

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Perry H. Gravely, Circuit Court Judge

**RECEIVED**

OCT 26 2016

S.C. SUPREME COURT

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KEEON BUTLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000789

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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  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether petitioner's plea of nolo contendere was involuntary?

## STATEMENT

On May 20, 2014, petitioner pled nolo contendere before the Honorable Roger M. Young, Sr. in Charleston County to armed robbery and possession of a firearm. Respective consecutive sentences of thirty (30) years and five (5) years were imposed. Guy Vitetta, Esquire was plea counsel. Lindsey Byrd, Esquire and Kelly Young, Esquire were the assistant solicitors. (App. p. 1 – p. 203).

Petitioner filed an application for post-conviction relief on August 18, 2014. (App. p. 204 – p. 211). Respondent filed a return dated November 5, 2015. (App. p. 212 – p. 217). An evidentiary hearing was held on January 20, 2016, before the Honorable Perry H. Gravely. Petitioner was present and was represented by Christopher Murphy, Esquire. Respondent was represented by Rutledge Johnson, Assistant Attorney General. Petitioner testified at the hearing. (App. p. 218 – p. 228). On March 15, 2016, Judge Gravely issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 229 – 234).

This petition follows.

## ARGUMENT

Petitioner's plea of nolo contendere was involuntary.

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 an 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.

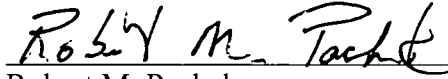
After almost two hundred pages of trial, petitioner decided to plea nolo contendere to the charges of armed robbery and possession of a firearm for a negotiated sentence of thirty-five (35) years. All other pending charges were dismissed and a possible sentence of life without parole was taken off the table. (App. p. 197, l. 7 – p. 198, l. 12). Even after this petitioner said he wanted to withdraw his plea. The judge told him he would get life without parole if he got convicted. That he would never get out except in a box. Petitioner said he could appeal. The judge told him he did not know what he could appeal. Petitioner said he would continue with the plea. (App. p. 199, l. 23 – p. 200, l. 21).

In his application for post-conviction relief petitioner wrote that he had an involuntary guilty plea. (App. p. 206). At the evidentiary hearing petitioner said throughout his representation he maintained his innocence. He did not commit the crimes he was accused of doing. (App. p. 223, ll. 11-17).

As noted above, in Boykin v. Alabama, “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.

CONCLUSION

Petitioner's guilty plea should be vacated.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Perry H. Gravely, Circuit Court Judge

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KEEON BUTLER,

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APPELLATE CASE NO. 2016-000789

---

PETITION TO BE RELIEVED AS COUNSEL


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Counsel for Keeon D. Butler states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Perry H. Gravely, which was held on January 20, 2016 (Evidentiary Hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Keeon D. Butler.

Respectfully Submitted,



Robert M. Pachak

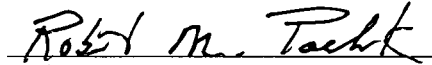
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2016.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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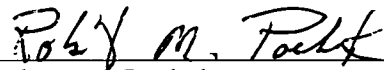
APPELLATE CASE NO. 2016-000789

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CERTIFICATE OF SERVICE

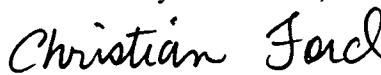
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Keeon D. Butler, #243002, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of October, 2016.



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 26th day of October, 2016.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: March 1, 2026