

No. _____

In the
Supreme Court of the United States

MATTHEW DAVID CWIK,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

**On Petition for Writ of Certiorari to the
Court of Appeals of Georgia**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were Petitioner's due process and fair trial rights violated when the victim was allowed to testify in a military uniform?

LIST OF PARTIES

The caption fully identifies each of the parties to this petition.

STATEMENT OF RELATED PROCEEDINGS

- *State of Georgia v. Matthew David Cwik*, No. 2018CR724 (Superior Court of Hall County, State of Georgia) (conviction entered: August 8, 2018, Motion for New Trial denied: December 31, 2019).
- *Matthew David Cwik v. The State*, No. A21A0184 (Court of Appeals of Georgia) (decided: June 18, 2021; Motion for Reconsideration denied: July 7, 2021).
- *Matthew David Cwik v. The State*, No. S21C1317 (Supreme Court of Georgia) (Petition for Writ of Certiorari denied: January 11, 2022).

There are no additional proceedings in any court that are directly related to this case.

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Petitioner Matthew David Cwik respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Georgia.

CITATIONS TO OPINIONS BELOW

Petitioner was convicted on August 8, 2018 of one count of aggravated child molestation and five counts of child molestation. He was sentenced to serve life on probation with 40 years of confinement without parole on aggravated child molestation, and 20 years of confinement concurrently on the child molestation counts.

On June 18, 2021, the Court of Appeals of Georgia affirmed Petitioner's convictions and sentences. *Cwik v. State*, 360 Ga.App. 525 (2021) (Appendix "A"). On July 7, 2021, the Court of Appeals of Georgia denied Petitioner's Motion for Reconsideration. (Appendix "B"). On January 11, 2022, the Supreme Court of Georgia denied Petitioner's Petition for Writ of Certiorari. (Appendix "C").

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (a).

In a correspondence dated March 24, 2022, Justice Thomas extended the time for filing Petitioner's Petition for Writ of Certiorari through and including May 11, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Course of Proceedings

Petitioner was tried by a jury in Hall County, Georgia on charges of aggravated child molestation, child molestation, and incest. He was convicted on August 8, 2018 of one count of aggravated child molestation and five counts of child molestation. He was sentenced to serve life on probation with 40 years of confinement without parole on aggravated child molestation, and 20 years of confinement concurrently on the child molestation counts.

The victim in Petitioner's case was Petitioner's step-daughter, A.B. The victim testified at trial about her relationship with Petitioner and about the offenses

which were allegedly committed several years earlier and which formed the basis of the charges against Petitioner. At trial, over Petitioner's counsel's objection, the victim was allowed to testify in a military uniform. (Appendix "D", at page 20 hereinafter "App. 20").

In deciding to allow the victim to testify in a military uniform, the trial court relied on *Carver v. State*, 324 Ga. App. 422 (2013). The Court of Appeals of Georgia also relied on *Carver v. State* in its decision in Petitioner's case. (Appendix "A", App. 10). Petitioner's Motion for Reconsideration was denied by the Court of Appeals of Georgia. (Appendix "B"). Petitioner's Petition for Writ of Certiorari was denied by the Supreme Court of Georgia. (Appendix "C").

II. Statement of Facts

Petitioner, who had no prior criminal history, is under a sentence of 40 years of confinement without parole after being convicted on the only aggravated count of the indictment, Count One. Petitioner's conviction on Count One was based solely on the uncorroborated testimony of the victim in his case. At trial, over the objection of Petitioner's counsel, the victim was allowed to testify in a military uniform. The victim testifying in a military uniform served no purpose other than to improperly bolster the victim's credibility before the jury. The victim's military service was irrelevant to any of the issues in Petitioner's case. At the time of Petitioner's trial, she had just completed her training in the National Guard, was not on active duty, and had not worn a military uniform the day prior to her testimony. Additionally, she was testifying in August 2018 to events which were alleged to have

occurred between September 16, 2012 and July 31, 2014. The sole purpose of the victim testifying in a military uniform under these circumstances was for the State to bolster her credibility.

This improper bolstering was particularly prejudicial in Petitioner's case because the evidence as to Count One, the only Count which carried a maximum sentence of life imprisonment, was uncorroborated. The State acknowledged in its opening and closing statements that there was no corroboration of the victim's testimony with respect to Count One. In considering Petitioner's motion for directed verdict as to Count One, the trial court stated that it was certainly worthwhile to have brought that motion. During deliberations, the jurors asked to re-hear the victim's testimony and asked several questions about the elements of some of the offenses, signaling that their minds were uncertain about the evidence. The victim was the State's key witness. The State should not have been allowed to bolster the victim's credibility by her testifying in a military uniform.

REASONS FOR GRANTING THE WRIT

In *Holbrook v. Flynn*, this Court stated:

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." 475

U.S. 560, 567 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (emphasis added)).

This principle was not followed at Petitioner's trial when the victim was allowed to testify in a military uniform. As will be discussed below, this is an issue which will continue to arise in State and Federal courts and for which there is no guidance from this Court. This Court has provided such guidance in similar circumstances where it has found that appearances before a jury can implicate constitutional rights and can result in denying a defendant the right to a fair trial. It is respectfully submitted, for the reasons stated below, that the Petition for Writ of Certiorari in the instant case should be granted.

I. This is an important issue which will continue to arise in the administration of justice.

The question presented is an important issue in the administration of justice. It is important to trial judges, it is important to victims, and it is important to defendants. At the center of this issue is the significance of a military uniform during a jury trial. A military uniform is not just any uniform. As the Court of Appeals of New Mexico noted in *State v. Marquez*, 145 N.M. 31, 34 (2008), *rev'd on other grounds and remanded*, 2009-NMSC-055, 147 N.M. 386 (2009):

[A] military uniform "tends to pull on the heart strings of some members of the jury," and that "just the sight of somebody in a camouflage uniform in today's climate leads to something else in the minds of the jurors . . . and may

prevent the jury from just simply hearing a case on its facts and coming to a jury decision on the merits.”

When trial judges are required to determine if a victim can testify in a military uniform, it is important that they have clear precedent upon which to rely. Such precedent would allow trial judges to render a decision that properly balances the interest of the victim in wearing a military uniform with the defendant’s interest in a fair trial. As will be discussed below, trial judges currently do not have this clear precedent because this Court has never addressed the issue. Finally, this is an issue that will reoccur during jury trials throughout the country.

II. State courts and Federal courts need guidance with respect to this issue.

State courts and Federal courts need guidance about how to determine if victims can testify in a military uniform. The Court in *Gonzales v. Cain* noted that it was unable to find any Supreme Court precedent specifically addressing this issue. *Gonzales v. Cain*, No. CIV.A. 11-1846, 2011 WL 6826640, at 7 (E.D. La. Nov. 21, 2011), *report and recommendation adopted*, No. CIV.A. 11-1846, 2011 WL 6826637 (E.D. La. Dec. 22, 2011), *aff’d*, 525 F. App’x 251 (5th Cir. 2013).

The initial unanswered question was described by the Seventh Circuit when it queried whether a victim wearing a military uniform could implicate Federal constitutional rights and suggested that it could. *Galmore v. Hanks*, 85 F.3d 631, 1996 WL 253854, at 3

(7th Cir.1996). The *Galmore* Court after observing that “assuming *arguendo* that permitting a witness to testify in full military uniform can be an error of constitutional proportions in certain circumstances,” determined that such circumstances were not present in that case. *Id.*

Another unanswered question is whether the victim must be on active duty in order to testify in a military uniform. In *Carver v. State*, 324 Ga. App. 422, 425 (2013) the Court held that the victim could testify in a military uniform because he was on active duty. In the instant case, however, the Court held that the victim could testify in a military uniform even though she was not on active duty. (Appendix “D”, App. 20).

Finally, lower courts need guidance with respect to limiting instructions when a victim testifies in a military uniform. In *Lloyd v. Riley*, No. CV–88–2847, 1990 WL 59592, at 2 (E.D.N.Y. May 3, 1990), *aff’d*, 930 F.2d 911 (2d Cir. 1991), the Court affirmed in habeas corpus proceedings a trial court’s decision to allow the victim to testify in a military uniform after determining that “the challenged evidentiary ruling . . . was not sufficient to violate petitioner’s rights pursuant to the Fourteenth Amendment” and noted that the trial court gave the jury a cautionary instruction. *Id.*

As was stated earlier, this is an issue that will continue to arise in State and Federal courts. These courts need guidance from this Court in order to properly address the questions referenced above.

III. This Court should follow its precedent with respect to appearances before a jury which violate a defendant's right to due process and to a fair trial.

This Court's precedent related to the question presented in the instant case is unmistakably consistent: appearances before a jury matter. What a person wears during a jury trial can affect a defendant's right to due process and to a fair trial. Though this Court's precedent has focused on the appearance of defendants, it goes without saying that the appearance of witnesses before a jury also matter.

In *Estelle v. Williams*, 425 U.S. 501, 512 (1976), this Court held that “the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes” The *Estelle* Court highlighted how “courts must be alert to factors that undermine the fairness of the fact-finding process . . . [and] carefully guard against dilution of the principle that guilt is to be established by *probative evidence* and beyond a reasonable doubt.” *Id.* (quoting *In re Winship*, 397 U.S. 358, 364, (1970)) (emphasis added). Implicit in this analysis is the notion that a defendant's attire can be interpreted by a jury unfairly as evidence of guilt.

After referencing a lengthy list of cases throughout the country concluding that “an accused should not be compelled to go to trial in prison or jail clothing

because of the possible impairment of the presumption so basic to the adversary system”,¹ this Court stated:

This is a recognition that the constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment. The defendant’s clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play.

Estelle at 504-05 (citing *Turner v. Louisiana*, 379 U.S. 466, 473(1965)).

This Court further found that appearances before a jury matter when it ruled that “the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.” *Deck v. Missouri*, 544 U.S. 622, 629 (2005) (emphasis added). The Court’s analysis of this case included determinations that a defendant’s appearance at both the guilt and the penalty phase matters, even though the presumption of innocence is

¹ *Estelle* at 504 (*Gaito v. Brierley*, 485 F.2d 86 (CA3 1973); *Hernandez v. Beto*, 443 F.2d 634 (CA5), *cert. denied*, 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174 (1971); *Brooks v. Texas*, 381 F.2d 619 (CA5 1967); *Commonwealth v. Keeler*, 216 Pa.Super. 193, 264 A.2d 407 (1970); *Miller v. State*, 249 Ark. 3, 457 S.W.2d 848 (1970); *People v. Shaw*, 381 Mich. 467, 164 N.W.2d 7 (1969); *People v. Zapata*, 220 Cal.App.2d 903, 34 Cal.Rptr. 171 (1963), *cert. denied*, 377 U.S. 406, 84 S.Ct. 1633, 12 L.Ed.2d 495 (1964); *Eaddy v. People*, 115 Colo. 488, 174 P.2d 717 (1946)).

absent from the latter. The Court provided clear instructions that exceptions can be made for safety and other reasons, but based its decision on the long court history against shackling absent special circumstances for reasons of fundamental fairness. *Id.* at 627. “Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension . . .” *Id.* at 628.²

Citing *Estelle*, the *Deck* Court also drew upon the potential for prejudice that the appearance of being shackled creates: “Visible shackling undermines the presumption of innocence and the *related fairness of the*

² The Court followed with this list of cases and reference materials: *Dyas v. Poole*, 309 F.3d 586, 588–589 (C.A.9 2002) (*per curiam*); *Harrell v. Israel*, 672 F.2d 632, 635 (C.A.7 1982) (*per curiam*); *State v. Herrick*, 324 Mont. 76, 78–82, 101 P.3d 755, 757–759 (2004); *Hill v. Commonwealth*, 125 S.W.3d 221, 233–234 (Ky.2004); *State v. Turner*, 143 Wash.2d 715, 723–727, 23 P.3d 499, 504–505 (2001) (*en banc*); *Myers v. State*, 2000 OK CR 25, ¶ 19, 17 P.3d 1021, 1033; *State v. Shoen*, 598 N.W.2d 370, 374–377 (Minn.1999); *Lovell v. State*, 347 Md. 623, 635–645, 702 A.2d 261, 268–272 (1997); *People v. Jackson*, 14 Cal.App.4th 1818, 1822–1830, 18 Cal.Rptr.2d 586, 588–594 (1993); *Cooks v. State*, 844 S.W.2d 697, 722 (Tex.Crim.App.1992) (*en banc*); *State v. Tweedy*, 219 Conn. 489, 504–508, 594 A.2d 906, 914–915 (1991); *State v. Crawford*, 99 Idaho 87, 93–98, 577 P.2d 1135, 1141–1146 (1978); *People v. Brown*, 45 Ill.App.3d 24, 26–28, 3 Ill.Dec. 677, 358 N.E.2d 1362, 1363–1364 (1977); *State v. Tolley*, 290 N.C. 349, 362–371, 226 S.E.2d 353, 365–369 (1976); *see also* 21A Am.Jur.2d, Criminal Law §§ 1016, 1019 (1998); *see generally* Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 St. Louis U.L.J. 351 (1970–1971); ABA Standards for Criminal Justice: Discovery and Trial by Jury 15–3.2, pp. 188–191 (3d ed.1996). *Deck* at 628–29.

factfinding process.” *Deck* at 630 (citing *Estelle* at 503.) (emphasis added). In addressing the State’s argument that the record lacked evidence that the jury saw the shackles, the *Deck* Court suggested otherwise but also stated that such argument “fails to take account of this Court’s statement in *Holbrook* that shackling is ‘inherently prejudicial.’” *Id.* at 635 (citing *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). Elaborating further, the Court found:

That statement is rooted in our belief that the practice will often have negative effects, but—like “the consequences of compelling a defendant to wear prison clothing” . . . those effects “cannot be shown from a trial transcript.” . . . Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation.

Id. (quoting *Riggins v. Nevada*, 504 U.S. 127, 137 (1992)).

In *Estelle* and *Deck*, this Court clearly established the precedent that appearances before the jury can result in the denial of a defendant’s right to due process and to a fair trial. This is because those appearances can undermine the fact-finding process and cause jurors to render a verdict that is not based upon the evidence. Neither prison clothes nor shackles should be allowed to affect a jury’s verdict because they are not evidence. In *Estelle* and *Deck*, the prison clothes and the shackles were irrelevant to any issue before the jury and only served to prejudice the defendant.

Similarly, allowing the victim to testify in a military uniform at Petitioner's trial was irrelevant to any issue before the jury and only served to improperly bolster the victim's credibility before the jury, thereby prejudicing Petitioner and denying his right to due process and to a fair trial. Granting the Petition for Writ of Certiorari in the instant case would be consistent with this Court's precedent in *Estelle* and *Deck*.

CONCLUSION

The decision by the Court of Appeals of Georgia allowing the victim in this case to testify in a military uniform violated Petitioner's right to due process and to a fair trial. In so holding, the Court of Appeals of Georgia "decided an important question of federal law that has not been, but should be, settled by this Court" and therefore this decision warrants granting the Petition for Writ of Certiorari pursuant to Supreme Court Rule 10(c).

For all of the reasons stated above, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari in this case and review the judgment of the Court of Appeals of Georgia.

Respectfully submitted,

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