

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



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Certiorari to Berkeley County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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JOSEPH MACK,

 ORIGINAL  
 RECEIVED  
OCT 09 2017  
S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001640

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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  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether trial counsel was ineffective in failing to object to petitioner remaining in shackles throughout the duration of his trial?

## STATEMENT

Petitioner was convicted of three counts of strong armed robbery and one count of failure to stop for a blue light after a jury trial held before the Honorable Carmen T. Mullen on March 17-18, 2014, in Berkeley County. Petitioner was sentenced to fifteen (15) concurrent years on the robbery convictions and to a consecutive three (3) year sentence for failure to stop for a blue light. He was represented by David Schwacke, Esq. and Keisha White, Esq. The assistant solicitors were Colleen Dixon Taylor and Charles Condon.

Petitioner appealed his convictions and the appeal was dismissed after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Mack, Jr., Op. No. 2015-UP-495 (Ct. App. filed Oct. 21, 2015).

Petitioner filed an application for post-conviction relief on December 22, 2015. Respondent filed a return dated June 6, 2016. An evidentiary hearing was held on April 18, 2017, before the Honorable Brooks P. Goldsmith. Petitioner was present and was represented by Lance S. Boozer, Esq. Respondent was represented by Alicia Olive, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. On July 14, 2017, Judge Goldsmith issued an order denying and dismissing the application for post-conviction relief.

This petition follows.

## ARGUMENT

Trial counsel was ineffective in failing to object to petitioner remaining in shackles throughout the duration of his 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).

At the evidentiary hearing in this case, petitioner testified that on the day of his trial he had on a suit and his hands and ankles were shackled. His wrists were tied to a waist chain. It was very much like the way he was shackled at the PCR hearing except he did have on a suit at trial, rather than the SCDC uniform he has now (App. p. 482, line 8- p. 483, line 9).

Petitioner spoke with his attorney about the shackles and he said they tried to disguise it as much as they could with his clothing and movements. (App. p. 484, lines 7-13). When it came time for petitioner to testify, his attorney asked for the shackles to be removed. Petitioner testified, however, that the shackles were not removed. Instead, the jury left the courtroom and then petitioner was told to walk to the witness stand. (App. p. 485, lines 9-23).

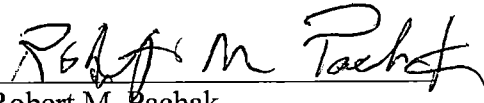
In Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691 (1976), the Supreme Court of the United States held that the state cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in prison clothing. The Court would not consider this issue, however, because there was no objection made at trial.

In Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007 (2005), the Court held that the Due Process Clause prohibits physical restraints on a defendant that are visible to the jury. The shackling in that case was not shown to be justified. Also, prejudice did not need to be shown.

In petitioner's case there was no objection made to his shackles. If an objection had been made his convictions would have been reversed as no prejudice had to be shown. The shackles themselves were the prejudice.

**CONCLUSION**

Petitioner's convictions should be reversed.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of October, 2017.

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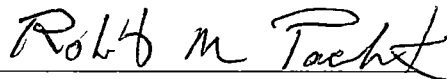
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Counsel for Joseph Mack states:

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 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 Joseph Mack.

Respectfully Submitted,



Robert M. Pachak

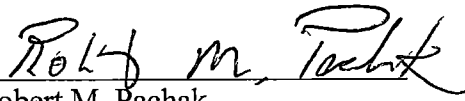
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of October, 2017.

**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."

  
Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
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ATTORNEY FOR PETITIONER

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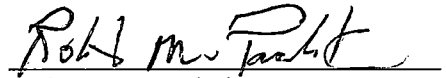
RESPONDENT

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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 Joseph Mack, #359321, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 9th day of October, 2017.

  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 9th day of October, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.