch and charged with armed robbery. On cross-examination, Bond admitted that Petitioner did not have a weapon. App. 128 – 129. Petitioner also did not appear until after Norris approached Bond and asked for identification. App. 128 – 129.

Petitioner testified on his own behalf. App. 237. Petitioner explained that he was asleep in bed when Norris knocked on his door and told him that “it looked like somebody was breaking into a building across the street.” App. 241. Petitioner got out of bed, put on some clothes, grabbed his phone, and looked outside. He saw “some movement in the trees” and what “looked like a couple of guys on top of the roof.” App. 247, l. 25 – App. 248, l. 2. He then walked across the street with bare feet. App. 241.

By the time Petitioner made it across the street, Norris had his hand on Bond’s shoulder and Bond was sitting on the ground. App. 242, ll. 1 – 11. Norris asked Petitioner to hold Bond’s identification card in case Bond ran away. App. 242, ll. 1 - 11. Petitioner put the identification card in his pocket. Police officers arrived moments later. App. 242, ll. 1 – 11. Petitioner and Norris walked back across the street to Petitioner’s house.

Petitioner cooperated with officers and handed over Bond’s card. App. 245. Petitioner explained that he did not participate in any type of crime. App. 247, ll. 6 – 12. Petitioner had no knowledge of any alleged robbery taking place when he walked across the street. App. 247, ll. 6 – 12.

Norris also testified on his own behalf. App. 264. Norris denied touching Andrew Bond and holding him on the ground. App. 276, l. 20. Norris admitted to having a knife in his pocket. However, he denied pulling out the knife and pointing it at Bond and his friends. App. 279, ll. 14 – 25. Norris stated that Bond “sat down” after he asked Bond for identification. App. 276, ll. 15 – 25. Norris claimed that Bond pulled out his own wallet and started showing Norris his name on the cards. App. 276, ll. 16 – 20. Norris denied ever having Bond’s wallet or cell phone. App. 276, ll. 1 – 3. However, Norris stated he was attempting to make a citizen’s arrest. App. 283, ll. 13 – 15.

The jury found Petitioner and Norris guilty of armed robbery. App. 335. Judge Cole sentenced Petitioner to eighteen years’ imprisonment. Norris was sentenced to twenty-eight years’ imprisonment. App. 344. Petitioner appealed his conviction and sentence.

A brief was filed on Petitioner’s behalf pursuant to the procedure in Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner’s appeal pursuant to Anders. See State v. Chiles, Op. No. 2011-UP-336 (S.C. Ct. App. filed June 28, 2011). The remittitur was submitted on July 14, 2011. App. 421. LaNelle Cantey DuRant represented Petitioner.

On April 30, 2012, Petitioner filed a PCR application. App. 347. On February 25, 2013, Respondent filed its return requesting an evidentiary hearing. App. 362. On September 17, 2014, a PCR hearing was held before the Honorable Roger L. Couch. App. 364. Leah B. Moody represented Petitioner. J. Clayton Mitchell represented the State. App. 364.

At the PCR hearing, Petitioner explained that he was in bed asleep and only walked across the street to see what was happening. App. 378 – 379. Petitioner did not know his co-defendant, Norris, had a weapon. App. 379.

Defense counsel testified during the PCR hearing. Counsel explained that the trial strategy was to distance Petitioner from his co-defendant. App. 395. Petitioner's defense was that "he basically had no intent to commit a crime or be an accomplice to a crime." App. 395, ll. 7 – 11. Petitioner's defense was that "he had no idea that a crime was being committed by Mr. Norris, and, therefore, he could not be an accomplice to it." App. 396, ll. 2 – 6.

Defense counsel admitted that he did not move to sever Petitioner's trial from Norris' trial. Counsel explained that he did not argue for a severance because "it would not have been granted." App. 396. According to counsel, "the chances (sic) of getting a severance was just like nil." App. 396, ll. 22 – 23.

Judge Couch issued an order of dismissal on May 8, 2015. App. 420. The judge wrote that Petitioner "failed to meet his burden of proving trial counsel ineffective for failing to move to sever the case." App. 424. The judge found that defense counsel "was not deficient in his decision to not move for a severance." App. 424. The judge also found that Petitioner "was not prejudiced by the joint trial with Norris." App. 424

Petitioner appealed the order of dismissal. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred by finding counsel provided effective representation where counsel failed to move for a severance prior to Petitioner's joint armed robbery trial with his codefendant, Carnie Norris, III., where Petitioner and Norris had inconsistent defenses and the jury could not make a reliable judgment about Petitioner's guilt, which prejudiced Petitioner.

A trial court should grant a severance “when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent a jury from making a reliable judgment about a codefendant's guilt.” State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). The judge “must carefully consider problems that may arise from a joint trial.” Id. at 281 – 82, 523 S.E.2d at 176.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant 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.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

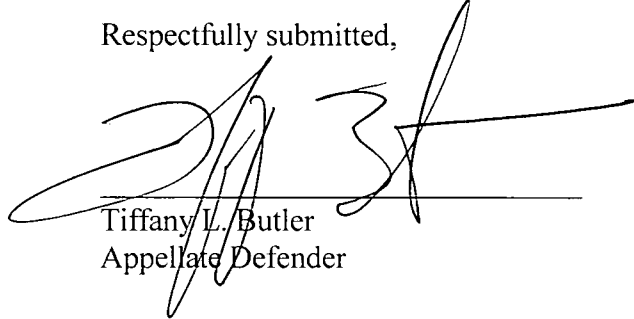
Here, defense counsel should have moved for a severance. Although Petitioner and Norris were both charged with armed robbery, they had inconsistent defenses. In fact, at the PCR hearing, defense counsel explained that Petitioner's defense was to distance himself from Norris as much as possible. See App. 397, ll. 21 – 25; App. 407, ll. 6 – 11. However, counsel did not move for a severance because he believed the trial judge would not have granted the motion. Because counsel did not at least move for a severance prior to trial, there was no ruling by the trial judge which could have been appealed and considered by an appellate court.

Had counsel moved to sever the cases, there is a reasonable probability that the trial judge would have granted counsel's motion. Petitioner and his co-defendant would have been tried separately. The jury would have considered Petitioner's guilt without having heard any testimony from his co-defendant, and the result of Petitioner's trial would have been different.

CONCLUSION

For the reasons argued above, Petitioner Kenneth Wayne Chiles respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', is written over a horizontal line. The signature is stylized and cursive.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of November, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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KENNETH WAYNE CHILES,

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STATE OF SOUTH CAROLINA,

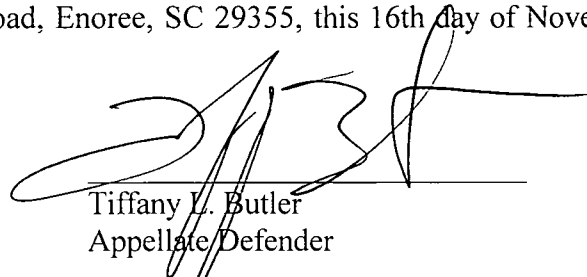
RESPONDENT

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CERTIFICATE OF SERVICE

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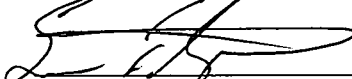
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Kenneth Wayne Chiles #167250, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 16th day of November, 2015.



Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

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



(L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.