

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

**RECEIVED**

JAN -5 2017

S.C. SUPREME COURT

HAROLD B. TURNER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001769

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JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether plea counsel was ineffective in giving petitioner incorrect sentencing advice?

## STATEMENT

On July 8, 2013, petitioner appeared before the Honorable J. Mark Hayes in Spartanburg County and pled guilty to common law robbery, burglary in the third degree, and petit larceny. Petitioner was sentenced to fifteen (15) years for common law robbery suspended upon service of ten (10) years imprisonment to five (5) years of probation. Upon the payment of his monetary obligation any remaining probationary sentence was to be terminated. Petitioner was also sentenced to five (5) years for third degree burglary and to thirty (30) days for petit larceny. Andrea Price, Esquire was plea counsel. Kate Robinette, Esquire was the assistant solicitor. (App. pp. 1-22)

An application for post-conviction relief was filed on March 31, 2014. (App. pp. 23-36) Respondent filed a return dated October 3, 2014. (App. pp. 37-42) On November 9, 2015, an evidentiary hearing was held before the Honorable Larry B. Hymen. Petitioner was present and was represented by J. Brandt Rucker, Esquire. Respondent was represented by Alicia Olive, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. pp. 43-64) On July 17, 2016, Judge Hymen issued an order denying and dismissing the application for post-conviction relief. (App. pp. 65-73)

This petition follows.

## ARGUMENT

### Plea counsel was 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,

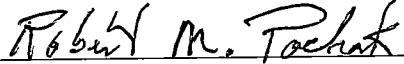
89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court 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.

Petitioner alleged that he would receive a cap of a seven (7) year sentence. (App. p. 32, paragraph B) At the evidentiary hearing, petitioner testified that he was sent an offer from the solicitor’s office to plead guilty which he signed. He received the offer from plea counsel. He had a meeting with her the Friday before he went to court on Monday. She told him he was going to plead for 0 to 7. He asked her if that would be a cap. She told him she was not sure. When he got to court on Monday she came in and there was a cap and he signed the plea page. On the sentencing sheet it said, “cap of 7 years.” (App. p. 48, l. 12 – p. 49, l. 13)

As can be seen from the above petitioner was led astray in deciding to plead guilty because he thought he was going to get a 7 year sentence. As shown above, giving incorrect sentencing advice constitutes ineffective assistance of counsel. ¶

**CONCLUSION**

Petitioner's guilty plea should be overturned.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable Larry B. Hyman, Circuit Court Judge

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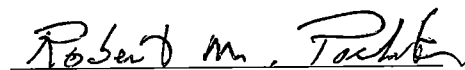
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Counsel for Harold B. Turner states:

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 Larry B. Hyman, which was held on November 9, 2015 (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 Harold B. Turner.

Respectfully Submitted,



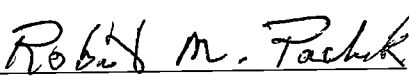
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2017.

**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."

  
Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
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ATTORNEY FOR PETITIONER

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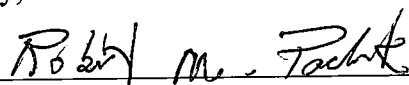
RESPONDENT

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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 Alicia Olive, 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 Harold B. Turner, #345674, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5th day of January, 2017.

  
\_\_\_\_\_  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 5th day of January, 2017.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026