

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

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**RECEIVED**

MAR 27 2014

**S.C. Supreme Court**

JOHN KITTRELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2013-002059

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ROBERT M. PACHAK  
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South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to challenge a coerced confession?

## STATEMENT

On January 7, 2010, petitioner appeared before the Honorable Doyet A. Early, III, in Aiken County and pled guilty to criminal sexual conduct with a minor in the first degree. A twenty-five (25) year sentence was imposed. Justin M. Mims, Esquire, was plea counsel. Brenda Brisbin, Esquire, was the assistant solicitor. (App. p. 1 – p. 19).

Petitioner filed an application for post-conviction relief on October 14, 2009. (App. p. 20 – p. 26). Respondent filed a return dated December 13, 2009. (App. p. 27 – p. 31). An evidentiary hearing was held on July 10, 2013, before the Honorable R. Ferrell Cothran. Petitioner was present and was represented by Sonja R. Tate, Esquire. Respondent was represented by Megan Harrigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 32 – p. 76). On August 19, 2013, Judge Cothran issued an order denying and dismissing petitioner's application for post-conviction relief. (App. 83 – p. 90).

This petition follows.

## ARGUMENT

Plea counsel was ineffective in failing to challenge a coerced confession.

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. 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 or failure to investigate. 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); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Stalk v. State, *supra*. The post-conviction relief court will normally consider the guilty plea transcript as well as the evidence presented at the post-conviction relief hearing in looking at guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the voluntariness of the plea. The difference "between a valid guilty plea and a invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). 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. The Court went on to note:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Mallory v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Third, is the right to confront one’s accusers. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243, 89 S. Ct. 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 he gave a written confession. He had been in jail four to five months before he saw plea counsel. He had been appointed another attorney prior to that, but he never saw him. Petitioner wanted to take a polygraph test. He was finally brought to SLED in Columbia for the test, but plea counsel was not there. Petitioner took the test four times and then he gave a statement. He said he was coerced into giving the statement. One of the detectives and the lieutenant that was proctoring the test threatened him. They manhandled him. They told him he could not use the bathroom. They did not give him anything to eat or drink. He told plea counsel about this, but plea counsel said it was their word against petitioner’s word. He also told plea counsel if he had been with

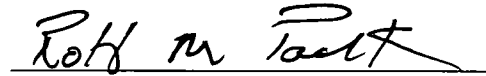
him at SLED, he would not have been treated that way and he would not have given a confession. He said the confession was not accurate. (App. p. 35, line 25 – p. 40, line 18).

As can be seen from petitioner's own testimony, plea counsel was ineffective for not challenging the confession.

CONCLUSION

Petitioner's writ should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Pachak", written over a horizontal line.

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO AIKEN COUNTY  
R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

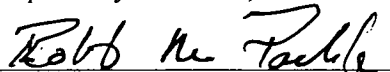
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Counsel for John Kittrell states:

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 July 10, 2013. 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 John Kittrell.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 27th day of March, 2014

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R. Ferrell Cothran, Jr., Circuit Court Judge

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JOHN KITTRELL,

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V.

STATE OF SOUTH CAROLINA,


RESPONDENT

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CERTIFICATE OF SERVICE

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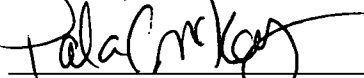
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Kittrell, #334595, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of March, 2014.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day  
of March, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.