

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Edward W. Miller, Circuit Court Judge  
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S.C. Supreme Court

WILFREDO SALAS

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-00240<sup>0</sup>

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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  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in giving incorrect sentencing advice?

## STATEMENT

On August 8, 2011, petitioner appeared before the Honorable Latitia H. Verdin in Greenville County and pled guilty to lewd act on a minor. A fifteen (15) year sentence was imposed. Scott D. Robinson, Esquire, was plea counsel. Kris Hodge, Esquire, was the assistant solicitor. (App. p. 1 – p. 21).

Petitioner filed an application for post-conviction relief on May 17, 2012. (App. p. 22 – p. 30). Respondent filed a return dated August 31, 2012. (App. p. 31 – p. 36). An evidentiary hearing was held on October 23, 2013, before the Honorable Edward W. Miller. Petitioner was present and was represented by John G. Reckenbeil, Esquire. Respondent was represented by Karen C. Ratigan, Assistant Attorney General. Both plea counsel and petitioner testified along with petitioner's wife. (App. p. 37 – p. 102). On January 7, 2014, Judge Miller issued an order denying and dismissing the application for post-conviction relief. (App. p. 104 – p. 111).

This petition follows.

## ARGUMENT

Plea counsel was ineffective in giving 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. 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.

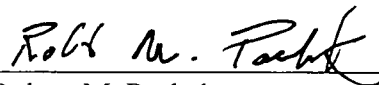
In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there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

Petitioner testified at the evidentiary hearing in this case that counsel came to him and offered him a plea. He brought out a piece of paper saying they were going to drop the charges and they were only going to deport him. (App. p. 73, lines 19 – 22; app. p. 76, lines 15 – 21). As noted earlier, giving incorrect sentencing advice constitutes ineffective assistance of counsel. There is a big difference between deportation and fifteen (15) years in prison.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,

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

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of July, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
EDWARD W. MILLER, CIRCUIT COURT JUDGE

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WILFREDO SALAS

PETITIONER,

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APPELLATE CASE NO. 2014-00240

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PETITION TO BE RELIEVED AS COUNSEL

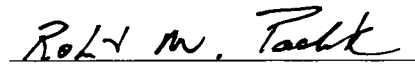
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Counsel for Wilfredo Salas states:

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 23, 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 Wilfredo Salas.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of July, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
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WILFREDO SALAS

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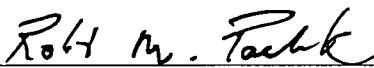
RESPONDENT

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CERTIFICATE OF SERVICE

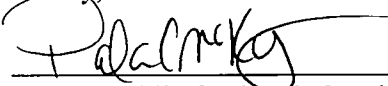
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Wilfredo Salas, #347611, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 18th day of July, 2014.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of July, 2014.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.