

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Pickens County

Eugene C. Griffith, Jr., Circuit Court Judge  
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**RECEIVED**

JUL - 6 2015

**S.C. Supreme Court**

RICKY LEE SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000584  
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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 misadvising petitioner about his sentence?

## STATEMENT

On April 22, 2013, petitioner appeared before the Honorable Edward W. Miller in Pickens County and pled guilty to two counts of first degree burglary, two counts of second degree burglary, two counts of grand larceny and one count of escape. He was sentenced to concurrent terms of 22 years for each count of first-degree burglary, 15 years for each count of second-degree burglary, 5 years for each count of grand larceny, and 1 consecutive year for escape. Michael Johnson, Esq. was plea counsel. Brandi Batson, Esq. was the assistant solicitor. (App. p. 1- p. 13)

Petitioner filed an application for post-conviction relief on October 8, 2013. (App. p. 14- p. 22) Respondent filed a return dated March 26, 2014. (App. p. 23- p. 29) An evidentiary hearing was held on December 15, 2014, before the Honorable Eugene C. Griffith, Jr. Petitioner was present and was represented by R. Mills Arial, Jr. Esq. Respondent was represented by Karen C. Ratigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 30- p. 51) On January 29, 2015, Judge Griffith issued an order denying and dismissing the application for post-conviction relief. (App. p. 52- p. 58)

This petition follows.

## ARGUMENT

Plea counsel was ineffective in misadvising petitioner about his sentence. 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.

Petitioner testified at the evidentiary hearing about what he thought his guilty was going to be about:

And I signed the plea. I come back up. And when I come back up, there was no plea no more. It was a whole other plea for some other reason.

Q Okay. So when you signed the -- are you saying you signed the plea agreement at one time?

A Yes, sir.

Q So what was that for?

A It was 18 years and one granted for the escape. It would have been 19 altogether.

Q Well, why didn't y'all go forward with that at that time?

A He said the Solicitor changed their mind. But I signed on it.

Q Okay. So you signed it. And when you say you signed it, you signed the sentencing sheet?

A No. I signed the -- it was supposed to have been like the agreement. You know what I'm saying?

Q Okay. So you signed something acknowledging you were taking 18 years?

A And a year consecutive.

(App. p. 35, l. 3- 22)

As can be seen from petitioner's testimony he was misadvised over his guilty plea.

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 6<sup>th</sup> day of July, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO PICKENS COUNTY  
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

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RICKY LEE SMITH,

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APPELLATE CASE NO. 2015-000584

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PETITION TO BE RELIEVED AS COUNSEL

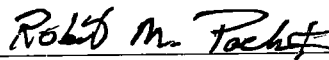
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Counsel for Ricky Lee Smith states:

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 December 15, 2014. 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 Ricky Lee Smith.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 6<sup>th</sup> day of July, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Pickens County  
Eugene C. Griffith, Jr., Circuit Court Judge

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RICKY LEE SMITH,

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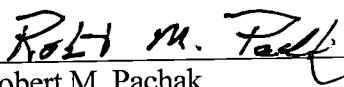
APPELLATE CASE NO. 2015-000584

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CERTIFICATE OF SERVICE

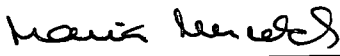
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire and Ricky Lee Smith, #321505, at Lee Correctional Institution this 6<sup>th</sup> day of July, 2015.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6<sup>th</sup> day  
of July, 2015.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.