

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge  
\_\_\_\_\_

KEVIN D. COX,

PETITIONER

RECEIVED

MAY 30 2018

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002507  
\_\_\_\_\_

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

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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**ISSUE PRESENTED**

Whether there was any evidence to support the PCR court's finding that petitioner failed to meet his burden that appellate counsel was ineffective in raising the issue of whether trial counsel was ineffective in failing to object to the admission of the prior bad acts?

## STATEMENT

Petitioner was convicted of distribution of methamphetamine or cocaine base and trafficking in cocaine after a jury trial held in his absence before the Hon. Edward B. Cottingham on March 4-5, 2008, in Horry County. Robert Paul Taylor, Esq. represent petitioner William Bertram von Herman, Esq. and Candice A. Lively, Esq. were the solicitors. On February 12, 2009, petitioner appeared before the Honorable Steven H. John and his sealed sentence of twenty-five (25) years on each charge was pronounced in court. (App. p. 1- p. 145).

Petitioner's direct appeal was dismissed by the Court of Appeals because it was not timely filed. Petitioner filed his first application for post-conviction relief on October 19, 2009. Respondent filed a return on November 23, 2009. An evidentiary hearing was held on February 9, 2010, before the Honorable Benjamin H. Culbertson. Petitioner was represented by Paul Archer, Esq. Respondent was represented by Christina J. Catoe, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. Judge Culbertson dismissed the application by written order dated March 4, 2010. Petitioner appealed the dismissal and appellate counsel, Wanda H. Carter, Esq. filed a petition for writ of certiorari. The Court of Appeals affirmed petitioner's conviction on November 27, 2013. (App. p. 236-p. 238)

Petitioner filed this current application for post-conviction relief on January 14, 2014. (App. p. 174-p. 183). Respondent filed a return dated February 8, 2017. (App. p. 187-p. 192). An evidentiary hearing was held on September 18, 2017, before the Honorable William H. Seals. Petitioner was present and was represented by Daniel A. Selwa, II, Esq. Respondent was represented by Johnny E. James, Jr. Assistant Attorney General. Petitioner and Wanda Carter, Esq. testified at the hearing. On October 23, 2017, Judge seals issued an order denying and dismissing petitioner's application for post-conviction relief (App. p. 193-p. 242).

This petition follows.

## ARGUMENT

There was no evidence of probative value to support the PCR court's finding that petitioner failed to meet his burden that appellate counsel was ineffective in raising the issue of whether trial counsel was ineffective in failing to object to the admission of prior bad acts.

Petitioner testified that he thought the best issues that could have been raised by appellate counsel were that he was tried in absentia and the chain of custody. (App. p. 198, line 2-4, app. p. 201, lines 12-15). Petitioner explained that, on the trial in absentia issue, trial counsel admitted that he should have asked for a continuance on the record which he did not do. (App. p. 201, lines 22-25). Trial counsel had noted on the day of trial that petitioner was not there and he asked that the trial proceed in petitioner's absence. (app. p. 203, line 21-p. 204, line 1). Petitioner also thought there was a chain of custody issue that was preserved but was not raised by appellate counsel. (App. p. 206, lines 1-18).

Petitioner complained that when appellate counsel submitted a White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) belated appeal she raised the issue that the trial judge erred in allowing the jury to hear prejudicial testimony and comments about petitioner's possession of heroin and marijuana. Petitioner said this issue was not preserved. (App. p. 214, lines 12-17).

Appellate counsel testified that she thought the most important issue which she raised was the prior bad acts issue mentioning other drugs petitioner had but which he was not on trial for. This was prejudicial to petitioner. (App. p. 224, line 19-p. 225, line 11), Appellate counsel

agreed that the Court of Appeals dismissed the appeal because the objections to the issued was not contemporaneous enough.<sup>1</sup> (App. p. 227, lines 8-25).

The PCR court in the order of dismissal wrote the following:

In a post-conviction relief action, an applicant has the burden of proving the allegations is his or her application. Rule 71.1(e), SCRCP; *Butler v. State* 286 S.C. 441, 334 S.E.2d 813 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgement, the failure to appeal all trial errors is not ineffective assistance of counsel. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgements and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .”)).

(App. p. 239-p. 240).

The PCR court then concluded:

Counsel testified she raised what she believed to be the best issue available to applicant—the admission of evidence of a prior bad act. On cross-examination, Counsel testified that she did not see a problem with the chain of custody in the case and that she did not believe the issue was preserved anyway. Counsel firmly asserted that the final call of which issues to brief is her own decision.

The Court finds that Counsel was effective. First, the Court finds that Counsel exercised reasonable professional judgement in excluding the chain of custody issue as not preserved and not likely to prevail on appeal. Second, Applicant conceded in his own testimony that the issue of validity of his trial in absentia was not preserved for appeal due to the ineffectiveness of trial counsel, which was wholly litigated at the prior PCR. Neither of the two

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<sup>1</sup>This should have set the issue up for PCR counsel to have gone after the prior PCR counsel for not raising the issue and thereby being ineffective.

issues advanced by Applicant are clearly preserved for appeal and, therefore, are not clearly stronger than the issue that Counsel raised, despite its own rejection on issue preservation grounds. Accordingly, Applicant has failed to meet his burden and his request for relief is DENIED.

(App. p. 241).

**CONCLUSION**

As can be seen from the above there was no evidence of probative value to support the decision in this case.

*Robert M. Pachak*

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of May, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Kevin D. Cox 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 William H. Seals, 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 Kevin D. Cox.

Respectfully Submitted,



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Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 30th 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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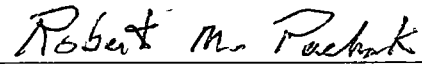
RESPONDENT

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CERTIFICATE OF SERVICE

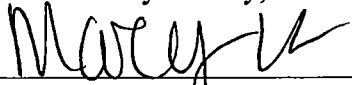
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly 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 Kevin D. Cox, #232745, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 30th day of May, 2018.



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 30th day of May, 2018.

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