

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

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WALTER HARRIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000891

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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  
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether defense counsel was ineffective in failing to investigate?

## STATEMENT

Petitioner was convicted of murder, first degree burglary, and armed robbery after a jury trial held with four co-defendants before the Honorable Edgar W. Dickson from December 10, 2010 to December 17, 2010 in Orangeburg County. Respective sentences of thirty-five (35) years, thirty-five (35) years, and thirty (30) years were imposed. W. Scott Palmer, Esquire was trial counsel. David M. Pascoe, Esquire was the solicitor. Donald N. Sorenson, Esquire was the assistant solicitor. (App. p. 1 – p. 1128).

Petitioner appealed his convictions and sentence and they were affirmed by the Court of Appeals on December 5, 2012. State v. Harris, Op. No. 2012-UP-644. (App. p. 1212). Petitioner filed an application for post-conviction relief on January 17, 2013, and an amended one on January 22, 2013. (App. p. 1129 – p. 1138). Respondent filed a return dated April 24, 2013. (App. p. 1139 – p. 1145). An evidentiary hearing was held on October 29, 2014 before the Honorable Kristi L. Harrington. Petitioner was present and was represented by Charles T. Brooks, Esquire. Respondent was represented by Clay Mitchell, Esquire. Petitioner, trial counsel, and appellate counsel testified at the hearing. (App. p. 1146 – p. 1209). On January 12, 2015, Judge Harrington issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 1210 – p. 1223).

This petition follows.

## ARGUMENT

Defense counsel was ineffective in failing to investigate.

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).

In this case petitioner testified at the evidentiary hearing that he attempted to withdraw from the crime when he saw where it was headed. He did not realize it was headed to a murder. He just wanted to buy marijuana from the victim. He didn't know that it would lead to a robbery

and a murder. He withdrew by staying in the car when he saw what was going to happen. (App. p. 1157, l. 23 – p. 1159, l. 11).

Petitioner testified defense counsel failed to investigate to back up his defense of withdrawal. Counsel did not get any forensic testing done. He did not look into experts, investigators, and ballistics. (App. p. 1162, ll. 10-23).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) the court wrote:

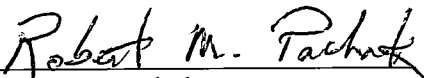
Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Thompson v. Wainwright, 787 F.2d 1447, 1450 (11<sup>th</sup> Cir. 1986); see also Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 . When evaluating the reasonableness of counsel’s conduct, “the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 . Moreover, while the scope of a reasonable investigation depends upon a number of issues, “at a minimum, \*332 counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla 1986). aff’d, 828 F. 2d 670 (11<sup>th</sup> Cir. 1987) (emphasis in original).

The American Bar Association (ABA) has specifically provided guidelines for defense counsel’s performance regarding investigation of a capital case: “Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.” *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added) (hereinafter “ABA Guidelines”).<sup>[14]</sup> With respect to forensic evidence, the ABA directs the following: “With the assistance of appropriate experts, counsel should aggressively re-examine all of the government’s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.” *Id.* at 1020.

372 S.C. at 331-332

**CONCLUSION**

Defense counsel was ineffective in failing to investigate and petitioner should be given a new trial.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2016.

STATE OF SOUTH CAROLINA

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Certiorari to Orangeburg County

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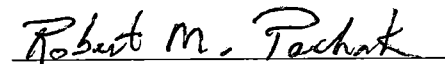
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Walter Harris states:

1. HE is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. HE has reviewed the record of petitioner's trial before Judge Kristi Lea Harrington, which was held on October 29, 2014 (Evidentiary Hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. HE has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Walter Harris.

Respectfully Submitted,

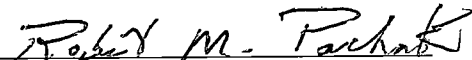


Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 15th day of September, 2016.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 15th day of September, 2016.

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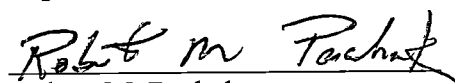
RESPONDENT

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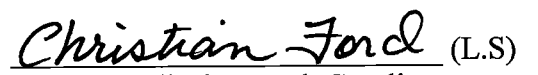
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Walter Harris, #344193, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of September, 2016.

  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 15th day of September, 2016.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026