

# COURT OF APPEALS OF GEORGIA

## RETURN NOTICE

February 24, 2015

To: Mr. Jontae Hower, GDC1001048709 F-1, Johnson State Prison, Post Office Box 344,  
Wrightsville, Georgia 31096

Case Number: \_\_\_\_\_ Lower Court: \_\_\_\_\_ County Superior Court

Court of Appeals Case Number and Style: \_\_\_\_\_

Your document(s) is (are) being returned for the following reason(s).

- There is no case pending in the Court of Appeals of Georgia under your name.**
- A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia. See OCGA §5-6-37.** Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.
- The Notice of Appeal must include a proper Certificate of Service.** A Certificate of Service must show service to the opposing counsel and contain the counsel's full name and complete mailing address. The opposing counsel must actually be served with a copy of your filing.
- An Application for Writ of Habeas Corpus should be filed in the superior court of the county in which you claim you are illegally detained.** An appeal from a denial of an Application for Writ of Habeas Corpus is to the Supreme Court and not the Court of Appeals.
- An Application for Writ of Mandamus should be filed in the superior court of the county official whose conduct you intend to mandate.** An appeal from a denial of an Application for Writ of Mandamus is to the Supreme Court and not the Court of Appeals.
- Your appeal was disposed by opinion (order) on \_\_\_\_\_.** The Court of Appeals \_\_\_\_\_  
\_\_\_\_\_ The remittitur issued on \_\_\_\_\_  
divesting this Court of jurisdiction. The case decision is therefore final.
- Your mailing/documents indicate that you intended to file your papers in another court rather than the Court of Appeals of Georgia.** The address of the Clerk of the \_\_\_\_\_ is: \_\_\_\_\_
- As long as you are represented by an attorney, you cannot file pleadings on your own behalf. Your attorney must file a Motion to Withdraw as Counsel and it must be granted, before you can file your own pleadings in this Court.**

**I am returning your documents to you.**

- A request for an out-of-time appeal should be made to the trial court from which you are appealing.** If your motion is denied by the trial court, you can file an appeal of that decision by filing a Notice of Appeal with the clerk of the superior court.

cc: Nathaniel J. Middleton, Esq.  
3951 Snapfinger Parkway • Suite 515  
Decatur, Georgia 30035

TO NATHANIEL J. MIDDLETON, ESQUIRE

RECEIVED IN OFFICE

FROM JONTAE HOWER (CLIENT)

2015 FEB 23 PM 3:08

GDC # 1001048709 (E-1-210)

LEWIS COUNTY ADMINISTRATOR  
COURT OF APPEALS OF GA

DATE FEBRUARY 16, 2015

LOCATION JOHNSON STATE PRISON, P.O. BOX 344, WRIGHTSVILLE, GA 31096

REFERENCE ATTORNEY/CLIENT CORRESPONDENCE

CASE A14A2293

Dear Mr. Middleton,

GREETINGS: I am contacting you and your Office about the above criminal appeal.

I have enclosed a true and complete copy of an Amended Motion to Withdraw Guilty Plea and Defendants Amended Brief.

There are FIVE GROUNDS that have been enumerated to preserve my rights. I ask that you fully exhaust each of the listed issues.

Please file my Motion/Brief as soon as possible, prior to the Georgia Court of Appeals renders their opinion/decision, so that they can take said issues into consideration to reverse my guilty plea conviction. Contact me. Your kind assistance, time, and consideration is greatly appreciated in this matter.

Sincerely,

Signed: Jontae Hower

1 IN THE SUPERIOR COURT OF DEKALB COUNTY

2 STATE OF GEORGIA

3  
4 STATE OF GEORGIA

5 (PLAINTIFF)

6 V

INDICTMENT NO: 11-CR-6281-1.

7 JONTAE HOWER

8 (DEFENDANT)

9  
10 AMENDED MOTION TO WITHDRAW GUILTY PLEA

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14 COMES NOW the Defendant, by and through counsel, and moves  
15 the court to withdraw his March 25, 2013 guilty plea in the  
16 above matter, showing as follows:

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18 1) Defendant files this Amended Motion; and by way of his  
19 brief in support of this motion, which is attached hereto and made a  
20 part hereof, enumerates FIVE GROUNDS to permit him to withdraw  
21 the aforementioned plea.

22 WHEREFORE, Defendant prays that the Court set a date certain  
23 to hear this motion, and, upon evidence presented, to allow the  
24 Defendant to withdraw his guilty plea to prevent a manifest injustice.

25  
26 Respectfully submitted,

27  
28 Signed:

1 CERTIFICATE OF SERVICE

2  
3 This is to certify that the following parties have been served  
4 this day with a true and complete copy of the above Amended  
5 Motion to Withdraw Guilty Plea, by hand delivery or first class  
6 mail with sufficient postage affixed.

7  
8 1) DISTRICT ATTORNEY OF DEKALB COUNTY, ATTN: DONNA  
9 STRIBLING (A.D.A.), 556 N. McDONOUGH STREET, DECATUR,  
10 GA 30030.

11  
12 2) PUBLIC DEFENDERS OFFICE, ATTN: GAYLE B MURRAY, ESQ.,  
13 120 W. TRINITY PLACE, DECATUR, GA 30030.

14  
15 SERVED ON THIS THE \_\_\_\_\_ DAY OF FEBRUARY, 2015.

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18 BY :

19 NATHANIEL J MIDDLETON, ESQ.

20 COUNSEL FOR THE DEFENDANT  
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IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,

(PLAINTIFF)

v.

INDICTMENT NO: 11-CR-6281-1.

JONTAE HOWER,

(DEFENDANT)

DEFENDANT'S AMENDED BRIEF

COMES NOW, the Defendant and by and through counsel files this brief in support of his Amended Motion to Withdraw Guilty Plea, respectfully requesting that the Defendant be allowed to withdraw his March 25, 2013, guilty plea to prevent a manifest injustice. Defendant shows the Court as follows:

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PROCEDURAL HISTORY

On or about December 06, 2011, the Defendant was indicted and charged with One Count of Aggravated Child Molestation.

On or about March 25, 2013, the Defendant entered a plea

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2 of guilty to One Count of Child Molestation and was sentenced  
3 to 20 years to serve 12 years in confinement.

4 On or about March 28, 2013, Defendant filed a Motion to  
5 Withdraw his guilty plea alleging that it was not freely and  
6 voluntarily entered and that he was not present in court at  
7 a critical stage during which his case was discussed.

8 On or about May 01, 2014, the Defendant's Motion to  
9 Withdraw Guilty Plea was denied and an appeal was taken.

10 Defendant now files an Amended Motion/Brief to  
11 Withdraw Guilty Plea to fully exhaust legal claims that was not  
12 previously presented or ruled upon prior to filing an Appeal.

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## FACTUAL HISTORY

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17 Defendant was indicted on or about December 06, 2011, and  
18 charged with one count of Aggravated Child Molestation. The  
19 Defendant was able to retain counsel who was able to secure  
20 a bond for him. However, due to financial hardship, he was  
21 unable to continue with representation and had to resort to  
22 acquiring the services of the Public Defenders Office. Over  
23 the months leading up to his trial, he was represented by  
24 several attorneys (T at 14). His last attorney was Gayle  
25 B. Murray, Esq, who received his case just a few weeks  
26 prior to trial.

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2 Defendant who felt uncomfortable with his representation attempted  
3 to hire private counsel. He was able to do so within days of the  
4 trial calendar call. See Entry of Appearance filed on March 19,  
5 2013. One of his two newly acquired attorneys appeared in court  
6 on March 25, 2013, at the trial calendar call and requested a  
7 one week continuance until April 01, 2013. He cited his major  
8 reason for not being ready was his lack of knowledge of the  
9 contents of the videotaped interview of the victim in this case  
10 (A minor child). Said request was denied, since both the  
11 assigned Public Defender and the State had both announced  
12 ready for trial. His potential counsel then left the courtroom.

13 After some preliminary matters, in the courtroom, Defendant and  
14 his Public Defender and associates went to a conference room to  
15 talk in private (inter alia, about the videotaped interview and  
16 his negotiated plea deal). During the plea discussions, Defendant  
17 was advised by his attorney that if he didn't accept the State's  
18 offer or plead guilty today then the State would use the Child  
19 Victim's Testimony against him at trial via the videotaped  
20 interview and that he would not be allowed to actually confront  
21 the sexually abused child in court because of her age.

22 Subsequently, he went back into the courtroom and entered his  
23 plea, despite his innocence.

24 Therefore, when the State's attorney asked the Defendant if he  
25 understood that he had the right to Question the Witnesses  
26 against him and he answered "yes," the Defendant had no  
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2 idea or understanding at this point in the plea proceedings that  
3 the State was referring to or even including among those  
4 witnesses the Child - Victim - Accuser.

5 On a related note, no comment by the Court, the State or  
6 defense counsel served to convey to Defendant the core  
7 constitutional right that he did not have to incriminate himself  
8 at trial.

9 Basically, the Defendant did complete the plea process but  
10 the record does Not support a valid finding that Defendant  
11 was properly advised of his BOYKIN rights when he entered  
12 his plea and that he made a knowing and intelligent waiver  
13 of those rights.

14 Further, the Defendant asserts that his defense lawyer failed to  
15 advise him that a guilty plea would result in mandatory sex  
16 offender registration and the remainder of his life on probation.  
17 The Defendant did not otherwise know this beforehand and  
18 would not have entered the plea if he had known about this  
19 drastic consequence before rendering his decision. Had this  
20 important information been disclosed or taken into consideration,  
21 the Defendant would have insisted on going to trial.

22 Moreover, the Defendant was never advised by counsel or  
23 considered by the Court for FIRST OFFENDER TREATMENT.

24 For these reasons and more, Defendant's MOTION TO WITHDRAW  
25 GUILTY PLEA should be GRANTED in its entirety and his plea  
26 vacated to prevent a manifest injustice.

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QUESTIONS OF LAW

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4 1) Whether the Defendant is entitled to the effective assistance  
5 of counsel during the plea proceedings ?

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7 2) Whether defense counsel was ineffective during the plea  
8 proceedings ?

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10 3) Whether the Defendant was properly advised of his  
11 BOYKIN rights when he entered his plea and thus made a  
12 knowing and intelligent waiver of those rights ?

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14 4) Whether the Defendant knowingly, voluntarily, and intelligently  
15 entered his plea of guilty ?

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17 5) Whether or not the Defendant waived his right to be present  
18 at all stages of the criminal prosecution ?

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## LEGAL ARGUMENT AND CITATION OF AUTHORITY

LEGAL ISSUE NUMBER ONE: Whether the Defendant is entitled to the effective assistance of counsel during the plea proceedings?

In PENSON V OHIO, the United States Supreme Court has said "the right to be represented by counsel is among the most fundamental rights... Lawyers in criminal courts are necessities, not luxuries." 488 US 75, 84, 109 S.Ct. 346, 102 L.Ed. 2d 300 (1988).

The same court in PERRY V LEEKE said "that a defendant has the right to the aid of counsel at each critical stage of the adversary process." 488 US. 272, 268, 109 S.Ct. 594, 102 L.Ed. 2d 624 (1989).

The tender of a plea and sentencing are critical steps in the plea proceedings, which (in this case) necessitated the aid of counsel. SIXTH AMENDMENT, U.S. CONST. See also DUINN V. STATE, 302 Ga 103 706 SE. 2d 596 (2011) and UNIFORM SUPERIOR COURT RULE 33.2

Not only is a defendant entitled to the assistance of counsel, he is entitled to the reasonably effective assistance of counsel. See YOUNG V STATE, 239 Ga. 53 60 236 SE. 2d 1 (1977).

1 LEGAL ISSUE NUMBER TWO: Whether defense counsel was  
2 ineffective during the plea proceedings?  
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4 Here, the defendant asserts a two-fold claim of Ineffective  
5 Assistance of Counsel: First, the defense counsel gave improper  
6 and misleading advice to the Defendant about his Confrontation  
7 rights; Second, is defense counsel's failure to affirmatively advise  
8 the defendant about the mandatory consequences of his guilty  
9 plea. See: FACTUAL HISTORY, at PARAGRAPH 2, *supra*, as fully  
10 incorporated herein and made a part hereof by reference.

11 Claims of ineffective assistance of counsel applies not only when  
12 a defendant is tried and convicted, but also when a defendant  
13 enters a guilty plea. MCCROSKEY V STATE, 280 Ga App. 638  
14 (2) 634 S.E. 2d 824 (2006).

15 A plea of guilty is not valid unless the defendant understands  
16 the rights he is waiving and the possible consequences of his  
17 plea. JOHNSON V STATE, 227 Ga. App. 390, 391 (1), 489 SE 2d 138  
18 (1997).

19 It must affirmatively appear that the defendant voluntarily  
20 and knowingly waived his right (1) against self-incrimination,  
21 (2) to a jury trial, and (3) to confront his accusers. BOYKIN  
22 V. ALABAMA, 395 US 238, 243, 89 S.Ct. 1709, 23 L.Ed. 2d 274  
23 (1969).

24 Counsel's erroneous legal advice about Defendant's Confrontation  
25 rights and counsel's failure to affirmatively advise the Defendant  
26 about the mandatory consequences of his guilty plea amounts  
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2 to ineffective assistance of counsel. PADILLA V. KENTUCKY, 130  
3 S.Ct. 1473 (2010)

4 Sex offender registration and a lifetime term of probation is  
5 similar to deportation, the issue in PADILLA, in that both are  
6 mandatory in this case. The distinction between "direct" and  
7 "collateral" consequences of a plea is not meaningful in this  
8 context. Competent counsel should be aware of this consequence  
9 (regardless of whether it is characterized as a "collateral" or  
10 a "direct" consequence) and the failure to affirmatively advise  
11 the defendant about these drastic consequences is ineffective  
12 assistance of counsel. TAYLOR V STATE, 304 Ga. App. 878,  
13 698 S.E. 2d 384 (2010).

14 Moreover, defense counsel's legal advice about the Videotaped  
15 Interview in this case and the fact that he would not have the  
16 right to actually confront, that is to see, hear, question and  
17 cross-examine the Child-Victim-Accuser in person, during  
18 trial, was an important factor that Defendant took into  
19 consideration in deciding whether or not to plead guilty.  
20 Had the Defendant been properly advised by counsel beforehand  
21 about the Videotaped Interview, his Confrontation Rights and  
22 about the mandatory consequences of his guilty plea, then, he  
23 would not have pled guilty but would have insisted on  
24 going to trial.

25 Accordingly, had it not been for counsel's unprofessional errors  
26 the result of the proceedings would have been different.

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1 LEGAL ISSUE NUMBER THREE: Whether the Defendant was  
2 properly advised of his BOYKIN rights when he entered his  
3 plea and thus made a knowing and intelligent waiver of those  
4 rights?

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6 The defendant enumerates that his guilty plea is invalid under  
7 the principles of BOYKIN because the State failed to meet its legal  
8 burden of showing that he knowingly and voluntarily waived his  
9 (a) right to confront his accuser and (b) right against compulsory  
10 self-incrimination. BOYKIN V ALABAMA, 89 S.Ct. 1709 (1969).

11 With limited exceptions, the entry of a guilty plea waives all  
12 defenses except those that relate to the knowing and voluntary  
13 nature of the plea. See MOORE V STATE, 285 Ga. 855, 858, 684  
14 SE 2d 605 (2009). Once a defendant raises a question  
15 about the validity of a guilty plea, the State bears the burden  
16 to establish that the plea was knowingly and voluntarily entered.  
17 See KING V STATE, 270 Ga. 367, 369, 509 SE 2d 32 (1998)  
18 (on direct appeal); BAZEMORE V STATE, 273 Ga. 160, 161,  
19 535 SE 2d 760 (2000) (in habeas corpus). In reviewing a  
20 direct appeal from a guilty plea, the Court must evaluate  
21 the enumerated errors based solely on "the trial court record,  
22 including the record of the guilty plea and sentencing as well  
23 as any subsequent evidence that was properly presented to  
24 the reviewing court, assuming all of that is also properly  
25 included in the record on appeal." SMITH V STATE, 287 Ga. 391,  
26 403, 697 SE 2d 177 (2010).

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2 a) Prior to pleading guilty, the Defendant was improperly advised  
3 by his plea lawyer that if he refused to accept the State's offer  
4 or plead guilty (immediately) then the State would use the  
5 pre-recorded Child Victim's Testimony against him at trial via  
6 Videotaped Interview and that he would not be allowed to  
7 actually confront, that is to see, hear, question and cross-examine  
8 the Child-Victim-Accuser during trial, because of her age, and  
9 thus no comment made thereafter served to properly convey to  
10 Defendant the core constitutional right to confront his accuser.  
11 Correct information would have changed the Defendant's decision to  
12 confront his accuser.

13 b) During the plea hearing, the State specifically limited its  
14 discussion of Defendant's privilege against self-incrimination to the  
15 guilty plea hearing itself, without ever informing him that, by  
16 pleading guilty, he would waive that right "at trial." Even though  
17 the State did advise the Defendant that he would be giving-up  
18 his rights by pleading guilty, the record does not show that the  
19 Defendant was specifically advised of his right against compulsory  
20 self-incrimination "at trial."

21 Accordingly, in a number of decisions over the past decade the  
22 Georgia Supreme Court has interpreted advice and waiver of the  
23 "three BOYKIN rights" as a strict constitutional requirement  
24 with reversal the automatic consequence if any deviation is  
25 found to have occurred. See, e.g., WILSON V KEMP, 288 Ga.  
26 779, 780-781, 707 SE 2d 336 (2011); ARNOLD V HOWERTON,

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282 Ga. 66 67-68 646 SE 2d 75 (2007). Under those decisions,  
Defendant's guilty plea was invalid and his conviction must be  
reversed and the case remanded to the trial court for further  
proceedings.

LEGAL ISSUE NUMBER FOUR: Whether the Defendant knowingly,  
voluntarily and intelligently entered his plea of guilty?

At this junction, the Defendant fully incorporates herein the  
FACTUAL SCENARIO, ISSUES, AND LEGAL ARGUMENT(S) AND  
CITATION OF AUTHORITY (set forth in his previously filed  
Motion to Withdraw Guilty Plea and Brief in Support Thereof)  
and makes the same a part hereof by reference thereto.

LEGAL ISSUE NUMBER FIVE: Whether or not the Defendant  
waived his right to be present at all stages of the criminal  
prosecution.

At this junction, the Defendant fully adopts and incorporates  
herein the FACTUAL SCENARIO, ISSUES, AND LEGAL ARGUMENT  
AND CITATION OF AUTHORITY (set forth in his previously filed  
Motion to Withdraw Guilty Plea and Brief in Support Thereof)  
and makes the same a part hereof by reference thereto.

1 CONCLUSION

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Because of the argument presented above, Defendant demands as a matter of law that he be allowed to withdraw his guilty plea tendered on March 25, 2013. Further, Defendant implores the court to allow him to remain out on his original bond or to sign own recognizance (SOR) bond, if a new bond is required. Defendant assures the Court that he will abide by all conditions of his bond and will be present to vigorously defend the allegations against him at the call of the next available trial calendar.

Respectfully submitted

Signed:

NATHANIEL J. MIDDLETON, ESQ  
COUNSEL FOR DEFENDANT.

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CERTIFICATE OF SERVICE

This is to certify that the following parties have been served this day with a true and complete copy of Defendant's Amended Brief, by hand delivery or first class mail with sufficient postage affixed.

1) DISTRICT ATTORNEY OF DEKALB COUNTY, ATTN: DONNA STRIBLING (A.D.A.), 556 N. McDONOUGH STREET, DECATUR, GA 30030.

2) PUBLIC DEFENDERS OFFICE, ATTN: GAYLE B. MURRAY, ESQ, 120 W. TRINITY PLACE, DECATUR, GA 30030.

SERVED ON THIS THE \_\_\_\_\_ DAY OF FEBRUARY, 2015.

BY :

NATHANIEL J MIDDLETON, ESQ  
COUNSEL FOR THE DEFENDANT.