

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**ORIGINAL**

Certiorari to Saluda County

Honorable R. Knox McMahon, Circuit Court Judge

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STACY WALKER,

PETITIONER

**RECEIVED**

JUN 17 2019

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001911

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Plea counsel provided ineffective assistance of counsel for failing to move to withdraw Petitioner’s guilty plea after Petitioner was sentenced to thirty years’ imprisonment for burglary in the first degree, where during the guilty plea hearing Petitioner said this sentence violated the plea agreement where the plea court stated that the withdrawal motion needed to be in “proper” form and counsel still failed to file a motion to withdraw the guilty plea. .... 4

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## **ISSUE PRESENTED**

Whether plea counsel provided ineffective assistance of counsel for failing to move to withdraw Petitioner's guilty plea after Petitioner was sentenced to thirty years' imprisonment for burglary in the first degree, where during the guilty plea hearing Petitioner said this sentence violated the plea agreement where the plea court stated that the withdrawal motion needed to be in "proper" form and counsel still failed to file a motion to withdraw the guilty plea?

## STATEMENT

During the June 2012 term the Saluda County Grand Jury indicted Petitioner for four counts of grand larceny, three counts of burglary in the second degree, breaking and entering into a motor vehicle, and burglary in the first degree. App. 3, ll. 6 – 18.

On May 21, 2013, Petitioner pled guilty to burglary in the first degree before the Honorable Thomas A. Russo. App. 1. W. Greg Seigler represented Petitioner. Id. Ervin J. Maye represented the state. Id. As a condition of the guilty plea, the remainder of the charges against Petitioner were “nol pros[ed].” App. 3, ll. 19 – 25.

Judge Russo accepted Petitioner’s guilty plea as freely, voluntarily, and intelligently made. App. 9, l. 19 – 10, l. 7. Petitioner’s sentencing was deferred until May 31, 2013. App. 12.

Petitioner’s sentencing hearing was held before the Honorable William P. Keesley. Id. W. Greg Seigler represented Petitioner. Id. Ervin J. Maye represented the state. Id.

Judge Keesley sentenced Petitioner to thirty years’ imprisonment. App. 32, ll. 7 – 19. Petitioner immediately expressed confusion as to the sentence. App. 32, l. 20 – 34, l. 21. Petitioner specifically asked to withdraw his plea because plea counsel Seigler told him if the sentence was over fifteen years he would make a motion to withdraw the plea. Id.

However, Judge Keesley interrupted and stated, “I’m not going to sit here and... try to build up some record. *You can take that up in a proper motion.* I didn’t take your plea, Judge Russo did. I imposed your sentence. It’s thirty years.” App. 35, ll. 2 – 8. (emphasis added) Plea counsel Seigler failed to make a proper motion to withdraw Petitioner’s plea and Petitioner was sentenced to thirty years’ imprisonment. App. 32, ll. 7 – 19.

On October 20, 2015, Petitioner filed a post-conviction relief application (PCR) alleging plea counsel provided ineffective assistance of counsel for failing to object to the plea court

deviating from the plea agreement of fifteen years' imprisonment and for failing to make a motion to withdraw the guilty plea after Petitioner told the court he wanted to withdraw. App. 37 – 45; App. 58 – 61. The state filed its Return on September 15, 2016. App. 46 – 56.

Petitioner's PCR hearing was held on November 21, 2017 before the Honorable R. Knox McMahon. App. 62. Kristy G. Goldberg represented Petitioner. Id. William Edgar Salter, III represented the state. Id.

In an order filed on July 12, 2018, Judge McMahon denied Petitioner relief. App. 131 – 150. Judge McMahon found credible plea counsel Seigler's testimony at the PCR hearing that he "did not promise" Petitioner a fifteen-year sentence and ruled that there was "no good faith basis on which [plea counsel] could have moved for... withdrawal of [Petitioner's] guilty plea." Id.

On July 12, 2018, Petitioner filed a motion to alter or amend judgment. App. 151 – 153. On October 9, 2018, the Honorable Allison Renee Lee<sup>1</sup> signed an order denying Petitioner's motion to alter or amend. App. 154 – 155.

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<sup>1</sup> According to the order signed by Judge Lee, Judge McMahon retired effective on June 20, 2018, prior to the filing of the motion to reconsider. App. 154 – 155.

## ARGUMENT

Plea counsel provided ineffective assistance of counsel for failing to move to withdraw Petitioner's guilty plea after Petitioner was sentenced to thirty years' imprisonment for burglary in the first degree, where during the guilty plea hearing Petitioner said this sentence violated the plea agreement where the plea court stated that the withdrawal motion needed to be in "proper" form and counsel still failed to file a motion to withdraw the guilty plea.

### **Relevant Facts**

The state alleged the facts as follows: On January 10, 2012, Petitioner and a co-defendant burglarized the home of Sherry McIntosh, the complaining witness. App. 8, l. 20 – 9, l. 14. Various items were taken from the home which included two firearms. Id.

In March of 2012, law enforcement arrested a man named Thomas Tolen with some of the items stolen from McIntosh's house. App. 16, ll. 17 – 22. Tolen cooperated with law enforcement and Greenwood authorities obtained a court order to place a GPS tracking system on Petitioner's car. App. 16, l. 25 – 17, l. 5.

After watching Petitioner's movements from March 12 – 16, 2012, law enforcement took Petitioner's co-defendant, Tonnie Pace, into custody. App. 17, ll. 11 – 22. Pace cooperated with law enforcement and Petitioner was arrested. Id. Petitioner and Pace went with police around Saluda county to show them the locations that they burglarized. Id.

Petitioner decided to plead guilty because plea counsel Seigler told him that he would receive fifteen years' imprisonment if he pled guilty. App. 82, l. 23 – 83, l. 13. However, when it came time for sentencing Petitioner received thirty years' imprisonment, double what he was promised. App. 32, ll. 7 – 19.

Petitioner expressed his dissatisfaction and confusion with his sentence. App. 32, l. 20 – 34, l. 21. Petitioner tried to withdraw his plea. Id. The court denied his request to withdraw his plea and specifically said that in order to withdraw his plea, Petitioner would have to, “take that up in a proper motion.”<sup>2</sup> App. 35, ll. 2 – 8. Plea counsel failed to make that motion to withdraw the guilty plea.

This petition follows.

### **Discussion**

Plea counsel Seigler failed to make a motion to withdraw Petitioner’s guilty plea in spite of the clearly expressed intention to withdraw the guilty plea that Petitioner made during the sentencing hearing and the clear direction of the court that Petitioner’s withdrawal must be made, “in a proper motion.” App. 32, l. 20 – 35, l. 8. Plea counsel’s failure to make a motion to withdraw Petitioner’s guilty plea under these circumstances constituted ineffective assistance of counsel.

In Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) this Court held plea counsel was ineffective for failing to move to withdraw Rolen’s guilty plea. Rolen pled guilty to voluntary manslaughter and was sentenced to twenty-five years’ imprisonment. Id. at 411, 683 S.E.2d at 473. Rolen confessed to the killing and proceeded to trial. Id. After a jury was selected, Petitioner decided to plead guilty. Id. At the guilty plea hearing Rolen expressed his desire to withdraw the plea. Id. However, plea counsel failed to move to withdraw the plea. Id.

At his PCR hearing, Rolen testified that he pled guilty because he was not thinking clearly due to being heavily medicated. Id. at 412, 683 S.E.2d at 473. Rolen also testified that

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<sup>2</sup> Since plea counsel Seigler was representing Petitioner, the motion to withdraw the plea had to come from plea counsel and not Petitioner because hybrid representation is not recognized in South Carolina. (See Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); Foster v. State, 298 S.C. 306, 369 S.E.2d 907 (1989))

plea counsel told him a jury would find him guilty, so he should plead instead of going to trial. Id. Counsel testified at the PCR hearing that he did not move to withdraw the plea because he believed once the plea was accepted it was final and could not be withdrawn. Id.

This Court determined, “that counsel was deficient in failing to move to withdraw [Rolen’s] guilty plea.” Id. at 413, 683 S.E.2d at 474. This Court reasoned that when Rolen stated at the plea hearing that he did not want to plead guilty, “it was clear that [Rolen] wanted to withdraw his guilty plea.” Id.

This Court also held that plea counsel’s deficient performance prejudiced Rolen, Id. at 413 – 414, 683 S.E.2d at 474. This Court took into account the fact that the plea judge had formally accepted the plea prior to Petitioner speaking out at the plea hearing, which meant that even if Petitioner had moved for withdrawal the plea court had the discretion to deny that motion. Id. (Citing State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982)). Nonetheless this Court held, “that Petitioner was prejudiced by counsel's deficient performance because due to counsel's failure to make such a motion, the plea judge was not able to exercise his discretion.” Id. at 414, 683 S.E.2d at 474. Moreover, this Court added, “even if the plea judge had denied Petitioner's motion to withdraw his plea, Petitioner could have raised this issue on direct appeal.” Id.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel's performance was deficient.” Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Then Petitioner must show trial counsel’s ineffective assistance prejudiced Petitioner case because, “but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 118, 386 S.E.2d at 625. Therefore, where ineffective assistance of counsel is

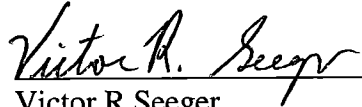
alleged, the applicant must prove that, “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 692.

In the present case, plea counsel failed to move to withdraw Petitioner’s guilty plea after Petitioner explicitly stated he wanted to withdraw his plea at the guilty plea hearing. App. 32, l. 20 – 34, l. 21. This was the same error that plea counsel made in Rolen. Here plea counsel’s deficiency is even more egregious than plea counsel in Rolen as the plea court informed plea counsel during the plea hearing that the withdrawal of Petitioner’s guilty plea would need to be, “in a proper motion.” App. 35, ll. 2 – 8.

Therefore, since plea counsel was on notice that Petitioner wanted to withdraw his plea and he was on notice that the plea court would not entertain the request to withdraw the plea unless it was in the form of “a proper motion,” he provided deficient performance. Id. That deficient performance prejudiced Petitioner because, “the plea judge was not able to exercise his discretion,” and, “even if the plea judge had denied Petitioner's motion to withdraw his plea, Petitioner could have raised this issue on direct appeal.” Rolen, at 414, 683 S.E.2d at 474.

**CONCLUSION**

Based on the foregoing reasons Petitioner respectfully requests that this Court vacate Petitioner's guilty plea and remand his case to the lower court for a new trial, or in the alternative, grant Certiorari to allow for full briefing on this issue.

  
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Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17<sup>th</sup> day of June, 2019.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Stacy Walker states:

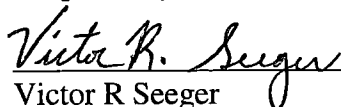
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Knox McMahon, which was held on November 21, 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 Stacy Walker.

Respectfully Submitted,

  
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Victor R Seeger

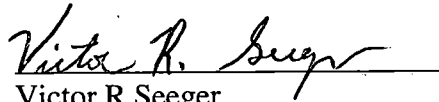
Appellate Defender

ATTORNEY FOR PETITIONER

This 17<sup>th</sup> day of June, 2019.

**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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ATTORNEY FOR PETITIONER

This 17<sup>th</sup> day of June, 2019.

STATE OF SOUTH CAROLINA

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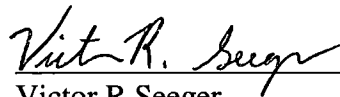
RESPONDENT

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CERTIFICATE OF SERVICE

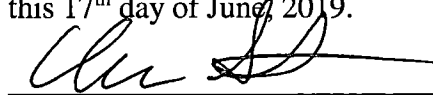
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, 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 Stacy Walker, #242126, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 17<sup>th</sup> day of June, 2019.



\_\_\_\_\_  
Victor R Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17<sup>th</sup> day of June, 2019.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: October 26, 2019