

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————  
Certiorari to Colleton County

Honorable Roger L. Couch, Circuit Court Judge  
—————

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S.C. SUPREME COURT

JOSHUA GRAHAM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000756  
—————

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 counsel was ineffective in failing to investigate and prepare for trial?

## STATEMENT

On August 12, 2013, petitioner appeared before the Honorable Brooks P. Goldsmith in Colleton County and pled guilty to armed robbery and possession of a weapon. He was sentenced to respective terms of seventeen (17) years and five (5) years. John Douglas Byron, Esquire was plea counsel. Tameaka Legette, Esquire was the assistant solicitor. (App. p. 1- p. 20)

Petitioner filed an application for post-conviction relief on December 17, 2013. (App. p. 21- p. 29) Respondent filed a return dated May 21, 2015. (App. p. 30 – p. 35) An evidentiary hearing was held on October 21, 2015, before the Honorable Roger L. Couch. Petitioner was present and was represented by James K. Falk, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 36 – p. 68) On April 5, 2016, Judge Couch issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 69 - p. 75)

This petition follows.

## ARGUMENT

### Counsel was ineffective in failing to investigate and prepare for trial.

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 alleged in his application for post-conviction relief that counsel was ineffective for failing to investigate and prepare for trial. (App. p. 23)

At the evidentiary hearing petitioner testified that he pled guilty on August 12, 2014. He thought that he was going to go to trial but his lawyer never came to see him the weekend before to come and talk to him like he said he would. When he got to the courthouse he told him that there were some issues. He told him the State had just interviewed another witness. Petitioner asked him if he had time to investigate the witness and counsel told him no. (App. p. 40, ll. 6-22) Because counsel failed to interview that witness, petitioner said he felt he had to plead guilty rather than go to trial like he wanted to do. (App. 40, l. 23 – p. 41, l. 8)

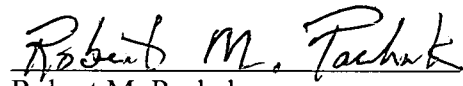
In Ard v. Catoe 372 S.C. 318, 642 S.E.2d 590 (2007) the court wrote:

When evaluating the reasonableness of counsel's conduct, “the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Strickland v. Washington 466 U.S. at 690, 104 S. Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon a number of issues, “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Troedel v. Wainwright, 677 F. Supp. 1456, 1461 (S. D. Fla.1986), *aff'd*, 828 F.2d 670 (11<sup>th</sup> Cir. 1987) (emphasis in the original).

372 S.C. at 331-332, 642 S.E.2d at 597.

CONCLUSION

Counsel was ineffective in failing to interview a witness and petitioner's guilty plea should be vacated.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Colleton County

Honorable Roger L. Couch, Circuit Court Judge

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JOSHUA GRAHAM,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2016-000756

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PETITION TO BE RELIEVED AS COUNSEL

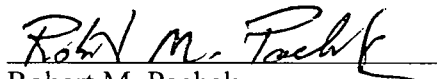
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Counsel for Joshua M Graham states:

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 Roger L. Couch, which was held on October 21, 2016, 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 Joshua M Graham.

Respectfully Submitted,



Robert M. Pachak

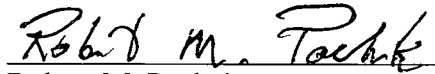
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2016.

**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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South Carolina Commission on Indigent  
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ATTORNEY FOR APPELLANT

This 8th day of September, 2016.

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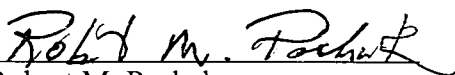
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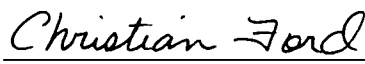
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CERTIFICATE OF SERVICE  
—————

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 J. Rutledge Johnson, 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 Joshua M Graham, #314554, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of September, 2016.

  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of September, 2016.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026