STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Pickens County

Honorable Daniel D. Hall, Circuit Court Judge

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S.C. SUPREME COURT

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MICHAEL BROWNING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000483

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether plea counsel provided ineffective assistance when she failed to object to the plea court's denial of Petitioner's withdrawal of his guilty plea where the plea court indicated that it intended to give Petitioner a lengthier sentence than the state's recommendation?

## STATEMENT

During the April 2014 term, the Pickens County Grand Jury indicted Petitioner for possession of methamphetamine. App.87 – 88. During the December 2014 term, the Pickens County Grand Jury indicted Petitioner for Petit Larceny and burglary in the second degree. App. 89 – 92.

On June 18, 2015, Petitioner pled guilty in front of the Honorable Edward Miller. App.1. Graham Buckner and Courtney Landsverk represented the state. Id. Dorothy Manigault represented Petitioner. Id.

Judge Miller accepted Petitioner's guilty plea and sentenced Petitioner to ten years' imprisonment, provided upon the service of six years' imprisonment, the balance is suspended to three years' probation, for petit larceny and burglary in the second degree. App. 24, ll. 16 – 17; App. 58, ll. 14 – 21. Judge Miller sentenced Petitioner to five years' imprisonment for possession of methamphetamine third offense, to run concurrent with his aforementioned charges. App. 93.

Petitioner filed a timely application for post-conviction relief (PCR) on September 1, 2015. App. 38 – 43. On January 31, 2017, Petitioner filed an amendment to his PCR application. App. 50 – 55. In his PCR application, Petitioner alleged his trial attorney provided ineffective assistance when she failed to object to the plea court's denial of his withdrawal of his guilty plea. App. 40; App. 60, ll. 16 – 25. The state made its Return on January 12, 2017. App. 45 – 48.

Petitioner's PCR hearing was held on June 28, 2017, before the Honorable Daniel Dewitt Hall. App. 56. R. Mills Ariail represented Petitioner. Id. DeShawn Mitchell represented the state. Id.

On February 13, 2018, Judge Hall issued an Order of Dismissal denying Petitioner relief. App. 81 – 86. Judge Hall found that Petitioner failed to carry his burden to prove ineffective assistance and to prove he was prejudiced by the alleged deficiencies. App. 85.

This petition for Writ of Certiorari follows.

## ARGUMENT

Plea counsel provided ineffective assistance when she failed to object to the plea court's denial of Petitioner's withdrawal of his guilty plea where the plea court indicated that it intended to give Petitioner a lengthier sentence than the state's recommendation.

**Relevant Facts**

The state alleged the facts as follows. On August 17, 2013, police officers in Pickens County were called about a suspicious car. App. 19, ll. 9 – 11. The officers stopped the suspicious car, detained Petitioner, and searched the car. App. 19, ll. 12 – 14. They found two small bags with a crystal-like substance that tested positive for methamphetamine. App. 14 – 16.

On March 18, 2014, Deputy Boyd responded to a trespassing report in Pickens County. App. 19, ll. 19 – 20. Boyd found Petitioner and two other people on the property with piles of metal. App. 19, ll. 20 – 22. Petitioner claimed that the property owner gave him permission to take the metal off of the property; however, the property owner denied that contention. App. 19, ll. 22 – 24.

Also on March 18, 2014, Deputy Nix responded to a burglary call at a property in Pickens County. App. 19, l. 25 – 20, l. 1. The property owner discovered that an old farm house and three "out buildings" on his property has been broken into. App. 20, ll. 2 – 5. The property owner provided police a surveillance video of that, "revealed the [Petitioner] on the surveillance." App. 20, ll. 6 – 8.

On June 18, 2015, Petitioner pled guilty in front of the Honorable Edward W. Miller. App.1. The state recommended "three years active time." App. 20, ll. 17 – 18. There was no negotiated sentence. App. 22, ll. 23 – 25.

Judge Miller told Petitioner, "I'm going to give you more time than that." App. 21, l. 24 – 22, l. 3. Petitioner replied that he wanted to withdraw his guilty plea now that Judge Miller indicated that he would impose a lengthier sentence than the state's recommendation. App. 22, ll. 5 – 6.

The plea court denied Petitioner's attempt to withdraw his guilty plea. App. 22, ll. 20 – 22. Judge Miller asked, "What good is [withdrawal] going to do? Put it off on someone else?" Id. Plea counsel did not object to the plea court's denial of Petitioner's withdrawal of his guilty plea.

Judge Miller did not follow the state's recommendation of three years' imprisonment. App. 21 l. 24 – 22, l. 3. Instead he sentenced Petitioner to ten years' imprisonment, upon the service of six years' imprisonment, the balance is suspended, upon service of three years' probation. App. 24, ll. 16 – 23. Judge Miller opined after the sentence that, "I was going to hit you a lot harder than that." App. 24, ll. 24 – 25.

On September 1, 2015, Petitioner filed a PCR application. App. 38 – 44. On January 12, 2017, the state filed its return. App. 45 – 48. Petitioner amended his PCR application on January, 31, 2017. App. 50 – 55.

On June 28, 2017, Petitioner's PCR hearing was held in front of the Honorable Daniel Dewitt Hall. App. 56. R. Mills Ariail represented Petitioner. Id. DeShawn Mitchell represented the state. Id.

Petitioner testified during the PCR hearing that his plea counsel was ineffective for failure to object to the plea court's denial of his withdrawal of his guilty plea. App. 61, ll. 1 – 6.

Petitioner explained that plea counsel did not inform him that the plea court was not required to accept the state's recommended sentence. App. 62, ll. 17 – 20. He did not know there was a difference between a recommended sentence and a negotiated plea. App. 68, ll. 1 – 6.

Petitioner testified that plea counsel never told him that the judge could give him a lengthier sentence than the state's recommendation. App. 68, ll. 7 – 10. He testified that plea counsel never discussed what would happen if the judge did not accept the state's recommendation. App. 62, ll. 8 – 14.

Petitioner testified that he only pled guilty to burglary in the second degree because he had other charges being dismissed as well and he was assured his sentence was seventy-five percent of three years' imprisonment. App. 63, ll. 15 – 25. Once Judge Miller made it clear he was going to give Petitioner a lengthier sentence than the state's recommendation, Petitioner attempted to withdraw his plea. App. 61, l. 25 – 62, l. 7. Therefore, Petitioner would not have pled guilty had he known that the three years' imprisonment sentence, recommended by the state, was not guaranteed. App. 61, ll. 11 – 14.

Plea counsel testified at the PCR hearing as well. Plea counsel testified that she notified Petitioner that the recommendation had been agreed on; however, the judge did not have to accept it. App. 73, ll. 12 – 15. She stated that she explained the difference between a recommended sentence and a negotiated plea, and that, "[T]he judge could give [Petitioner] any sentence that the judge desired and even including consecutive sentences." App. 74, ll. 4 – 11. However, she also mentioned that, "we never discussed a negotiated plea." App. 77, l. 16.

Plea counsel explained her reasoning for not objecting to Judge Miller's denial of Petitioners guilty plea withdrawal, "I didn't make any objection after [Petitioner] asked himself to withdraw, and the judge made it clear he was not going to allow him to withdraw. *So any argument that I would have made would have been futile because Judge Miller already made his decision.*" (emphasis added)

Judge Hall denied Petitioner's PCR allegations at the end of the hearing where he found that Petitioner did not meet his burden to prove ineffective assistance of counsel. App. 79, ll. 20 – 23. On February 13, 2018, Judge Hall issued an Order of Dismissal denying Petitioner's PCR application. App. 81 – 86.

**Discussion**

Plea counsel provided ineffective assistance when she failed to object to the plea court's denial of Petitioner's withdrawal of his guilty plea. Plea counsel was the attorney representing Petitioner during the plea hearing. App. 1. Petitioner requested that his plea be withdrawn and that request was denied by the plea court. App. 22, ll. 5 – 6; App. 22, ll. 20 – 22. Rather than maintaining silent, plea counsel should have objected and took exception to the denial of Petitioner's withdrawal of his guilty plea to ensure the issue was preserved for review. *see* State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (holding a contemporaneous objection is required at trial to preserve an error for appellate review).

In this case, Petitioner did not understand the nature of his plea nor did he understand the difference between a recommended sentence and a negotiated guilty plea. App. 68, ll. 1 – 10. Petitioner was under the impression that the plea court could not deviate from the recommended sentence and he would not have pled guilty had he known he could face a longer sentence than the one recommended by the state. App. 60, ll. 24 – 25; App. 62, ll. 17 – 20. Therefore, once Petitioner attempted to withdraw his guilty plea and Judge Miller denied his request, plea counsel should have objected and took exception to the ruling to preserve the issue for direct appeal.

The United States Supreme Court has held that "on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained *or given through ignorance, fear or*

*inadvertence*. Such an application does not involve any question of guilt or innocence. The court in exercise of its discretion will permit... a trial if for any reason the granting of the privilege seems fair and just. Kercheval v. United States, 274 U.S. 220, 224 (1927); *see* Nagelberg v. U.S., 377 U.S. 266 (1964).

In order for Judge Miller's denial of Petitioner's guilty plea withdrawal to be preserved for direct appellate review, plea counsel needed to object. *see* State v. Torrence, supra, (holding a contemporaneous objection is required at trial to preserve an error for appellate review); State v. Hoffman, 312 S .C. 386, 393, 440 S.E.2d 869, 873 (1994) (noting an issue which is not properly preserved cannot be raised for the first time on appeal); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review); State v. Black, 319 S.C. 515, 522–23, 462 S.E.2d 311, 315 (Ct.App.1995) (determining a failure to object when the evidence is offered constitutes a waiver of the right to object). Plea counsel's failure object and preserve the denial of Petitioner's guilty plea withdrawal for appellate review constituted ineffective assistance. *See* Foye v. State, 335 S.C. 586, 590, 518 S.E. 265, 267 (1999). That failure to preserve prejudiced Petitioner because he lost his opportunity to directly appeal the denial of his guilty plea withdrawal.

In Estelle v. Williams, 425 U.S. 501 (1976), the United States Supreme Court held that a trial counsel's failure to object to Williams being brought to court in prison clothes constituted ineffective assistance that resulted in prejudice to Williams. Id. at 512 – 513. Trial counsel's explanation for his failure to object was that he thought his objection would be *futile*. Id. at 514. (emphasis added) The Supreme Court held that trial counsel's reasoning for his failure to object

was insufficient because, "there [was] nothing to suggest that there would have been any prejudicial effect on defense counsel had he made the objection." Id. at 511.

In State v. Hazel, 275 S.C. 392, 393 271 S.E.2d 602, 603 (1980), Hazel challenged the denial of her request to withdraw her guilty plea to kidnapping, for which she received a sentence of life imprisonment. The Supreme Court of South Carolina found that trial counsel advised Hazel that the judge *might exercise discretion* in sentencing. Id. (emphasis added) However, that advice was incorrect because the statute that related to sentencing for kidnapping mandated a sentence of life imprisonment. Id.

The Court held that Hazel's plea was not knowing because it was entered without an understanding of the consequences for the offense to which she pled. Id. at 392, 271 S.E.2d at 603. *Citing* Boykin v. Alabama, 395 U.S. 238 (1969).

In Boykin, supra, the United States Supreme Court held that Boykin's guilty plea was invalid because the record did not show that Boykin had voluntarily and understandingly entered a plea of guilty. Id. Boykin was convicted of robbery and sentenced to death. Id. at 239.

Boykin was appointed counsel and a few days later pled guilty to five indictments. However, the record showed the judge asked no questions of Boykin and Boykin did not address the court. Id. Therefore, because the record was unclear as to whether Boykin fully understood the consequences of his plea, the Court overturned his guilty plea as involuntarily given. Id. at 244.

In Henderson v. Morgan, 426 U.S. 637 (1976), the United States Supreme Court found that Morgan did not receive adequate information about the offense to which he pled guilty. Therefore, his plea was involuntary and the conviction was entered without due process of law. Id. at 647.

Henderson pled guilty to second degree murder without being informed that intent to cause the death of the decedent was an element of the offense. Id. at 643 – 644. At the sentencing hearing Henderson's attorneys made a statement that explained his version of the offense, noting that he "meant no harm to [the decedent]." Id. at 643. At Henderson's evidentiary hearing, Henderson testified that he would not have pled guilty if he had known an intent to cause the death of the decedent was an element of second-degree murder. Id. at 643 – 644.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687 – 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The difference, "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a 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) (internal quotations omitted) (applying the two-part test for

claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S.Ct. at 370. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

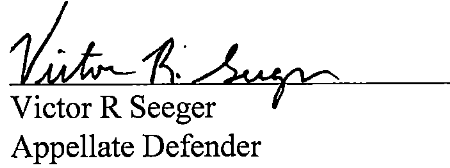
In the instant case, Petitioner did not plead guilty knowingly, voluntarily, and intelligently. App. 60, ll. 24 – 25; App. 62, ll. 17 – 20. Petitioner's understanding of his guilty plea was that he was guaranteed to get the three-year sentence that he and the state agreed upon. App. 60, ll. 24 – 25; App. 62, ll. 17 – 20. Due to that misunderstanding, Petitioner pled guilty and unknowingly exposed himself to a potentially longer term of imprisonment.

Petitioner attempted to withdraw his plea when Judge Miller indicated he was going to impose a more severe sentence than the state's recommendation. App. 22, ll. 5 – 6. Judge Miller denied Petitioner's withdrawal request. App. 22, ll. 20 – 22. Plea counsel's reasoning for failing to object to that was that it would have been "futile" because the court already made its decision; however, as in Estelle, futility is not a valid reason for failure to object when there was nothing to suggest that there would have been any prejudicial effect on defense counsel had she made the objection. Id. at 511; App. 78, ll. 8 – 12.

Therefore, plea counsel should have objected to Judge Miller's denial of Petitioner's withdrawal of his guilty plea because Petitioner did not plead guilty knowingly, voluntarily, and intelligently, and her objection would have ensured that the issue of the denial of Petitioner's request to withdraw his guilty plea was preserved for direct appeal.

## CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of September, 2018.

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MICHAEL BROWNING,

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Michael Browning states:

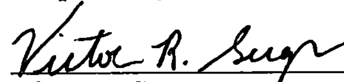
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Daniel D. Hall, which was held on June 28, 2017, 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 Michael Browning.

Respectfully Submitted,

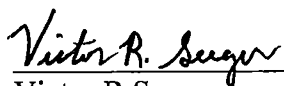


Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of September, 2018.

## 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."



Victor R Seeger
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ATTORNEY FOR PETITIONER

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PETITIONER

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RESPONDENT

---

CERTIFICATE OF SERVICE

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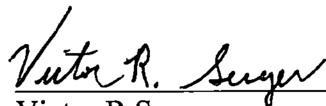
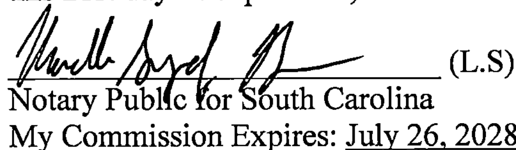
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael Browning at 2023 Ruhamah Road, Liberty, SC 29657, this 19th day of September, 2018.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of September, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028