

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

Edgar W. Dickson, Circuit Court Judge

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OCT 18 2013

S.C. Supreme Court

TERRY DUNOVANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001536

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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  
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Columbia, SC 29211-1589  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to exclude impeachment of petitioner on worthless check charges?

## STATEMENT

Petitioner was convicted of kidnapping, and two (2) counts of criminal sexual conduct in the first degree after a jury trial held before the Honorable John C. Hayes, III, on March 30 – April 2, 2009, in York County. A thirty (30) year sentence was imposed for kidnapping and twenty (20) year concurrent sentences were imposed on the criminal sexual conduct charges. Gary Lemel, Esquire, was trial counsel. Mindy Lipinski, Esquire, and Justin Maines, Esquire, were the assistant solicitors. (App. p. 1 – p. 786).

Petitioner appealed his convictions and they were affirmed by the Court of Appeals on December 16, 2010. State v. Dunovant, Op.No. 2010-UP-546. (App. p. 820).

Petitioner filed an application for post-conviction relief on August 31, 2011. (App. p. 801 – p. 819). Respondent subsequently filed a return (App. p. 820 – p. 824). An evidentiary hearing was held on October 10, 2012, before the Honorable Edgar W. Dickson. Petitioner was present and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 825 – p. 850).

On June 27, 2013, Judge Dickson issued an order denying and dismissing the application for post-conviction relief. (App. p. 851 – p. 858).

This petition follows.

## ARGUMENT

Defense counsel was ineffective in failing to exclude impeachment of petitioner on worthless check charges.

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).

Petitioner's case was a swearing match and credibility was at the heart of the case. His defense at trial was that sex with the complainant was consensual. The State wanted to impeach him with almost ten year-old worthless check convictions. These were from North Carolina and punishment ranged from sixty days to six months. Defense counsel objected on grounds that a

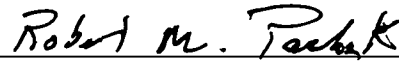
worthless check conviction is not inherently a crime of dishonesty. The trial ruled that it was a crime of dishonesty and allowed impeachment. (App. p. 619, line 3 – p. 621, line 10).

Defense counsel should have inquired as to the circumstances behind the worthless check convictions. If they were because of insufficient funds as opposed to forgery or false pretenses, it may not have been a crime involving dishonesty. Without knowing the circumstances, there is not a sufficient grounds for appeal on that issue. Defense counsel was ineffective for failing to properly preserve this issue for appeal.

CONCLUSION

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of October, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO YORK COUNTY  
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

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TERRY DUNOVANT,

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---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Terry Dunovant states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 10, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Terry Dunovant.

Respectfully submitted,



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Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of October, 2013

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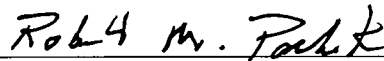
RESPONDENT

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CERTIFICATE OF SERVICE

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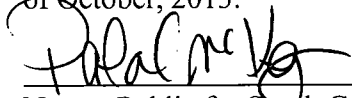
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Terry Dunovant, #334019, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of October, 2013.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of October, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.