

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

Tanya A. Gee, The Honorable Tanya A. Gee  
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**RECEIVED**

OCT 26 2015

**S.C. Supreme Court**

TIMOTHY CLEMENT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001425  
\_\_\_\_\_

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  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective for failing to object when the solicitor characterized his offenses as a crime spree?

## STATEMENT

On June 19, 2013, petitioner appeared before the Honorable Doyet A. Early, III in Aiken County and pled guilty to the following charges with their respective sentences:

Armed Robbery- twenty-five (25) years

Kidnapping- twenty-five (25) years

Carjacking- twenty (20) years

Burglary, Second Degree- fifteen (15) years.

All sentences were ordered to run concurrently. DeGrant Gibbons, Esquire was plea counsel, J. William Weeks, Esquire was the assistant solicitor. (App. p. 1- p. 27)

Petitioner filed an application for post-conviction relief on April 7, 2014 (App. p. 28- p.34) Respondent filed a return dated August 6, 2014 (App. p. 35- p. 41) an evidentiary hearing was held on May 18, 2015, before the Honorable Tanya A. Gee. Petitioner was present and was represented by Lance S. Boozer, Esquire. Respondent was represented by Daniel F. Gourley, II, Esquire. Both petitioner and plea counsel testified at the hearing. (App. p. 42- p. 66) On June 25, 2015, Judge Gee issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 67- p. 73)

This petition follows.

## ARGUMENT

Plea counsel was ineffective in failing to object when the solicitor characterized his offenses as a crime spree.

In giving the facts of the charges against petitioner the assistant solicitor said it was “a crime spree, for lack of a better word...” Plea counsel did not object to this characterization. That description amounted to improper character evidence and constitutional ineffective assistance of counsel.

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.

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, 260 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 is 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 or element of the crime charges. *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 charges. *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).

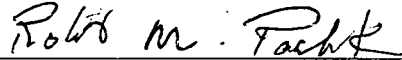
293 S.C. at 324-325, 360 S.E.2d at 319.

Plea counsel in this case testified that he was appointed and only saw petitioner once at jail and then at the courthouse. (App. p. 59, lines 12-17) He admitted he made no objections at the guilty plea. (App. p. 61, lines 19-21) That response was hardly a valid reason to avoid a finding of ineffectiveness.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,



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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO AIKEN COUNTY  
TANYA A. GEE, THE HONORABLE TANYA A. GEE

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TIMOTHY CLEMENT,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001425

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PETITION TO BE RELIEVED AS COUNSEL

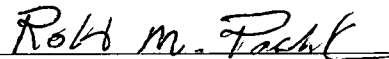
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Counsel for Timothy Clement states:

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 May 18, 2015. 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 Timothy Clement.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 26th day of October, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County  
Tanya A. Gee, The Honorable Tanya A. Gee

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TIMOTHY CLEMENT,

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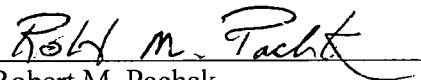
APPELLATE CASE NO. 2015-001425

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CERTIFICATE OF SERVICE

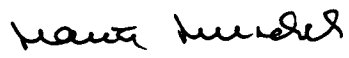
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire and Timothy Clement, #320509, at Perry Correctional Institution this 26th day of October, 2015.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day  
of October, 2015.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.