

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

RECEIVED

Honorable Perry H. Gravely, Circuit Court Judge

FEB 06 2017

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DEANGELO MITCHELL,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000777

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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John H. Strom  
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**

Did the PCR court err in finding plea counsel provided effective assistance of counsel where Petitioner asserts that he would have gone to trial had plea counsel not erroneously told him, in the crucial weeks leading up to his guilty plea, that he would serve sixty-five percent of his sentence in incarceration when, in reality, Petitioner would be required to serve eighty-five percent of his sentence in incarceration?

## STATEMENT

On November 30, 2011, Petitioner, his younger brother, Wayne Mitchell, and a friend, Shalon Beaufort, were pulled over by Charleston City police officers because Beaufort's car had only one working headlight. App. 11, l. 20 – 14, l. 23. The officers claimed to have observed "a lot of movement amongst the parties inside the car" after they pulled it over. *Id.*

Police ordered all three men out of the car. Petitioner and his brother were detained in the back of a patrol car while the officers interrogated Beaufort. *Id.* Video footage from the patrol car recorded Petitioner handing his brother a packet of cocaine. His brother swallowed the packet. Five to ten minutes later Petitioner's brother started convulsing. *Id.* He died thirty to forty minutes later. *Id.*

### **Indictment and Guilty Plea**

On March 5, 2012, the Charleston County Grand Jury indicted Petitioner for involuntary manslaughter and distribution of cocaine. App. 76 – 79. After rejecting an earlier plea offer, Petitioner pled guilty as indicted before the Honorable Kristi Lea Harrington. App. 1 – 23.

Mark A. Peper represented Petitioner. Assistant Solicitor E. Culver Kidd, IV, represented the State. During the guilty plea, the court asked Petitioner if he understood the impact that pleading guilty to a violent crime would have on his length of incarceration. App. 5, l. 18 – 6, l. 9.

Petitioner responded that "I don't understand the percent of it, how much time it carries at you know at 65 and 85 percent situation. *Id.* The court replied that:

[T]he involuntary manslaughter is considered a violent crime. That would affect the length of time that you are in. But you should assume that you are going to do day for day, all right. There is no one right now that can tell you how much, how many days you are going to do. That is on a variety of different classifications, and that – it is not for this court to tell you or to calculate.

*Id.* The court then reiterated that Petitioner should expect to be incarcerated for all five years of the involuntary manslaughter conviction. App. 7, ll. 5-11.

When asked by the court about the factual basis for the plea, Petitioner explained that his brother initially had the drugs on him. Petitioner tried to help him hide some of the drugs. He was unable to hide all of the drugs so his brother took a portion and swallowed them in an effort to avoid detection. App. 14, l. 4 - 15, l. 32.

The court accepted Petitioner's plea and sentenced him to fifteen years for possession with intent to distribute cocaine and five years for involuntary manslaughter. The sentences were ordered to be served concurrently. App. 18, l. 10 – 22, l. 4.

#### **PCR Application and Evidentiary Hearing**

Petitioner filed an application for post-conviction relief (PCR) on August 29, 2014 alleging that plea counsel was ineffective for providing Petitioner with erroneous sentencing advice. App. 26 – 32. The State filed a return on March 26, 2015. App. 33 – 37. Petitioner filed an amended PCR application clarifying that plea counsel was ineffective for failing to advise Petitioner of the consequences of pleading guilty to a serious offense under S.C. Code Ann. § 17-25-45(B).

An evidentiary hearing was held before the Honorable Perry H. Gravely on January 20, 2016. James Falk represented Petitioner. Assistant Attorney General Rutledge Johnson represented the State. Petitioner and plea counsel both testified.

Petitioner testified that plea counsel was his second privately retained attorney. App. 45, ll. 1-24. Petitioner stated that he believed plea counsel had secured an offer of a fifteen year sentence with sixty-five percent to be served while incarcerated. *Id.* This would have entailed a maximum incarceration of a little over nine years. Petitioner further testified that he would not

have accepted the offer had he known it he would be required to serve eighty-five percent of the sentence incarcerated. *Id.*

Petitioner recalled that the guilty plea judge refused to tell him whether he would have to serve sixty-five or eighty-five percent of his total sentence. Instead, the judge repeatedly stressed that he should expect to have to serve the entirety of his sentence incarcerated. App. 49, ll. 9-21.

According to Petitioner, during the negotiations, plea counsel always promised Petitioner that whatever sentence he received he would only have to serve sixty-five percent of it incarcerated. App. 51, ll. 1-19. Petitioner was first told that he would have to serve eighty-five percent of his sentence on the day of his guilty plea. *Id.*

On cross-examination, Petitioner admitted that the plea court told him that he should expect to serve every year of his sentence. App. 53, l. 1 – 55, l. 17. However, Petitioner's understanding of his potential sentence of incarceration was based on the assurances of plea counsel that he was facing a sixty-five percent sentence, rather than the refusal of the plea court to address his specific sentencing concern.

Plea counsel admitted that he advised Petitioner in writing that the terms of the guilty plea meant that he would only have to serve sixty-five percent of any sentence. App. 58, l. 18 – 59, l. 20. Plea counsel testified Petitioner's exclusive focus during his representation was on securing as short a sentence of incarceration as possible. App. 61, l. 7 – 62, l. 15.

While conceding that he had misadvised Petitioner in the weeks leading up to the guilty plea and that the misadvice was a major factor in Petitioner to agreeing to plead guilty, plea counsel averred that he adequately corrected his misadvice on the day of the guilty plea by explaining to Petitioner that he would now be serving twenty percent more time in prison than he expected. App. 59, l. 11 – 61, l. 7.

## **Order of Dismissal**

The PCR court denied Petitioner's application in an order of dismissal issued on March 14, 2016. App. 70 – 75. In denying Petitioner relief the court concluded that Petitioner failed to prove by a preponderance of the evidence that plea counsel misadvised him about the sentence that he would receive. App. 73.

Specifically, the court held that plea counsel had corrected his advice prior to the guilty plea hearing and that the judge also correctly advised Petitioner that he should expect to serve every day of his sentence. *Id.* The court also ruled that Petitioner could not prove he was prejudiced by plea counsel's misadvice and that Petitioner decided to continue with the guilty plea after being correctly advised of the consequences. *Id.*

This petition follows.

## ARGUMENT

**The PCR court erred in finding plea counsel provided effective assistance of counsel where Petitioner asserts that he would have gone to trial had plea counsel not erroneously told him, in the crucial weeks leading up to his guilty plea, that he would serve sixty-five percent of his sentence in incarceration when, in reality, Petitioner would be required to serve eighty-five percent of his sentence in incarceration.**

At the evidentiary hearing, Petitioner stated that he based on plea counsel's sentencing advice, he believed he was going to serve no more than sixty-five percent of his sentence incarcerated. App. 47, l. 1 – 49, l. 21. Petitioner also testified that he would not have pled guilty and would have gone to trial if he knew he would have to serve eighty-five percent of his sentence incarcerated. *Id.*; *See Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel when plea counsel erroneously advised the defendant about his potential sentence prior to his guilty plea); *see also Ray v. State*, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (finding defendant's guilty plea was not intelligently and voluntarily made based on plea counsel's erroneous sentencing advice). Thus, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 73-74; *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges based on ineffective assistance of counsel).

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” *Brady v. United States*, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand

the sentencing consequences of his plea for it to be considered voluntarily given).

Furthermore, “[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and 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.” *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing *Hill*, 474 U.S. at 57-59).

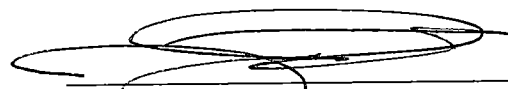
In this case, an “unsound result” occurred because plea counsel’s erroneous sentencing advice created an unreasonable expectation, which hindered Petitioner’s ability to fully understand the sentencing consequences of his guilty plea. *See Boykin*, 395 U.S. 238. Petitioner recalled at the evidentiary hearing that he was presented with a sentencing sheet that said he was pleading guilty to a non-violent offense. App. 50, ll. 14-25.

Petitioner was also prejudiced by plea counsel’s deficient performance because Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to the unreasonable expectation plea counsel created as to his potential sentence. *See Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when “there is a reasonable probability that, but for counsel’s errors, [Petitioner] would not have pled guilty and would have insisted on going to trial.” App. 73-74; *Hill*, 474 U.S. at 57-59; *See Boykin*, 395 U.S. 238.

**CONCLUSION**

Based on the foregoing reasons, Petitioner DeAngelo Mitchell petition for writ of certiorari should be granted to allow full briefing on the issue.



John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of February, 2017.

STATE OF SOUTH CAROLINA

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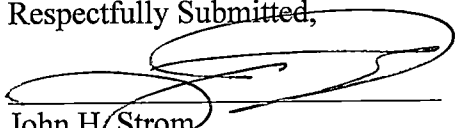
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for DeAngelo Mitchell 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, 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 DeAngelo Mitchell.

Respectfully Submitted,

  
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John H. Strom

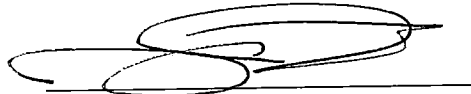
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of February, 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."



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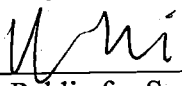
CERTIFICATE OF SERVICE

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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 DeAngelo Mitchell, #322456, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 6th day of February, 2017.

  
John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 6th day of February, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina

(L.S)  
My Commission Expires: 5/12/2025