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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

EMMANUEL ELLEBY,

APPELLANT

APPELLATE CASE NO 2015-002620  
\_\_\_\_\_

INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge abuse her discretion in denying the motion for continuance and proceeding with a jury trial in Appellant's absence with the State seeking a sentence of life without parole pursuant to S.C. Code §17-25-45 when the State had offered to allow Appellant to plead guilty for a negotiated twenty year sentence and Appellant had indicated that he would accept the plea offer?

### STATEMENT OF THE CASE

In November of 2014, the Richland County Grand Jury indicted Appellant Elleby for armed robbery and kidnapping, indictments #2014-GS-40-7355, 7364. On September 15, 2015, Appellant was tried in his absence before a jury with the Honorable DeAndrea G. Benjamin presiding. Adam S. Ruffin and Megan A. Eigenbrot represented Appellant at trial. April w. Sampson and Sandra V. Moser prosecuted the case. The jury returned verdicts of guilty and Judge Benjamin sealed the sentences. On October 16, 2015, Appellant appeared before Judge Benjamin for sentencing. Judge Benjamin sentenced Appellant to life without parole pursuant to S.C. Code §17-25-45 on both charges. On October 21 2015, Appellant filed a timely motion to reconsider sentence and declare S.C. Code §17-25-45 unconstitutional. (R. p. \*\*). On November 12, 2015, Judge Benjamin held a hearing in regard to the motion. In a written order filed October 16, 2015, Judge Benjamin denied the motion. (R. p. \*\*). A timely notice of intent to appeal was served on December 22, 2015. This appeal follows.

## ARGUMENT

The trial judge abused her discretion in denying the motion for continuance and proceeding with a jury trial in Appellant's absence with the State seeking a sentence of life without parole pursuant to S.C. Code §17-25-45 when the State had offered to allow Appellant to plead guilty for a negotiated twenty year sentence and Appellant had indicated that he would accept the plea offer.

Prior to trial, on September 14, 2015, counsel for Appellant contacted the prosecutor and advised her that Appellant accepted the offer to plead guilty to a negotiated sentence of twenty years but he needed time to complete the paperwork with Appellant. (Sept. 14-17, Tr. p. 13, lines 2-15). While Appellant was completing the paperwork, he had a medical issue and was taken to the hospital by ambulance. (Sept. 14-17, Tr. p. 6, lines 5-16). The matter was continued to the next day. (Sept. 14-17, Tr. pp. 6-11). The next day, however, Appellant did not appear in court. (Sept. 14-17, Tr. pp. 11-14; 22-26). Counsel for Appellant objected to a trial in Appellant's absence, especially in light of the fact that Appellant had indicated that he wished to accept the plea offer and plead guilty. (Sept. 14-17, Tr. p. 22, lines 2-22). Counsel argued that because the State was seeking a mandatory sentence of life without parole upon conviction at trial, the better practice would be to issue a bench warrant for Appellant and continue the matter until he was located. (Sept. 14-17, Tr. p. 24, 25, 26, lines 1-4). The judge denied the motion to continue the case, finding that Appellant had been given proper notice. (Sept. 14-17, Tr. p. 32, lines 2-18). The jury was chosen that afternoon but not sworn. (Sept. 14-17, Tr. p. 40, lines 1-15).

The next day, prior to the jury being sworn, counsel for Appellant again objected to the trial in Appellant's absence and asked for a continuance. (Sept. 14-17, Tr. pp. 164-173). The judge again denied the motion to continue. (Sept. 14-17, Tr. p.173, lines 17-24). At the close of the case counsel renewed the objection to the trial in Appellant's absence. (Sept. 14-17, Tr.

p. 408, lines 4-8; p. 416, line 24 – p. 417, lines 1-2). The trial judge erred in refusing to continue the case and proceeding with the trial in Appellant's absence when Appellant had accepted the offer to plead guilty to a negotiated twenty year sentence instead of risk facing the mandatory sentence of life without parole upon conviction at trial.

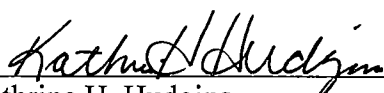
In Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006), the South Carolina Supreme Court wrote:

The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996); Lytchfield, supra. Here, it is clear petitioner would have been prejudiced by the denial of a continuance because the trial *in absentia* subjected him to the ABIK conviction whereas the guilty plea would have been to ABHAN. The difference between these two crimes is significant. ABHAN is a common law misdemeanor punishable by up to ten years in prison, while ABIK is a violent crime felony punishable by up to twenty years in prison. See State v. Fennell, 340 S.C. 266, 274-75, 531 S.E.2d 512, 516 (2000); S.C.Code Ann. §§ 16-1-60, 16-3-620 (2003). Given the drastic distinctions between a conviction of ABIK versus one of ABHAN, we find this is the rare case where the refusal of the continuance would have amounted to an abuse of discretion. See State v. Williams, supra; Lytchfield, supra. Thus, we find petitioner established prejudice from counsel's deficient performance.

In Morris counsel failed to move for a continuance. In the present case, counsel moved for a continuance but the judge denied the motion. Appellant was prejudiced by the denial of the continuance. The trial in his absence resulted in a mandatory sentence of life without parole. The guilty plea would have resulted in a sentence of twenty years. The difference between a sentence of twenty years and a mandatory sentence of life without parole is significant. Like Morris, the present case is one of the rare cases where the refusal to grant the continuance amounted to an abuse of discretion.

**CONCLUSION**

Based on the above argument, Appellant's convictions and sentences should be reversed and the case remanded.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

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THE STATE,

RESPONDENT,

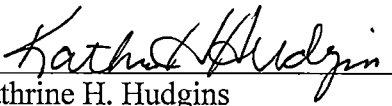
V.

EMMANUEL ELLEBY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Emmanuel Elleby, #275057, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 4<sup>th</sup> day of November, 2016.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 4th day of November, 2016.

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