

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Georgetown County

Honorable Michael G. Nettles, Circuit Court Judge

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ELIJAH A. BROWN,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000666

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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 ORIGINAL

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PETITIONER  
S.C. SUPREME COURT

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**ISSUE PRESENTED**

Was the guilty plea rendered involuntary because of counsel's advice to reject the State's ten year plea offer?

## STATEMENT

In July of 2014, the Georgetown County Grand Jury indicted Petitioner Brown for possession of marijuana, second offense and possession with intent to distribute heroin [PWID heroin], indictments #2014-GS-22-651, 652. In November of 2014, the Georgetown County Grand Jury indicted Petitioner for trafficking in heroin, indictment #2014-GS-22-347. On March 31, 2015, Petitioner appeared before the Honorable George C. James and pled guilty to possession of marijuana, second offense and PWID heroin. Charles D. Barr represented Petitioner at the guilty plea. Judge James sentenced petitioner to twelve (12) years for PWID and one year concurrent for possession of marijuana. On May 12, 2015, Petitioner appeared before the Honorable Paul M. Burch and pled guilty to trafficking in heroine. Charles D. Barr again represented Petitioner. Judge Burch sentenced petitioner to twelve (12) years concurrent for the trafficking charge. Petitioner did not appeal any of the convictions or sentences.

On August 11, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on October 24, 2016. On February 10, 2017, an evidentiary hearing was held before the Honorable Michael G. Nettles. James J. Falk represented Petitioner at the PCR hearing. Jane Diange, supervised by J. Rutledge Johnson, represented the State. In a written order signed March 1, 2017, Judge Nettles denied relief and dismissed the application. A timely notice of intent to appeal was served on March 15, 2017. This petition for writ of certiorari follows.

## ARGUMENT

The guilty plea was rendered involuntary because of counsel's advice to reject the State's ten year plea offer.

During the PCR hearing Petitioner testified that counsel advised him that the State offered a ten year plea offer in exchange for a guilty plea. (App. p. 58, line 24 – p. 59, line 1). Plea counsel testified that the ten year plea bargain was only for the PWID heroin and marijuana charge and did not include the trafficking charge. (App. p. 72, lines 8-16). Plea counsel testified that he would have recommended that Petitioner reject the ten year plea offer. (App. p. 71, lines 14-15; p. 72, lines 8-9). Plea counsel testified that it was in Petitioner's best interest to handle all of the charge at one time. (App. p. 71, line 14 – p. 72, lines 1-4). The charges, however, were not handled at the same time. At first, Petitioner only pled guilty to the PWID heroin and marijuana charges. The guilty pleas were entered without negotiations or recommendations. (App. pp. 37-38). Petitioner received a twelve year sentence, two years more than the plea offer counsel recommended Petitioner reject.

A few weeks later Petitioner pled guilty to the trafficking charge. The State allowed Petitioner to plead guilty to the lesser included offense of trafficking first offense rather than second offense with no recommendation as to sentence. (App. p. 22, lines 1-7). Plea counsel testified at the PCR hearing, however, that the second plea was negotiated. (App. p. 73, lines 15-18). The sentencing sheet reflects that guilty plea was entered without negotiations or recommendations. (App. p. 39). Plea counsel was ineffective in advising Petitioner to reject the ten year plea deal for the PWID and marijuana charges.

In the order of dismissal the PCR judge wrote:

This Court also finds Counsel effectively represented Applicant with respect to discussing the plea offer of ten (10) years. Counsel testified that he discussed any and all plea offers and recommended to the Applicant that he not accept the offer because it would have left him vulnerable to the other outstanding charges. Counsel testified that he discusses all plea offers with clients. This Court has observed Counsel and heard his testimony, and this Court finds counsel is credible. This Court notes that Counsel is a very experienced criminal defense attorney with many years of practice experience.

Accordingly, this court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

(App. pp. 84-85). The PCR judge erred. Plea counsel was ineffective in advising Petitioner to reject the ten year plea deal for the PWID heroin and possession of marijuana charges. When Petitioner pled guilty to the PWID heroin and possession of marijuana charges in March, the trafficking charge was still pending. Both the March guilty pleas to PWID heroin and possession of marijuana charges and the May guilty plea to trafficking were entered without negotiations or recommendations. Petitioner received a twelve year sentence rather than a ten year sentence and still faced the trafficking charge.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily,

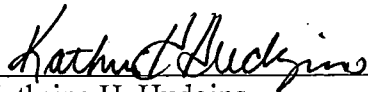
knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Id. Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. id.

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (“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.’ ” (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970))). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. 52 at 59, 106 S.Ct. 366.

The plea in the present case did not represent a voluntary and intelligent choice among the alternative courses of action open to the Petitioner. Plea counsel was ineffective in advising Petitioner to reject the ten year plea deal. Counsel’s deficient performance affected the outcome of the plea process. Petitioner received a twelve year sentence instead of the ten year plea offer and still faced the trafficking charge. Petitioner demonstrated both deficient performance and prejudice.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of November, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ELIJAH A. BROWN,

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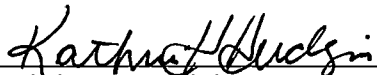
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Elijah A. Brown states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. She has reviewed the record of petitioner's trial before Judge Michael G. Nettles, which was held on February 10, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. She 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 her as counsel for Elijah A. Brown.

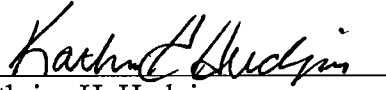
Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of November, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her 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."



Kathrine H. Hudgins  
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South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

This 16th day of November, 2017.

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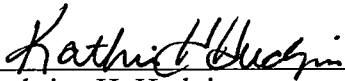
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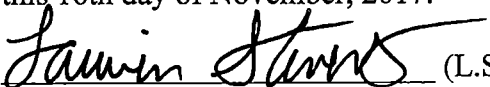
RESPONDENT

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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 Johnny Ellis James, Jr., 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 Elijah A. Brown, #304631, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 16th day of November, 2017.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 16th day of November, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.