

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

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DAVID STEVENSON BOYD, II,

RECEIVED

MAY 22 2017

PETITIONER

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002560

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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) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether defense counsel was ineffective in failing to investigate the absence of dye that was on his person following a bank robbery?

## STATEMENT

Petitioner was convicted of possession of stolen goods- third offense, armed robbery, possession of a weapon, and assault and battery with intent to kill (ABWIK) after a jury trial held before the Honorable Letitia H. Verdin in Greenville County on January 9-13, 2012. He was sentenced to ten (10) years for possession of stolen goods, twenty (20) years for armed robbery, five (5) years for possession of a weapon, and to twenty (20) consecutive years for ABWIK. Brian Johnson, Esq. and James Erwin, Esq. represented appellant. Allen O. Fretwell, Esq. was the assistant solicitor. (App. p. 1-p. 1023)

Petitioner appealed his convictions and the appeal was dismissed after a review pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). State v. Boyd, Op. No. 2013-UP-401 (S.C. Ct. App. filed October 30, 2013). (App. p. 1034)

Petitioner filed an application for post-conviction relief on October 30, 2014. (App. p. 1027-1032). Respondent filed a return dated March 30, 2015. (App. p. 1033-1037). An evidentiary hearing was held on December 5, 2016, before the Honorable John C. Hayes, III. Petitioner was present and was represented by R. Mills Ariail, Jr., Esq. Respondent was represented by Patrick Schmeckpeper, Assistant Attorney General. Both petitioner and Brian Johnson, Esq. testified at the hearing. (App. p. 1038-p. 1087). On December 13, 2016, Judge Hayes issued an order denying and dismissing the application for post-conviction relief. (App. p. 1088- p. 1098).

This petition follows.

## ARGUMENT

Defense counsel was ineffective in failing to investigate the absence of red dye that was on petitioner's person following a bank robbery.

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).

Petitioner's armed robbery charge was based on robbing three tellers at gunpoint at the Bank of Traveler's Rest on December 10, 2008. There was an issue about a pack of red dye that exploded. None of the dye was found on the petitioner. At the evidentiary hearing, petitioner testified that they had an expert testify at trial about the dye pack. The expert was Jason Brewer. He was a State expert. The expert was called to testify that there was no dye on the petitioner's hands or clothes. Brewer was not employed by the dye pack company. He also was not called for the second trial after the first trial ended in a mistrial. (App. p. 1048, line 14-p. 1049, line 23). In addition, Brewer was not qualified to testify to dye pack activation. He was only qualified to analyze and do solution tests. (App. p. 1050, lines 5-17). Defense counsel failed to inquire about the dye enough. He did not call any experts, especially a dye pack expert at his second trial. (App. p. 1057, lines 17-24).

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. at 691, 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 similar case.” *Strickland v. Washington*, 466 U.S. at 691, 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).

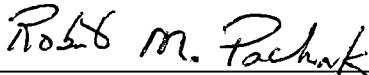
372 S.C. at 331-332, 642 S.E. 2d at 597.

The defense attorney in Ard only hired a State expert. He did not hire an independent expert and he was found ineffective in not hiring an independent expert. Defense counsel in this case also

failed to properly investigate and present an expert to the jury on the absence of red dye on petitioner.

**CONCLUSION**

Petitioner's conviction should be reversed based on ineffective assistance of counsel.

  
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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of May, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

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DAVID STEVENSON BOYD, II,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

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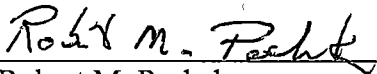
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for David Stevenson Boyd 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 John C. Hayes, which was held on December 5, 2016, 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 David Stevenson Boyd.

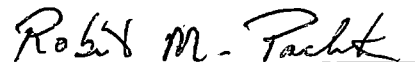
Respectfully Submitted,

  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 22nd day of May, 2017.

**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."



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South Carolina Commission on Indigent  
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ATTORNEY FOR PETITIONER

This 22nd day of May, 2017.

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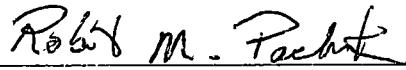
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STATE OF SOUTH CAROLINA,

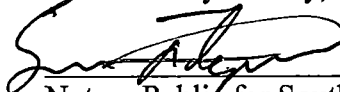
RESPONDENT

—————  
CERTIFICATE OF SERVICE  
—————

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 Justin J. 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 David Stevenson Boyd, #349271, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 22nd day of May, 2017.

  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 22nd day of May, 2017.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022