

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge

LEARTHUR HILLS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

RECEIVED  
OCT 31 2016  
S.C. SUPREME COURT

APPELLATE CASE NO 2016-000656

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find plea counsel ineffective in failing to assure that Petitioner was able to accept the five year plea bargain and enter a guilty plea before the plea bargain expired?

## STATEMENT

In June of 2014, the Horry County Grand Jury indicted Petitioner Hills for shoplifting third or subsequent offense, indictment #2014-GS-26-02495. In July of 2014, the Horry County Grand Jury indicted Petitioner for another shoplifting third or subsequent offense, indictment #2014-GS-26-02748. On January 21, 2015, Petitioner appeared before the Honorable R. Markley Dennis, Jr. and pled guilty to both shoplifting charges. Jonathan Eric Fox represented Petitioner during the guilty plea. George DeBusk prosecuted the case. Judge Dennis sentenced Petitioner to six (6) years on one of the shoplifting charges and ten (10) years suspended upon five (5) years of probation on the other shoplifting charge. Judge Dennis ordered that the suspended sentence was to be served consecutively to the active sentence. Petitioner did not appeal his sentence or conviction.

On March 24, 2015, Petitioner filed an application for post-conviction relief (PCR). The State filed a return and motion for more definite statement on July 15, 2015. On February 11, 2016, an evidentiary PCR hearing was held before the Honorable D. Craig Brown. James K. Falk represented Petitioner at the hearing. Jessica E. Kinard represented the State. In a written order filed March 11, 2016, Judge Brown denied relief and dismissed the application. A timely notice of intent to appeal was served on March 25, 2016. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find plea counsel ineffective in failing to assure that Petitioner was able to accept the five year plea bargain and enter a guilty plea before the plea bargain expired.**

Petitioner testified at the PCR hearing that he received paperwork in the mail offering a plea bargain of a five year sentence in exchange for guilty pleas to two counts of shoplifting third or subsequent. (App. p. 52, line 1 – p. 53, 54, lines 1-6). Petitioner testified that he accepted the plea offer and sent the paperwork to the Solicitor's office in a return envelope but never heard back from anyone. (App. p. 53, lines 2-11). Petitioner testified that when he appeared in court, the offer had expired. (App. p. 53, lines 2-7).

Plea counsel confirmed the existence and terms of the plea agreement. Plea counsel testified, "Included in the discovery packet I have is a plea offer dated June 13, 2014 listing two of his three charges. The offer was to plead to two counts of shoplifting, third or subsequent, five years and that was to be accepted by September the 5<sup>th</sup> of 2014 or when it expired." (App. p. 50, lines 19-24). When plea counsel was asked when he discussed the expiration date of the pleas bargain with Petitioner, plea counsel testified, ""I don't recall exactly. I don't know that there is a specific discussion of that, quite honestly. Mr. Hills, for a time, was little bit difficult to get in touch with, and he was here – the trial itself was a bit of a scramble because he wanted to hire Mr. Massey, he was still wanting to ask about these programs, so I honestly don't remember if it wasn't at the last minute that he was informed." (App. p. 48, lines 3-10).

The order of dismissal references the five year plea deal but does not address counsel's failure to assure that Petitioner was able to accept the offer and enter a guilty plea before the offer expired. Instead, the PCR judge wrote, "This Court finds plea counsel adequately

conferred with Applicant and was thoroughly competent in his representation. For these reasons, the request of relief on this ground is denied and dismissed.” (App. p. 67). The PCR judge erred. Once Petitioner accepted the five year plea deal, it was incumbent upon plea counsel to arrange for the plea to be entered in a timely fashion prior to expiration of the offer. Plea counsel was ineffective in failing to assure that Petitioner was able to accept the five year plea bargain and enter a guilty plea before the offer expired.

In Davie v. State, 381 S.C. 601, 607-08, 675 S.E.2d 416, 419-20 (2009), the South Carolina Supreme Court wrote:

To prevail on his claim of ineffective assistance of counsel, Petitioner was required to prove that 1) plea counsel's failure to communicate the State's initial, fifteen-year plea offer constituted deficient performance, and 2) he was prejudiced by this deficient performance, *i.e.*, there is a reasonable probability that but for counsel's deficient performance, he would have accepted the original plea offer.

In Davie the South Carolina Supreme Court granted relief and remanded for re-sentencing. In Missouri v. Frye, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), the United States Supreme Court wrote, “This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” The plea offer in the present case was a formal offer and trial counsel had a duty to convey the offer to Petitioner. Petitioner acknowledged that he received the five year plea offer and thought he had accepted the five year plea offer. Plea counsel, however, failed to arrange for Petitioner to plead guilty pursuant to the agreement prior to its expiration. Plea counsel could not recall if he discussed the fact that the plea agreement contained an expiration date. Plea counsel’s performance was deficient. Counsel had a duty to not only communicate the formal offer but also to advise of the expiration date, and assure that Petitioner could enter the guilty plea prior to the expiration of the offer.

Addressing the prejudice prong the Court in Missouri v. Frye, 132 S. Ct. 1399, 1409, 182

L. Ed. 2d 379 (2012), wrote:

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) (“[A]ny amount of [additional] jail time has Sixth Amendment significance”).

In the present case Petitioner met his burden of showing prejudice. Petitioner demonstrated that he would have accepted the five year plea offer. Petitioner mistakenly believed that he had accepted the offer by signing the paperwork and mailing it. As he testified at the PCR hearing, it was only when he arrived in court that he learned the plea offer had expired. . (App. p. 53, lines 2-7). Petitioner testified, “I would have accepted the five years with no problem, but I go there that day and it was gone.” (App. p. 52, lines 15-16). There is a reasonable probability that the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it. There is a reasonable probability that the end result would have been more favorable by reason of the five year plea offer. Petitioner was sentenced to six (6) years on one of the shoplifting charges and a consecutive ten (10) years suspended upon five (5) years of probation on the other shoplifting 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.

Plea counsel was ineffective in failing to assure that Petitioner was able to accept the five year plea bargain and enter a guilty plea before the offer expired. There is a reasonable probability that, but for counsel’s deficient performance, Petitioner would have pled guilty pursuant to the plea agreement and received a five year sentence.

**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 31st day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge

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LEARTHUR HILLS,

PETITIONER,

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PETITION TO BE RELIEVED AS COUNSEL

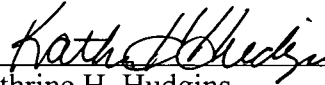
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Counsel for LeArthur Hills states:

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 D. Craig Brown, which was held on February 11, 2016 (Evidentiary Hearing), 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 LeArthur Hills.

Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 31st day of October, 2016.

**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."



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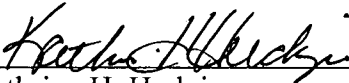
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 Johanna C. Valenzuela, 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 LeArthur Hills, #296523, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 31st day of October, 2016.

  
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Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 31st day of October, 2016.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026