

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Newberry County

Casey L. Manning, Circuit Court Judge

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**RECEIVED**

**Jan 28 2021**

S.C. SUPREME COURT

MANUEL S. HERNANDEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001080

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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DAVID ALEXANDER  
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

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT.....2

ARGUMENT .....3

CONCLUSION.....6

PETITION TO BE RELIEVED AS COUNSEL .....7

**ISSUE PRESENTED**

Whether the PCR Court erred in finding that petitioner's guilty plea was not unknowing and involuntary where plea counsel could have successfully moved to suppress petitioner's statements to the police admitting sexually assaulting his stepdaughter?

## STATEMENT

Petitioner was indicted in Newberry County for second-degree criminal sexual conduct with a minor and on April 6, 2015, he pled guilty before the Honorable Eugene C. Griffith. App. 1. Dale Scott represented the State and Charles Verner represented petitioner. App. 1. Tim Nichols served as the translator. App. 4, l. 1 – 3. The plea agreement had a negotiated cap of fifteen years' imprisonment. App. 3, l. 2 – 14. Judge Griffith sentenced petitioner to twelve years' imprisonment. App. 14, l. 10 – 13. Petitioner did not appeal.

On July 2, 2015, petitioner filed a PCR application. App. 16. On October 16, 2019, the Honorable L. Casey Manning held a hearing on petitioner's application. App. 38. Carson M. Henderson represented petitioner. App. 38. Brianna L. Schill represented the State. App. 38. Ruby Stevens served as the translator. App. 38. Judge Manning denied petitioner's application and also denied petitioner's Rule 59(e), SCRCF, Motion. App. 299. App. 331. This appeal follows.

## ARGUMENT

The PCR Court erred in finding that petitioner's guilty plea was not unknowing and involuntary where plea counsel could have successfully moved to suppress petitioner's statements to the police admitting sexually assaulting his stepdaughter.

Petitioner is a Mexican citizen. App. 109, l. 5 – 6. His native language is Spanish. App. 109, l. 7 – 9. He is not fluent in English and cannot write in English. App. 109, l. 10 – 15. Plea counsel agreed that petitioner could not understand English very well. App. 83, l. 21 – 85, l. 13. Translators worked at both petitioner's guilty plea hearing and at the PCR hearing. App. 4, l. 1 – 3. App. 38. Plea counsel also relied on translators to communicate with petitioner during their pre-trial conversations. App. 54, l. 13 – 19.

Entered into evidence at petitioner's PCR hearing were the advice of rights form and petitioner's purported statement to police on the night the complainant reported the alleged sexual abuse. App. 250-51. The advice of rights form has written on it that petitioner can read, but "not in English." App. 250. Nevertheless, the form is signed by petitioner agreeing that he understands his rights and is willing to waive them. App. 250.

The "voluntary statement" is also signed by petitioner. App. 251. It appears petitioner began writing the statement himself and has the Spanish word for "I" ("Yo"). App. 251. The statement then says, in a different handwriting, "Upon the request of Manuel de Jesus Solorzano-Hernandez I Sgt Stephen B Epps will be writing this statement." App. 251. In the statement, petitioner admits sexually abusing his stepdaughter. App. 251. The statement shows it was completed at 5:30 AM. App. 251.

Plea counsel agreed at the PCR hearing that petitioner would not have been able to read and understand the advice of rights form in English. App. 83, l. 19 – 85, l. 16. Plea counsel said,

“If the question is could he read and understand it, my opinion would be no.” App. 84, l. 10 – 11. Even if the officer explained it to him, plea counsel opined that petitioner could not understand it “at a high level of function.” App. 84, l. 12 – 15. Plea counsel said that from his own discussions with petitioner in his basic English, that “Legal issues would be well beyond his English vocabulary.” App. 76, l. 3 – 7.

Petitioner testified that no translator was present at the interrogation. App. 109, l. 21 – 23. He did not understand his conversations with the police. App. 109, l. 24 – 25. The police did not offer him a translator and they only spoke English. App. 110, l. 1 – 10. Petitioner was also drunk when he talked to the police. App. 110, l. 11 – 18.

Plea counsel knew that “the confession was really probably the most important, or one of the very top problems in his case for us as a defense.” App. 82, l. 9 – 11. Plea counsel did not remember specifics of his conversation with petitioner about the statement, but was “highly confident” and “sure that we indicated” that they would have to attack the statement’s admissibility. App. 82, l. 2 – 14. Petitioner testified that plea counsel should have moved to suppress his verbal and written statements. App. 115, l. 19 – 21.

The PCR court credited plea counsel’s testimony that he discussed the right to challenge the admissibility of the statement with petitioner. App. 307. The PCR court found no prejudice because plea counsel testified that petitioner “never indicated he wanted to go to trial” and always wanted to pursue a plea agreement. App. 307 - 08.

The PCR court erred in its analysis because it failed to consider plea counsel’s failure to advise petitioner that the statements could likely be suppressed because they were not voluntary. Petitioner’s inability to understand English, combined with his own intoxication, would have prevented the State from admitting them as evidence. See State v. Pichardo, 367 S.C. 84, 106,

623 S.E.2d 840, 852 (Ct. App. 2005). In Pichardo, the Court upheld a trial judge's decision to suppress the search of a car after finding that the defendant's consent was not voluntary. Id. The defendant spoke very little English. Id. The defendant's inability to understand English was one of the reasons the Court used to affirm the suppression. Id. See also United States v. Garibay, 143 F.3d 534, 538 (9<sup>th</sup> Cir. 1998) (using six-factor test to examine the voluntariness of statements of non-English speakers); United States v. Barry, 979 F.Supp.2d 715 (M.D. La. 2013) (suppressing statement of speaker of Fulani); United States v. Monreal, 602 F.Supp.2d 719 (E.D. Va. 2008) (suppressing statement of Spanish speaker).

Pichardo can be contrasted with State v. Rios, 388 S.C. 335, 696 S.E.2d 608 (Ct. App. 2010). In Rios, the police used a Spanish interpreter to advise the defendant of his rights before he gave a statement. Rios at 338, 696 S.E.2d at 610. The interpreter took the statement in Spanish, wrote it in English, and then read it back to the defendant in Spanish. Id. No such efforts were made in this case. Petitioner was only questioned in English and the officers did not have the ability to explain the rights form or what they wrote for petitioner.

Had plea counsel explained that petitioner's statement would have been suppressed, he likely would not have pled guilty. See Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). Without the statement, the State's case would have largely boiled down to a credibility contest between complainant and her mother against petitioner. This Court should grant certiorari and reverse petitioner's conviction.

**CONCLUSION**

For the foregoing reasons, petitioner's conviction should be reversed.

s/David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2021.

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Counsel for Manuel S. Hernandez 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 post-conviction relief hearing before Judge L. Casey Manning, which was held on October 16, 2019, 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 Manuel S. Hernandez.

Respectfully Submitted,

s/David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2021.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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.”

s/David Alexander  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

This 28th day of January, 2021.