

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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SASHA GASKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002554

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether trial counsel was ineffective in failing to object to irrelevant testimony about a sexual assault of a female victim by a co-defendant because it was prejudiced to petitioner as it put her character into issue since she participated in the burglaries and robberies with all of the defendants?

## STATEMENT

Petitioner was convicted of two (2) counts of first degree burglary and two (2) counts of armed robbery after a jury trial held before the Honorable Deadra L. Jefferson in Charleston County from February 29, 2011, March 4, 2011. On March 31, 2011, petitioner was sentenced to four (4) concurrent terms of eighteen (18) years imprisonment. Kenneth Sowell, Esq. was trial counsel. The assistant solicitors were Culver Kidd and Dale Savage. (App. p. 1- p. 1114).

Petitioner appealed her convictions and they were affirmed by the South Carolina Court of Appeals on May 22, 2013. State v. Gaskins, 2013-UP-203. (App. p. 1125-p. 1126).

Petitioner filed an application for post-conviction relief on May 5, 2014. (App. p. 1117-p. 1124). Respondent filed a return dated March 4, 2015. (App. p. 1125-p. 1129). An evidentiary hearing was held on April 19, 2017, before the Honorable Brooks P. Goldsmith. Petitioner was present and was represented by Rodney S. Davis, Esq. Respondent was represented by Alicia Olive, Assistant Attorney General. Both petitioner and Kenneth Sowell testified at the hearing. (App. p. 1130-p. 1249). On October 30, 2017, Judy Goldsmith filed an amended order of dismissal.<sup>1</sup> (App. p. 1250-p. 1285).

This petition follows.

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<sup>1</sup>The amended order of dismissal was filed in response to petitioner's motion to amend judgement under Rule 59(e), SCRCP. (App. p. 1251-p. 1252).

## ARGUMENT

Trial counsel was ineffective in failing to object to irrelevant testimony about a sexual assault of a female victim by a co-defendant because it was prejudiced to petitioner as it put her character into issue since she participated in the burglaries and robberies with all the defendants.

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 was accused of conspiring with four co-defendants to commit two home invasions and rob their occupants. In the Rule 59(e), SCRCP motion PCR counsel complained that the PCR court failed to rule on the following issue:

1. Ineffective assistance of counsel by inducing and failing to object to testimony about the sexual assault for which the Applicant was not charged. Such testimony was irrelevant, prejudicial and inflamed the jury to an extent that casts doubt on the fairness of the verdict.

PCR counsel went on to argue in his motion as follows:

The issue was fully presented at the PCR hearing yet not addressed in the Order of Dismissal. Specifically, trial counsel testified that he made no objection to this testimony multiple times during the trial (Trial Transcript Pg. 115, Line 10; Pg. 120, Line 11; Pg. 175, Line 14; Pg. 346, Line 8; Pg. 348, Line 8-Pg. 349, Line 20; Pg. 446, Line 6; Pg. 726, Line 9-Pg. 728, Line 2; and Pg. 734, Line 23). Furthermore, the trial attorney elicited testimony about the sexual assault from the State's witnesses (Trial Transcript Pg. 408, Line 22; Pg. 409, Line 14-Pg. 410, Line 21; Pg. 552, Line 21; Pg. 557, Line 19; and Pg. 740, Line 23.) The Applicant was never charged with Criminal Sexual Conduct (CSC). Applicant argued at the PCR Hearing that evidence involving a CSC that occurred is irrelevant and prejudicial during the trial of the Applicant. It was argued that trial counsel's conduct is ineffective and directly influenced the jury's verdict.

(App. p. 1251-p. 1252).

The PCR court in its amended order of dismissal found that trial counsel did not object to any testimony about criminal sexual conduct "because he thought it was relevant to the incidents in which Applicant participated." But then the court said counsel "elicited testimony regarding the sexual offense in an attempt to distance Applicant's involvement in the crimes." (App. p. 1283).

If trial counsel thought the testimony was both relevant and prejudicial he could have moved to have it excluded under Rule 403, SCRE. He could also have asked for a curative instruction as far as it could have impacted petitioner.

Trial counsel should have objected to the testimony concerning criminal sexual conduct which petitioner was not involved. In Mitchell v. State, 298 S.C. 186, 379 S.E. 2d 123 (1989), the Court wrote:

In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280, S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: “Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules.” (citation omitted). In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused in a bad individual. *See, e.g., State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact element of the crime charged. *See, United States v. Johnson*, 610 F.2d 194 (4<sup>th</sup> Cir.1979); State v. Byers, 277 S.C. 176, 284 S.E.2d, 360 (1981); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. *See, State v. Wilson*, 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element i.e., intent or motive, of the crime charged. *See e.g., State v. Lyle, supra; State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985); and State v. Huggins, 285 S.C. 361, 329 S.E.2d 759 (1985). 293 S.C. at 324-325, 360 S.E.2d at 319.

**CONCLUSION**

Petitioner's convictions should be reversed.

*Robert M. Pachak*

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2018.

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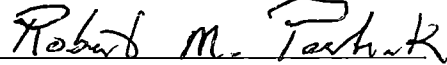
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Sasha A. Gaskins 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 Brooks P. Goldsmith, which was held on April 19, 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 Sasha A. Gaskins.

Respectfully Submitted,

  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 17th day of May, 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."



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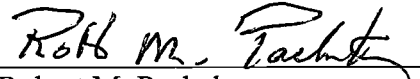
RESPONDENT

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CERTIFICATE OF SERVICE

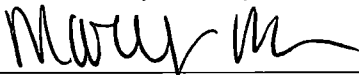
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly 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 Sasha A. Gaskins, #345415, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 17th day of May, 2018.



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of May, 2018.

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