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Feb 19 2026

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Debra R. McCaslin, Circuit Court Judge

EVIN RAE DAVENPORT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001619

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in determining that plea counsel was not deficient for advising Petitioner to plead guilty to avoid LWOP sentencing, when LWOP sentencing was not a lawful option based on Petitioner's prior criminal history?

STATEMENT

2018 Guilty Pleas

On February 13, 2017, Petitioner was indicted by the Aiken County grand jury for possession with intent to distribute (PWID) methamphetamine, first offense. App. 84. That indictment alleged that Petitioner committed the charged offense on April 10, 2016. App. 84. Sometime thereafter, Petitioner was arrested and charged with trafficking methamphetamine ten to twenty-eight grams, first offense. App. 82. She would later waive presentment to the grand jury for the trafficking charge; the waiver indictment alleged that Petitioner committed the charged offense on November 19, 2017.

On September 21, 2018, Petitioner pleaded guilty to both above offenses. The Honorable William P. Keesley presided over the plea hearing. App. 90-91. Nicholas R. McCarley represented Petitioner; John William Weeks represented the state. App. 90-91. The sentence sheets from this hearing show that both charges were denoted as first offenses, and the plea was entered without negotiation or recommendation by the state. App. 90-91. Judge Keesley sentenced Petitioner to five years' imprisonment on both charges, to run concurrently. App. 90-91.

2022 Guilty Plea

On June 7, 2021, the Aiken County grand jury indicted Petitioner for trafficking methamphetamine and trafficking heroin. App. 86-89. The methamphetamine indictment alleged that Petitioner committed that offense on July 23, 2020. App. 88. The heroin indictment alleged that Petitioner committed the heroin offense on September 23, 2020. App. 86. Petitioner pleaded guilty to both charges on June 13, 2022, before the Honorable Courtney Clyburn-Pope. App. 1.

De Grant Gibbons represented Petitioner; John William Weeks again represented the state. App. 1.

The factual basis for the guilty plea, as provided by the solicitor at the plea hearing, was as follows:

> Your Honor, [Petitioner] is before you on three indictments, two stemming from one incident and one, a separate incident. She's charged with trafficking in methamphetamine from a purpose of methamphetamine from her on July the 23rd of 2020. She is before you, also, on two indictments stemming from an arrest on September the 23rd of 2020. Both of these separate incidents occurred in Aiken County.
>
> The first incident occurred with narcotics officers with Aiken County Sheriff's Department making a purchase of methamphetamine from [Petitioner] in the parking lot of the Clearwater shopping center. The drugs were analyzed and came back over the statutory ten gram limit for trafficking in methamphetamine.
>
> The second event occurred on the date I indicated and was the result of them taking warrants taken out for the July 23rd, 2020 incident to arrest her.... They went to her house....
>
> She was present there. When she opened the door, the officers indicated...that she broke out in tears and when questioned about the drugs, she said, they're in my purse in the bedroom.
>
> There was a sufficient quantity of methamphetamine to get by the statutory inference level of ten grams. The heroin that was confiscated from the same purse came back just shy of trafficking in heroin inference level, so we have accepted a plea of [PWID] heroin third offense.
>
> [Petitioner] has, at least, two prior convictions for drug offenses. The last one was a trafficking in drugs and she received a sentence of five years.

App. 3, l. 15 – 4, l. 25. Petitioner pleaded guilty on these facts in exchange for a negotiated sentence of twenty-five years' imprisonment on both charges, to run concurrently. App. 5, ll. 1-6. Gibbons informed the plea court that Petitioner felt "like this [was] the best thing she [could] do at this point to avoid LWOP and consecutive sentences and things like that." App. 8, ll. 11-13. Judge Clyburn-Pope accepted the plea and negotiations and sentenced Petitioner to twenty-five years' imprisonment on both charges, to run concurrently. App. 9. Petitioner did not appeal.

Post-Conviction Relief Proceedings

Petitioner filed a timely application for post-conviction relief (PCR) on January 9, 2023. App. 11-17. In her application, she alleged, *inter alia*, that she was improperly sentenced for third offenses rather than second offenses, and that plea counsel "informed [her]...if [she] appealed, [she] would be facing [a] life sentence without the chance of parole." App. 12-13. On June 9, 2025, an evidentiary hearing was held before the Honorable Debra R. McCaslin. App. 37. Petitioner was represented by Ashley A. McMahan; T. Cruise Mitchell represented the state. App. 37. At the hearing, Petitioner testified that Gibbons told her several times prior to the plea that her charges constituted a "third strike" but that right before she pleaded guilty, he told Petitioner that the 2022 charges should actually be "second offenses." App. 41, ll. 13-16. Petitioner, on that understanding, went forward with the guilty plea and believed that this fact would change the sentencing range. App. 41, ll. 24-25. Petitioner also testified that she had previously been "set on taking it to trial" but had decided against it based on Gibbons's advice, "seconds before [she] was going to take it to trial," that she would be life without parole (LWOP) eligible. App. 42, ll. 18-21. Petitioner's guilty plea was entered the day that her trial was scheduled to begin. App. 45, ll. 8-13. Importantly, neither the record nor the public index reflects

that the state ever served a written notice of intent to seek an LWOP sentence under the recidivist statute.

Gibbons testified that the state had "indicated to" him that they intended to seek an LWOP sentence should Petitioner take her case to trial. App. 54, ll. 1-3. During Gibbons's testimony, the PCR court asked several questions to clarify how Petitioner was LWOP eligible. App. 60. This led to the following colloquy:

> THE COURT: I was just looking at the transcript. I mean, it's obvious that you told her that she was looking at LWOP. The transcript verifies that. But her LWOP comes from her prior drug offense of trafficking meth that she had pled to and then – that was strike one?
>
> GIBBONS: Correct.
>
> Q. And then she picked up all these other traffickings-
>
> A. Two separate incidents, so that would have been a second and a third.
>
> Q. Exactly. And my point is that she got charged with trafficking, made bond and then got out and got charged with another trafficking and I assume they kept her there?
>
> A. They did, Your Honor. I think she, also, had some kind of charge over in Georgia, drug charge over there, too.
>
> Q. So they would not have – more than likely not have tried those together. They're separate incidences and would not have tried them separately and there goes her life without parole. And they reduced one of the traffickings to distribution of heroin?
>
> A. Yeah, yeah.
>
> Q. I mean, clearly, clearly her third and clearly a life without parole situation?

A. And the PWID third is the same thing as far as the strike goes.

Q. Right. But it doesn't matter if she pled to PWID or trafficking, it would have been a strike any way being her third offense and, also, the mandatory minimum 25.

A. Right.

App. 60, l. 8 – 61, l. 11. After this, Petitioner's counsel asked several follow-up questions. App. 61. Among them, Gibbons was asked whether Petitioner had any other drug charges apart from the 2017 trafficking charge. App. 61, ll. 17-19. Gibbons responded that Petitioner did not; rather, the state intended to convict her on one of the 2020 charges and then use that conviction to enhance the other 2020 charge to a third or subsequent offense. App. 61, ll. 20-23.

The PCR court dismissed the application with prejudice. App. 67. As to the allegation that plea counsel had "never informed [Petitioner] she was LWOP eligible,"[1] the PCR court found that the evidence refuted the allegation that Gibbons failed to tell her she was LWOP eligible[2] and in any event, Petitioner had failed to show that the outcome of her plea would have been different, since "upon learning of the potential for a life sentence, she had no intention of proceeding to trial." App. 75.

This petition follows.

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[1] This is an accurate statement of Petitioner's allegation in her amended PCR application. App. 35(1)(b). However, in Petitioner's *pro se* application for PCR, she alleged, "This should be my 2nd strike (7-30 yrs.) not my 3rd (25 years mandatory)." App. 13. For the reasons stated *infra*, this *pro se* allegation is an accurate statement of the status of Petitioner's case.

[2] Petitioner does not contest this fact; the amended PCR application was a simple misstatement of her actual allegation.

ARGUMENT

The PCR court erred by determining that plea counsel was not deficient for advising Petitioner to plead guilty to avoid LWOP sentencing, when LWOP sentencing was not a lawful option based on Petitioner's prior criminal history.

Plea counsel informed Petitioner that she was LWOP eligible. That advice was erroneous. Because plea counsel's erroneous advice led Petitioner to plead guilty, he provided ineffective assistance of counsel. Further, the evidence presented at the evidentiary hearing showed that Petitioner would not have pleaded guilty but for plea counsel's erroneous advice. This Court should grant post-conviction relief.

To prevail on a claim of ineffective assistance of counsel, Petitioner must show both that his attorney performed deficiently, and that the deficient performance prejudiced him. *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018); *accord, Strickland v. Washington*, 466 U.S. 668 (1984). An attorney is unconstitutionally deficient when their performance falls "below an objective standard of reasonableness." *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722 (2001). A petitioner satisfies the prejudice prong by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). In the context of a guilty plea, Petitioner must show "that there is a reasonable probability that, but for counsel's errors, [she] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To enter into a knowing and voluntary guilty plea, a criminal defendant must be aware of, *inter alia*, the maximum and mandatory minimum penalty for the offense charged. *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1991); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991).

Illustratively, in *Robinson v. State*, 422 S.C. 78, 810 S.E.2d 32 (2018), this Court granted PCR after a guilty plea based on erroneous advice regarding the sentencing range. The *Robinson* defendant pleaded guilty to criminal sexual conduct with a minor, first degree, based on his attorney's advice to plead guilty to avoid a sentencing range of twenty-five years to life imprisonment. *Id.* at 82, 810 S.E.2d at 34. However, at the time the *Robinson* defendant committed the offense, the sentencing range was zero to thirty years' imprisonment, and the amended sentencing range could not apply to him due to such application violating the *Ex Post Facto* Clause of the Constitution. *Id.* at 86, 810 S.E.2d at 37. Because the *Robinson* defendant pleaded guilty in an effort to avoid being sentenced under the amended statute's twenty-five years to life sentencing range, even though that range could not be applied to him as a matter of law, this Court found that his trial counsel had rendered deficient performance. *Id.* at 87, 810 S.E.2d at 37. Further, since he had maintained his innocence throughout the entire process, this Court found that he had established prejudice, and likely would have gone to trial but for the erroneous sentencing advice. *Id.* at 88, 810 S.E.2d at 37.

Here, plea counsel testified at the PCR hearing that the state had "indicated to" him that they intended to seek an LWOP sentence should Petitioner take her case to trial. Petitioner testified that the only reason she pleaded guilty was because of that advice. But that advice was incorrect as a matter of law. At the time of the plea, as far as is in the record before this Court, Petitioner's only criminal history included the guilty pleas that she entered in 2018: trafficking in methamphetamine and PWID methamphetamine. Trafficking in methamphetamine is a "serious" offense; but PWID methamphetamine is not. *See generally,* S.C. Code Ann. § 17-25-45(C)(2)(b) (enumerating "serious" offenses). Petitioner would only be LWOP eligible upon conviction for her third "serious" offense, meaning that she would not be LWOP eligible unless she was

convicted of both of the pending charges below. *See id.* § 45(A)(2)(b). As the PCR court pointed out, the state was unlikely to have tried the two charges together. App. 60, ll. 23-25.

If Petitioner went to trial on one of the two charges, was convicted, then was brought to trial on the other charge, and was convicted again, it is true that she would have faced an LWOP sentence. But an assumption that all of the above would happen requires myriad assumptions that, considered together, are unlikely to materialize. First, Petitioner would have needed to be convicted of either trafficking methamphetamine or PWID heroin[3], depending on which charge the state called to trial first. Second, Petitioner would have needed to be convicted of that charge, which would have resulted in a mandatory-minimum sentence of twenty-five years' imprisonment for trafficking methamphetamine, *see* S.C. Code Ann. § 44-53-375(C)(1)(c), or a mandatory-minimum sentence of ten years' imprisonment, and maximum sentence of thirty years' imprisonment, or PWID heroin, *see id.* § 370(b)(1).

After Petitioner's conviction for one of the above charges, she would, at least in the case of trafficking methamphetamine, be sentenced to the same amount or more prison time than she received in this case, the state would then have to seek to try Petitioner again for the other charge. This means that the only way in which Petitioner's apparent LWOP eligibility would actually come to fruition is if the state, after convicting Petitioner at trial and having her sent to prison for twenty-five to thirty years, decided to refuse to plea bargain on the remaining count,

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[3] Petitioner was originally indicted for trafficking heroin. App. 3, l. 15 – 4, l. 25. However, as the solicitor stated at the plea hearing, the weight of the heroin was insufficient to reach trafficking quantity. The amount of heroin involved is an essential element of the offense of trafficking heroin. Possession of less than four grams of heroin is *not*, as a matter of law, trafficking heroin. *See* S.C. Code Ann. § 44-53-370(e)(3)(A). The PCR court appeared to believe that the reduction of Petitioner's charge to PWID heroin was part of a plea offer by the state. App. 61, ll. 1-2 ("And they reduced one of the traffickings to distribution of heroin"). This is inaccurate. The charge of trafficking heroin was reduced to PWID because Petitioner was not guilty of trafficking.

have an entirely separate trial, serve Petitioner with a notice of intent to seek an LWOP sentence, and convict her at a second trial.

Had the state actually possessed the motivation to have Petitioner sentenced to LWOP, it is not clear why it would have offered her the plea she accepted in this case. Regardless, however, the point remains: plea counsel told Petitioner that she needed to plead guilty because she was LWOP eligible. That advice was not accurate, absent numerous assumptions about the state's actions, as well as the actions of a future jury. Therefore, plea counsel rendered deficient performance when he advised Petitioner that she was LWOP eligible immediately.

Further, the evidence presented to the PCR court supports Petitioner's theory that she would not have pleaded guilty but for plea counsel's incorrect advice. *See Hill*, 474 U.S. at 59. As the PCR court found, Petitioner "accepted the plea offer to avoid the possibility of a life without parole sentence." And while it may be true that the sentence Petitioner received was a "good" outcome, this fact is irrelevant. The only relevant inquiry is whether Petitioner would have insisted on going to trial. *See Thompson v. State*, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000). The evidence presented to the PCR court suggests that she would. Accordingly, the PCR court erred in dismissing Petitioner's application.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of February, 2026.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Evin Davenport 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 Debra R. McCaslin, which was held on June 9, 2025, 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 Evin Davenport.

Respectfully Submitted,

W. Chandler Norville
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of February, 2026.

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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 19th day of February, 2026.