

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jun 14 2023**

S.C. SUPREME COURT

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Certiorari to Richland County

Honorable George M. McFaddin, Circuit Court Judge

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GEORDI JERELL HEYWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000710

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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### **ISSUE PRESENTED**

Whether plea counsel provided ineffective assistance of counsel where counsel failed to move to enforce the plea offer or object to the violation of the plea offer when the State first recommended a sentence of fifteen to twenty years incarceration. In the alternative, if this Court finds that the State did not violate the plea agreement, Petitioner's guilty plea was rendered unknowing and involuntary where he entered his plea based on plea counsel's misstatement of the terms of the plea agreement and where counsel did not afford Petitioner the opportunity to withdraw his plea once the State recommended a specific sentence?

## STATEMENT OF THE CASE

Petitioner was indicted for one count of criminal sexual conduct (CSC) with a minor second degree during the July 2017 term of the Richland County grand jury. App. 49-50. On October 12, 2017, Petitioner appeared before the Honorable Alison Renee Lee to enter a guilty plea to the CSC charge. Petitioner was represented by Bakari Sellers. The State was represented by Nicole Simpson. App. 1. In announcing the terms of the plea negotiations to the circuit court Simpson stated,

With respect to the recommendations, Your Honor, the state is dismissing three counts of human trafficking, as well as one count of contributing -- or two counts of contributing to the delinquency of a minor. This was all one incident. He is pleading guilty to this one charge from that incident, and we've agreed to run it concurrent to the probation revocation which will be heard at a later date. Other than that, there are no additional recommendations with respect to the agreements in this case.

App. 3, l. 19-App. 4, l. 3. Simpson also informed the Judge Lee that the case was scheduled for trial that week and that one of Petitioner's co-defendants was cooperating with the State. App. 4, ll. 4-10.

In support of the plea, the State alleged that Petitioner, along with two co-defendants, had been involved in the trafficking of three minor girls who were all fifteen years old. The minors were runaways who alleged that they had been held against their will in different hotel rooms, given drugs, and forced to have sex with various men. The State characterized Petitioner as "the muscle" of the group who made sure the minors did not leave the hotel and who kept watch over them. Regarding the CSC charge, Minor Three asserted that she went into a bathroom with Petitioner, and they began to have sex. She told Petitioner it hurt and to stop but he did not. Petitioner admitted to having sex with Minor Three but stated it was consensual, that he stopped when she asked him to, and that he did not know she was underage. App. 12, l. 9-App. 15, l. 20.

After Judge Lee accepted Petitioner's plea, the mother of Minor One gave a victim impact statement requesting that Petitioner be sentenced to the maximum time possible. App. 18, ll. 10-24. The State then requested that Petitioner be sentenced to fifteen to twenty years incarceration. The State based the request for the severe sentence on the facts and nature of the case, that Petitioner was on probation at the time of the incident,<sup>1</sup> and Petitioner's age<sup>2</sup> at the time of the incident. App. 20, ll. 7-12.

Counsel Sellers informed Judge Lee that the plea hearing was the first time that the State referred to Petitioner as "the muscle" and that the State had theorized at one point that Petitioner was the ringleader of the trafficking scheme. However, Counsel Sellers asserted that Petitioner was only present for a matter of hours over the course of the scheme. He further detailed that Minor Three had at one point stated Petitioner was unaware of her age and he provided Judge Lee with a copy of the picture ID that Minor Three had in her possession during the incident. He maintained that Petitioner was not a predator and that he was unaware of Minor Three's age when they had sex. App. 20, l. 14-App. 22, l. 4. After Petitioner's mother and godmother spoke on Petitioner's behalf, Counsel Sellers requested Judge Lee sentence Petitioner to a term of imprisonment between three and five years. Petitioner also addressed Judge Lee stating that he did not know what was going on at the time and he was sorry for his involvement. App. 23, l. 16-App. 27, l. 4.

Just prior to sentencing, Simpson clarified that she referred to Petitioner as "the muscle" based on statements taken from Minor 1 and Minor 2. She then reiterated the State's position

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<sup>1</sup> Petitioner was on probation for two counts of strong-arm robbery. He was facing up to fifteen years, non-violent time, on those charges. App. 3, ll. 12-13.

<sup>2</sup> At the time of his guilty plea Petitioner was twenty-five years old. He had been incarcerated for fifteen months at the time he pled guilty. App. 14-17.

that a term of imprisonment between fifteen and twenty years was the “appropriate sentence” considering the “substantial benefit” Petitioner had received in the dismissal of the other charges. App. 27, l. 6-App. 28, l. 6. Counsel Sellers reiterated that Minor Three had made at least one statement in which she stated Petitioner did not know her age and again referenced the picture ID that Minor Three had in her possession at the time of the incident. App. 28, ll. 9-19.

In handing down the sentence Judge Lee stated

What I've heard today seems to imply that while this was one particular incident that occurred, that there was other activity taking place around the same time. And I understand he's pleading to the criminal sexual conduct with a minor under the age of sixteen and that one charge, and that was one offence with that one particular individual ... But I can't ignore that there apparently is some other activity that's taking place. And I understand that those charges are being dismissed, that he's not pleading to those charges, but it certainly involves, seems to involve some activity and not just a situation where he shows up at this place and ends up having sex with someone who's under the age of sixteen. And so[,] I don't think that a three-to-five-year prison time is appropriate under those circumstances. And I am giving him some benefit from the idea that he is -- that there are other charges that are being dismissed, and that that was in exchange for his plea today, and also understanding that it's 85 percent time as well.

App. 29, l. 10-App. 30, l. 11. Judge Lee proceeded to sentence Petitioner to fifteen years imprisonment. App. 30, ll. 12-16.

Counsel Sellers filed a motion to reconsider sentence dated October 18, 2017, wherein he argued for the first time that the State had violated the terms of the plea agreement by making a specific sentencing recommendation. App. 32-33. A hearing was held on the motion to reconsider sentence on December 4, 2017, before Judge Lee. The State was again represented by Nicole Simpson. App. 34. At the hearing Counsel Sellers provided<sup>3</sup> Judge Lee with two emails from the solicitor's office, dated September 7 and October 4, which stated the terms of the plea deal and showed the progression of the plea negotiations. Counsel Sellers argued that the plea

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<sup>3</sup> These emails were not entered as exhibits during the hearing on the motion to reconsider.

agreement included that the State would not make any recommendation as to sentencing. He informed Judge Lee that he had verbally affirmed the terms of the deal with the State on October 12, the day of the plea, and asserted that the State had violated the terms of the offer when the solicitor asked for a sentence of fifteen to twenty years imprisonment. App. 38, l. 10-App. 39, l. 22.

Simpson responded that the “initial offer” did include the term that there would not be a recommendation by the State. However, defense counsel had submitted a counteroffer to which the State had responded by offering a plea to the CSC charge without repeating the “no recommendation” term. Simpson stated that when she stated the terms of the plea agreement at the hearing, she did not say that the State would not take a position on sentencing. Finally, she argued that Counsel Seller’s should have brought up any issue he had with the plea when it was occurring. App. 39, l. 23-App. 40, l. 20.

Counsel Sellers argued in response that the basic principles of contract law applied and that without expressly revoking the “no recommendation” term that it was carried over from the original offer. App. 40, l. 21-App, 41, l. 8. Simpson stated that in accepting the offer Counsel Sellers said “we accept your offer to plead to the sole charge of CSC second with a minor as well as handle his outstanding probation violation concurrently” which she understood meant that the State would take a position on sentencing. She maintained that if the State was not going to take a position as to the sentence, then she would have stated so when she set forth the terms of the plea at the plea hearing. App. 41, ll. 9-21. Counsel Sellers noted that if the State had intended to take a position regarding sentencing, then it should have expressly stated so in the written communications. He maintained that the only written communication regarding sentencing

included that the State would not make a recommendation and the State should be bound by that writing. App. 42, ll. 2-23.

In ruling on the motion to reconsider, Judge Lee noted that when the plea was presented the State did not make any recommendation and only requested fifteen to twenty years imprisonment after the victim impact statement. Judge Lee recalled that Counsel Sellers had requested three to five years imprisonment which she was not inclined to follow and that she based her sentence upon the facts and Petitioner's pending probation revocation. App. 43, ll. 13-22. Judge Lee also stated that she considered the circumstances in which everything occurred in fashioning the sentence. In ruling on the motion Judge Lee stated,

I'm going to deny the motion. I think it's one of those situations which could be close but given the last statements in the October 4th email that says as to the offer we would be willing to dismiss the human trafficking charges which your client will need to plead to CSC with a minor second degree which says to me, you know, plead straight up to that charge.

App. 45, ll. 5-11. Judge Lee signed an order dated March 21, 2018, denying the motion, and stating that the State had not violated the terms of the plea offer. App. 48.

Petitioner appealed his conviction and sentence. After receiving advice from appellate counsel, Petitioner opted to withdraw his direct appeal and proceed directly into post-conviction relief. App. 79, ll. 2-13. Petitioner filed the present PCR application on February 6, 2019. App. 52-60. The State filed a return on February 10, 2020. App. 61-67. PCR Counsel Tara Dawn Shurling filed two amended PCR application on June 14, 2021, in which she raised twenty-two allegations of ineffective assistance of counsel and involuntary guilty plea. App. 68-73. A hearing was convened before the Honorably George M. McFaddin on June 14, 2021. Petitioner was represented by Counsel Shurling. The State was represented by Megan Jameson. App. 74. Solicitor Nicole Simpson, Counsel Sellers, and Petitioner testified at the PCR hearing. App. 75.

At the start of the hearing the parties, by consent, entered into the record three email chains regarding Petitioner's plea offer as Applicant's Exhibit 1-3. App. 79, l. 22-App. 80, l. 21; App. 229-234.

Simpson testified that she, Luck Campbell, and Lamar Fyall were the prosecuting team in Petitioner's case, and they all worked on the case together. App. 82, ll. 4-10. She confirmed that the September 7 email from Fyall stated the plea offer was for Petitioner to plead guilty to one count of human trafficking and the CSC charge with no recommendation, both sentences to run concurrent to each other and to Petitioner's probation revocation. App. 82, l. 21-App. 83, l. 21. Simpson testified that following further negotiations she sent the October 4 email containing the offer to allow Petitioner to plead to the single count of CSC. The email did not include that all the other charge would be dismissed and that the sentence would be concurrent to the probation revocation, however she testified those aspects of the deal remained in place. App. 90, l. 3-App. 91, l. 20; App. 97, ll. 1-18. Simpson testified that her intent was that Petitioner would plead guilty with no recommendations, meaning it was a "straight up" plea where both parties could ask for the sentence they wanted. App. 94, l. 21-App. 95, l. 7.

Simpson confirmed that in the motion to reconsider and at the hearing on the motion that Counsel Sellers represented that he had verified with her the "no recommendation" term of the plea deal. She did not have an independent recollection of that conversation and testified that she was sure they spoke the morning of the plea, but she could not recall specifics. App. 93, l. 8-App. 94, l. 10. She stated that there were conversations that occurred outside of the emails and that it was made clear during the plea hearing what the terms of the agreement were. App. 98, l. 13-App. 99, l. 8.

On cross-examination, Simpson testified that the email did not specifically say that the State would remain silent but that by stating “no recommendation” someone could think that the State was not making a recommendation expect that the sentences were to be concurrent to probation revocation. App. 110, ll. 11-19. She further testified that when she is making a recommendation, which does not always have to be in respect to the sentence, she makes that recommendation clear. In Petitioner’s case, the recommendation was that the sentence would run concurrent to the probation revocation and that it was “straight up” as to sentencing so either side could ask for what they wanted. App. 110, l. 21-App. 111, l. 21.

Essentially, her testimony was that she understood the terms of the agreement to mean that she would not remain silent on sentencing. App. 112, ll. 8-13. Simpson testified that if Petitioner or Counsel Sellers had a problem with the terms of the plea agreement they could have stood down, discussed matters, and clarified on the record what the agreement was. She maintained that at no point did she say that the State would not take a position with respect to the plea offer. She further stated that “with respect to offers, quite frankly, the offer is what it is on the day.” App. 145, ll. 4-23.

Counsel Sellers testified that he understood the plea offer to be a plea to CSC that would resolve all outstanding charges, and that there would be no recommendation by the State. App. 149, ll. 6-11. He confirmed the terms of the plea agreement with Simpson as he understood them and although he did not remember the details of the conversation, he thought that the State was not going to make a recommendation as to sentencing. App. 150, ll. 3-14. Counsel Sellers testified that he did not object when the State made a sentencing recommendation because he thought he could still get a fair and reasonable sentence from the court despite the recommendation. He testified he strategically asked for a low sentence in the hopes the court

would “split the baby” and sentence Petitioner between 8-10 years. He stated that if he had walked away from the plea at that time Petitioner was facing a seventy-year sentence and was scheduled for trial that week, so he continued with the plea instead of objecting. He acknowledged that he could have made a motion for specific performance, but he had not seen it done before and believed it would have led to the prosecution withdrawing the offer and proceeding to trial. App. 151, l. 13-App. 155, l. 23.

Counsel Sellers admitted that he did not ask Petitioner if he wanted to continue the plea after the State made a sentencing recommendation. He testified that his “decision was whether or not I would take [Petitioner] forward on that day at that particular time with this particular charge or whether or not we would back down, which never crossed my mind...” App. 155, l. 24-App. 157, l. 3. Counsel Sellers stated if he had objected or made a motion to enforce the plea agreement that he believed the plea would have been pulled and trial would have commenced on all the charges. Counsel Sellers testified that he believed he made the best decision for Petitioner at that time. App. 157, l. 4-App. 159, l. 18.

Counsel Sellers testified that he did not think there were any preservation issues in the case. He stated that they were not prejudiced because he filed the motion for reconsideration and therefore the issue was presented to the lower court. He stated that he did not know if not objecting at the hearing was the wrong decision. App. 160, l. 15-App. 161, l. 12. He also testified that the emails referenced in the motion to reconsider were presented to Judge Lee at the hearing. While he could not recall if he entered the emails as exhibits, he stated they were considered by the court and “recapped” in the record, so he did not need to read the emails or publish them because the court had them for consideration. App. 161, l. 15-App. 163, l. 4. Counsel Sellers maintained that the plea terms included that the State would not make a

sentencing recommendation and he asserted that the State had violated the terms of the plea agreement. App. 165, l. 20-App. 166, l. 22.

Counsel Sellers did not recall asking Petitioner if he wanted to continue with the plea but testified that Petitioner did not want to go to trial. App. 171, ll. 13-25. He reiterated numerous times that the plea contained a “no recommendation” term and that the State had violated the plea agreement. App. 172, ll. 8-24. He could not recall specifically discussing with Petitioner if he wanted to go forward with the plea after the State made a recommendation and stated that he made “strategic decisions” as they went through the plea. App. 172, l. 25-App. 173, l. 14. He testified that he did not move to withdraw Petitioner’s plea and would rely on Petitioner’s recollection as to whether he advised him of that option. App. 195, l. 19-App. 196, l. 3. Counsel Sellers confirmed that in discussing the plea with Petitioner he specifically told him that the State had agreed to not make any recommendation as to sentencing. App. 175, ll. 20-24; App. 198, ll. 17-21.

Petitioner testified repeatedly that he understood the risks of proceeding on his PCR application. App. 200, l. 19-App. 202, l. 21; App. 215, ll. 15-17. Petitioner stated that Counsel Sellers told him that there would be a “no time recommendation” which he understood to mean time-served or whatever Counsel Sellers thought was best. He stated that Counsel Sellers did not explain what he meant when he told him there would be no time recommendation but that he did believe it meant the State would not ask for a particular sentence. Petitioner testified that if he had known the State was going to ask for a particular sentence that he would not have pled guilty and would have gone to trial despite the amount of time he was facing. App. 202, l. 22-App. 205, l. 7; App. 206, ll. 14-18. Petitioner testified that Counsel Sellers should have objected when

the State asked for a specific sentence because that was not the plea deal that he had agreed to, and he should have been able to withdraw his plea. App. 206, l. 19-App. 207, l. 4.

Petitioner testified that Counsel Sellers never informed him that he could stand down on the plea and did not ask him what he wanted to do once the State requested a specific sentence. App. 207, l. 11-App. 208, l. 9. Petitioner discussed the plea hearing with Counsel Sellers after he had been sentenced and asked him why the State recommended time when it was supposed to be a “no time recommendation” to which Counsel Sellers responded that sentencing was ultimately up to the judge. He also stated that Counsel Sellers filed the motion to reconsider the sentence without speaking with him and that Counsel Sellers did not inform him that he could move to withdraw the plea. App. 209, ll. 2-25.

Petitioner testified that he was not made aware of the September 7 email offer and that Counsel Sellers had only told him that Luck Campbell was going to offer ten or more years. He stated that he understood that offer was that the State would not make a recommendation and Counsel Sellers had informed him that on the morning of the plea it would be a “no time recommendation” which is why he would ask for three to five years incarceration. App. 212, l. 12-App. 215, l. 14. On cross-examination, Petitioner testified that he did not want the charges dismissed but wanted to take them trial. He stated he thought there would be a “no time recommendation” once he pled guilty and he thought that he could get a time served sentence at the plea. App. 217, l. 19-App. 218, l. 15.

The State recalled Counsel Sellers to the stand. Counsel Sellers testified that he never told Petitioner that he would receive a time-served sentence. He clarified that he explained the plea offer to Petitioner in detail that the State would not make a recommendation as to sentencing

but that he never said the State would make a recommendation of no time. App. 219, l. 18-App. 220, l. 25.

An order of dismissal was filed on April 22, 2022. App. 235. The PCR court ruled as a matter of law that Counsel Sellers could not be found ineffective for failing to move to enforce the plea agreement because Judge Lee had made a specific finding that there was not a violation of the plea agreement, and that decision was never appealed. The PCR court also ruled that Counsel Sellers had “articulated a valid, well-reasoned strategic basis for not interjection or otherwise objecting during the plea proceeding as it would have likely let [sic] to the plea falling apart and all-but-certain conviction at trial (at least to the second-degree criminal sexual conduct with a minor charge).” App. 255. The PCR court ruled that there was no term requiring the State to remain silent as to sentencing.

The court further ruled that Petitioner could not prove prejudice because the plea court had stated independent reasons for its sentence and Petitioner had not shown that his proceeding would have been different had counsel advised him that the State would make a recommendation on sentencing. The court further stated that Petitioner had not pled guilty because he believed the state would not make a sentencing recommendation but because he believed he was getting a time served sentence. App. 256. The order of dismissal repeated its reasoning in each of the twenty-two grounds raised in Petitioner’s PCR application. App. 235-269.

## ARGUMENT

Plea counsel provided ineffective assistance of counsel where counsel failed to move to enforce the plea offer or object to the violation of the plea offer when the State first recommended a sentence of fifteen to twenty years incarceration. In the alternative, if this Court finds that the State did not violate the plea agreement, Petitioner's guilty plea was rendered unknowing and involuntary where he entered his plea based on plea counsel's misstatement of the terms of the plea agreement and where counsel did not afford Petitioner the opportunity to withdraw his plea once the State recommended a specific sentence.

Counsel Sellers argued consistently and vehemently that the plea agreement contained the term that the State would not make a recommendation regarding sentencing. He confirmed that he advised Petitioner that the terms of the offer included that the State would not make a recommendation as to sentencing. When the State reneged on that promise, defense counsel had a duty to move to enforce the plea agreement with the solicitor's office and the failure to perform that duty was ineffective assistance of counsel. See Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000).

In Jordan, *supra*, the defendant had repeatedly asserted to his counsel that he wanted to proceed to trial and would only accept a plea deal if the solicitor recommended probation. Jordan at 53, 374 S.E.2d at 684. Defense counsel was able to negotiate a deal with a particular solicitor that if the defendant pled guilty, she would neither recommend nor oppose probation. Id. Jordan accepted the terms of the agreement. Id. At the plea hearing, a different solicitor appeared on behalf of the state and vigorously opposed probation. Id. Defense counsel did not move to withdraw Jordan's plea, nor did he point out to the judge that the solicitor had altered the terms of the plea agreement. Id.

Jordan was sentenced to imprisonment for ten years, suspended upon the service of three years and five years on probation. Id. at 52, 374 S.E.2d at 648. This Court held that defense counsel's conduct in failing to protect Jordan's right to enforce the original plea agreement fell below the prevailing professional norms as required by Strickland, 466 U.S. 668 (1984). Further, this Court held that based on the "original vehemence" of Jordan in wanting to pursue his right to a jury trial, that there was a "reasonable probability that but for the fact that Jordan's attorney failed to object to the continuation of the guilty plea proceeding once the solicitor reneged on the plea bargaining agreement, that Jordan would not have pleaded guilty, but would have insisted on going to trial." Jordan v. State, 297 S.C. 52, 54–55, 374 S.E.2d 683, 684–85 (1988).

Likewise, in Thompson, *supra*, this Court found trial counsel ineffective where counsel failed to object when the solicitor recommended that the trial judge impose the maximum sentence in violation of the plea agreement. Thompson, at 115, 531 S.E.2d at 296. Pursuant to the agreement, the solicitor was not supposed to make any recommendation as to sentencing. Id. at 116, 531 S.E.2d at 296. The PCR court had ruled that Thompson's attorney's conduct fell below prevailing professional norms. However, the PCR Court found Thompson was not prejudiced because, based on the plea colloquy, Thompson had been adequately informed of the twenty to thirty-year sentencing range. Id.

In overturning the PCR court and analyzing the prejudice to Thompson this Court stated that,

“[T]he fact that the judge sentenced Thompson within the range is irrelevant. To establish prejudice, the proper analysis is to determine whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).”

Id. at 116, 531 S.E.2d at 297. This Court found that, based on the testimony from the PCR hearing, Thompson was unsure whether to plead guilty until right before trial and he only entered the guilty plea based upon the fact that he was under the impression the solicitor would not make a sentencing request. This was enough evidence to demonstrate a reasonable probability that Thompson would not have pled guilty but for his attorney's ineffective assistance in failing to object when the solicitor reneged on the plea agreement and recommended the maximum sentence. Id. at 117, 531 S.E.2d at 297.

Petitioner was advised that the terms of his plea agreement were that he would plead guilty to the CSC charge in exchange for the other charges being dismissed, the sentence would run concurrent to his probation revocation and the State would not take a position on sentencing. The State in its September 7 offer expressly conveyed that the plea would be without recommendation. While the plea negotiations continued with respect to what charges Petitioner would plead to, the original terms set forth in the September 7 offer were never revoked. In fact, the State admitted that it had carried over all the original terms articulated in the September 7 email regarding concurrent sentences and the dismissal of the other charges, even though it did not re-express those terms in writing. It logically follows then that the "no recommendation" term was also carried over to the final offer, as it was never expressly revoked nor re-expressed in subsequent writing. During the plea hearing, the State laid out the terms of the plea agreement and then stated there were no other recommendations in the matter and did not make a sentencing recommendation until after the victim impact statement. Counsel Sellers also testified that he confirmed the terms of the plea agreement, including the no recommendation term, with the State the day Petitioner pled guilty.

The record reflects that the State entered into an agreement in which it would remain silent as to sentencing. However, the State breached the agreement when, after the mother of Minor One spoke, the State asked for a sentence of fifteen to twenty years. Counsel Sellers recognized that the State had violated the plea agreement and wholly failed to object and bring the violation of the agreement to the plea courts attention. Under the standard set forth in Jordan and Thompson, *supra*, this was deficient performance.

Petitioner testified that he entered his plea with the understanding that the State would not make a sentence recommendation and that, although he thought he could get a time-served sentence, he knew that Counsel Sellers was asking for a sentence of three to five years. All parties testified that Petitioner pled on the cusp of trial and Petitioner testified multiple times at the hearing that he would not have pled guilty had he known the State was going to recommend he received the maximum sentence. Thus, he has shown a reasonable probability that he would have pled guilty but for Counsel Seller's ineffective assistance in failing to object when the solicitor reneged on the plea agreement. Under the standard set forth in Jordan and Thompson, *supra*, Petitioner has shown prejudice.

Petitioner was further prejudiced because Counsel Sellers failed to preserve the issue for appellate review when he did not object when the State violated the terms of the plea deal. It is well settled that failure to preserve an issue for appellate review can be the basis of a claim of ineffective assistance of counsel. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel can be found deficient for failing to object, failing to place an argument on the record, failing to obtain a final ruling, or failing to proffer testimony. See Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018); Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Generally, for an issue to be preserved, a

party must make a “contemporaneous objection that is ruled upon by the trial court.” State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). It is settled that “[a]n issue may not be raised for the first time in a motion to reconsider.” Repko v. Cnty. of Georgetown, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) citing Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009).

The record is clear that Counsel Sellers did not contemporaneously object when the State violated the plea agreement but only raised the matter for the first time in the motion to reconsider. Importantly, even Judge Lee stated it was a “close one” as to whether the plea agreement contained the “no recommendation” term. However, by failing to object, Counsel Sellers did not preserve the issue for appellate review and Petitioner was denied the opportunity to have the appellate court determine whether the terms of the plea agreement were in fact violated.

In the alternative, if this Court finds that the terms of the agreement were not violated, Petitioner’s guilty plea was rendered unknowing and involuntary because he was misadvised regarding the terms of the plea and not given the opportunity to withdraw his plea once it became clear that he was not pleading under the terms he had accepted. “The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). Generally, to prevail on PCR in the context of a guilty plea, a PCR applicant must show that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

Both Counsel Sellers and Petitioner testified that there was a “no recommendation” term in the plea agreement which they believed meant the State would remain silent as to sentencing. Petitioner testified that he would not have pled guilty if he had known that the State was going to recommend a specific sentence. That testimony was supported by the fact that Petitioner pled the week his case was going to be tried. Importantly, Counsel Sellers testified that if he would have objected and walked away from the plea that Petitioner would have been facing trial on all his charges. He stated that he decided to take Petitioner forward during the plea hearing and that backing down never crossed his mind.

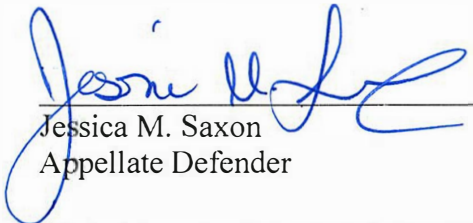
Whether to proceed with the plea at that point in time was not a decision for Counsel Sellers to make. He had a duty to consult with Petitioner once it became apparent that the terms of the plea agreement had changed and failure to do so was not reasonable under prevailing professional norms. Petitioner did not agree to enter a plea where the State was making a sentencing recommendation. His guilty plea was based upon the advice that the State would remain silent. A defendant who is induced to plead guilty based on erroneous legal advice may have a valid ineffective assistance of counsel claim. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (court found ineffective assistance of counsel when trial counsel misinformed petitioner of sentence possibility and petitioner testified at PCR he would not have pled guilty absent the erroneous advice); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (new trial granted where incorrect parole eligibility advice induced plea).

Counsel Sellers mishandling of Petitioner’s guilty plea was deficient performance that greatly prejudice Petitioner. At a minimum, Petitioner’s case should be remanded for resentencing where the State is bound by the terms of the offer to not make a recommendation for sentencing. In the alternative this Court should find that Petitioner’s guilty plea was

involuntary and remand the matter back to the Court of General Sessions of Richland County for a new trial.

**CONCLUSION**

Based upon the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of the issue.

  
Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of June, 2023.