

ORIGINAL

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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S.C. Supreme Court

DONTAVIOUS R. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001115  
\_\_\_\_\_

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

# INDEX

INDEX.....	1
ISSUE PRESENTED .....	2
STATEMENT .....	3
ARGUMENT .....	4
CONCLUSION .....	7
PETITION TO BE RELIEVED AS COUNSEL.....	8

ISSUE PRESENTED

Whether plea counsels were ineffective in giving petitioner incorrect sentencing advice?

## STATEMENT

On August 8, 2007, petitioner appeared before the Honorable Lee S. Alford in York County and pled guilty to the following charges:

criminal conspiracy	5 years
murder	life without parole
armed Robbery	30 years
possession of a weapon	5 years
possession of a pistol	1 year
possession of a stolen vehicle	5 years
kidnapping	20 years

Harry A. Dest, Esquire, and B. J. Barrowclough, Esquire, were plea counsel. Kevin Bracket, Esquire, was the solicitor and Willy Thompson was the assistant solicitor. (App. p. 1 – p. 74).

Petitioner appealed his guilty plea and the appeal was dismissed by the South Carolina Court of Appeals on January 21, 2010, after a review pursuant to Anders v. California, 386 U.S. 738 (1967); State v. Mack, Op. No. 2010-UP-008. (App. p. 90).

Petitioner filed an application for post-conviction relief on March 22, 2010. (App. p. 83 – p. 88). Respondent filed a return dated July 19, 2010. (App. p. 89 – p. 95). An evidentiary hearing was held on October 10, 2013, before the Honorable Edgar W. Dickson. Petitioner was present and was represented by Leah Moody, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Petitioner testified in his own behalf at the hearing. Also testifying were Monica Townsend, Louise Addison, B. J. Barrowclough, and Harry Dest. (App. p. 96 – p. 137).

On April 18, 2013, Judge Dickson issued an order denying and dismissing the application for post-conviction relief. (App. p. 147 – p. 158).

This petition follows.

## ARGUMENT

Plea counsels were ineffective in giving petitioner incorrect sentencing advice.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel 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); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, *supra*. This means that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243,

89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case, petitioner testified at the evidentiary hearing that his attorneys told him the solicitor was going to seek the death penalty, but they came with a plea offer of a life sentence. Petitioner said he did not accept that offer and he then got another offer for an open plea from thirty (30) years to life imprisonment. He accepted that offer because B. J. Barrowclough told him he would end up getting a thirty (30) year sentence. He told petitioner he was 99% sure he would get thirty years. Petitioner said that is why he went forward with the plea. (App. p. 102, line 10 – p. 104, line 19). He said his mother and grandmother were with him when he was told he was going to receive a thirty-year sentence. (App. p. 106; lines 3 – 9). Petitioner also said if he had known he was not going to receive the thirty-year sentence, he would not have pled guilty, but would have gone to trial. (App. p. 108, lines 1 – 3).

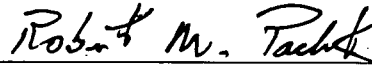
Monica Townsend, petitioner’s mother, testified that she was with petitioner when he was told he would get a thirty-year sentence. (App. p. 118, lines 17 – 23). Louise Addison, petitioner’s grandmother, also testified that she was there when petitioner was told about the thirty years. (App. p. 120, line 16 – p. 121, line 16).

Petitioner was given incorrect sentencing advice and he relied upon that advice in deciding to plead guilty. Plea counsels were ineffective in this regard. Hinson v. State, supra.; Ray v. State, supra.

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 16th day of September, 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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DONTAVIOUS R. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001115

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PETITION TO BE RELIEVED AS COUNSEL

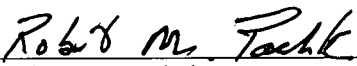
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Counsel for Dontavious R. Mack states:

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 Dontavious R. Mack.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of September, 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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DONTAVIOUS R. MACK,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

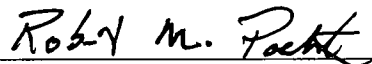
APPELLATE CASE NO. 2013-001115

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CERTIFICATE OF SERVICE

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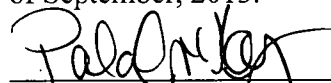
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Dontavious R. Mack, #323350, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 16th day of September, 2013.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day  
of September, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.