

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

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Certiorari to Cherokee County

Honorable Grace Gilchrist Knie, Circuit Court Judge

RECEIVED

APR 09 2018

PRINCE D. SNIPES,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000001

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JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether trial counsel was ineffective in failing to advise petitioner that if he chose not to testify the judge would instruct the jury that they could not use his not testifying against him?

## STATEMENT

Petitioner was convicted of murder and possession of a weapon after a jury trial held before the Honorable J. Derham Cole on July 16, 2013, in Cherokee County. A life sentence was imposed. Shawn Campbell, Esq. was trial counsel. Barry J. Barnette, Esq. was the solicitor. (App. p. 1- p. 374).

Petitioner appealed his murder conviction and the appeal was dismissed on March 2, 2016, by the South Carolina Court of Appeals after a review pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). State v. Snipes, Op. No. 2016-UP-124. (App. p. 385).

Petitioner filed an application for post-conviction relief on August 11, 2016. (App. p. 385-p 384). Respondent filed a return dated May 16, 2017. (App. p. 385-p. 389). An evidentiary hearing was held on September 18, 2017, before the Honorable Grace Gilchrest Knie. Petitioner was present and was represented by Rodney W. Richey, Esq. Respondent was represented by Valerie Giovanoli, Assistant Attorney General. Both petitioner and defense counsel testified at the hearing. (App. p. 390- p. 428).

Petitioner raised the following issues in post-convictions relief:

1. "Ineffective Assistance of Counsel"
  - a. "Trial counsel was ineffective for failure to argue and request for an immunity hearing, under the Protection of Persons, people and property Act, Castle Doctrine, and or Stand Your Ground Laws"
  - b. Trial counsel was ineffective for failing to request the Judge during Voir Dire of jury whether any member of the jury panel contribute money or is a member of MADD, SADD, Citizens Against Violence (CAVE) or any other group that lobbies on behalf of victims rights or tougher penalties for criminals [or] whether any contribute money to any law enforcement organization..."
  - c. "Sentencing counsel was ineffective for failing to inform applicant during sentencing, that he could make a

motion under rule 29, post trial motions for Reconsideration and Reduction of Sentence[...] and failing to file the motion...”

2. “Denied Due Process of Law”

- a. “Applicant was denied due process when his counsel and the trial court failed to inform him, if he chose not to testify, the judge would instruct and order the jury not to use his not testifying against him.”<sup>1</sup>

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<sup>1</sup>Petitioner also alleges IAC based on trial counsel’s failure to inform him of this.

(App. p. 378-p. 380)

On December 18, 2017, Judge Knie issued an order denying and dismissing all of petitioner’s issues. (App. p. 429-p. 438).

This petition follows.

## ARGUMENT

Trial counsel was ineffective in failing to advise petitioner that if he chose not to testify the judge would instruct the jury that they could not use his not testifying against him.

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).

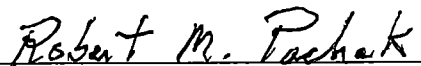
In this case at the trial level, after the State rested its case, the trial court instructed petitioner that he had the right to remain silent and that he did not have to testify. Petitioner was also told that

he had the right to testify. (App. p. 229, line 9-p. 230, line 13). After a series of questions by the trial court, petitioner said he wanted to testify. (App. p. 230, line 14-p. 231, line 18). Noticeably absent from the trial court's remarks was any information informing petitioner that if he did not testify the jury would be instructed that they could not hold that against him.

Trial counsel testified at the evidentiary hearing that he did not remember whether he advised petitioner that the jury would be instructed that they could make no adverse inference if he did not testify. (App. p. 419, lines 7-8). It is improper for the solicitor to comment directly or indirectly on a defendant's failure to testify. When such a comment is made a jury instruction to disregard is sufficient to cure any error. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is how important that jury instruction is. But petitioner was never advised of the instruction.

**CONCLUSION**

As a result of trial counsel's failure to advise petitioner of this important jury instruction that could have been given, his conviction should be reversed.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Cherokee County

Honorable Grace Gilchrist Knie, Circuit Court Judge

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PRINCE D. SNIPES,

PETITIONER

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RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

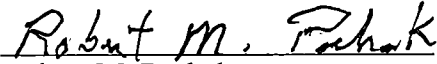
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Counsel for Prince D. Snipes states:

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 Grace Gilchrist Knie, which was held on September 18, 2017, 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 Prince D. Snipes.

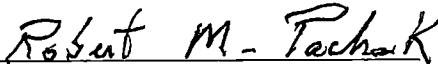
Respectfully Submitted,

  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 9th day of April, 2018.

**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  
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ATTORNEY FOR PETITIONER

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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 Megan Harrigan Jameson, 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 Prince D. Snipes, #356225, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 9th day of April, 2018.

Robert M. Pachak  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 9th day of April, 2018.

Mary He (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.