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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

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MARION STEWART — PETITIONER

V.

THE STATE — RESPONDENT

APPELLATE CASE NO. 2016-0001243

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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## INDEX

## ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to explain to Petitioner that upon conviction the only sentence the judge could impose was a sentence of life without parole?

## STATEMENT

In January of 2010, the Spartanburg County Grand Jury indicted Petitioner Stewart for armed robbery, indictment #2010-GS-42-494. On April 13, 2011, Petitioner proceeded to jury trial before the Honorable L. Couch. Kathleen J. Hodges represented Petitioner at trial. Barry Barnette and Wes Boyd prosecuted the case. The jury returned a verdict of guilty and Judge Couch sentenced Petitioner to a sentence of life without parole [LWOP] pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was filed and the direct appeal perfected. On December 12, 2012, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Stewart, Op. No. 2012-UP-654 (S.C.Ct.App. filed December 12, 2012). Petitioner filed a petition for writ of certiorari with the South Carolina Supreme Court on March 27, 2013. The South Carolina Supreme Court denied the petition for writ of certiorari on June 26, 2014.

On July 10, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on April 9, 2015. On March 23, 2016, an evidentiary hearing was held before the Honorable R. Keith Kelly. Leah B. Moody represented Petitioner at the PCR hearing. Alicia A. Olive represented the State. In a written order signed May 27, 2016, Judge Kelly denied relief and dismissed the application. A timely notice of intent to appeal was served on June 9, 2016. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to explain to Petitioner that upon conviction the only sentence the judge could impose was a sentence of life without parole.

The jury convicted Stewart of robbing the RX Care pharmacy in Boiling Springs. The pharmacist and another pharmacy employee testified that at 10:15 AM on October 14, 2009, an armed masked robber entered the pharmacy and took over thirty thousand dollars ($30,000.00) in prescription medications. (Tr. p. 161, lines 11 – p. 162, 163, lines 1-5; p. 169, lines 22-25; pp. 285-286). Grady Taylor, a co-defendant and the brother of Stewart's girlfriend, Shirley Gilbert, testified against Stewart at trial. According to Taylor, he, Stewart and Stewart's sister, Lee Ann Nichols, planned the robbery of the pharmacy. (Tr. p. 184, lines 1-18). According to Taylor, Stewart went in the pharmacy while he and Lee Ann waited in the car. (Tr. p. 184, lines 19 – p. 185, lines 1-25). Lee Ann Nichols denied any involvement in the robbery and testified that she and her brother Stewart were at their mom and dad's house making repairs at the time of the robbery. (Tr. p. 349 - 353). The mom, Gail Stewart, testified that Lee Ann and Stewart arrived at the house between 10:00 AM and 10:30 AM on October 14, 2009. (Tr. p. 375, lines 16 – p. 376, 377, lines 1-7).

During the PCR hearing Petitioner testified that he rejected the State's offer to withdraw the notice of intent to seek a sentence of life without parole and not prosecute Petitioner's sister in exchange for a guilty plea to one count of armed robbery and one count of kidnapping. (App. p. 553, line 11 – p. 554, 555, lines 1-3). Petitioner testified that he discussed the plea offer with his attorney and they agreed that the State did not have physical evidence to convict and Petitioner should reject the plea offer. (App. p. 554, lines 1-7). Petitioner, however, in deciding to reject the plea offer, believed that while life without parole was the maximum sentence he

faced, if convicted, the judge could impose a sentence of less than life without parole. (App. p. 554, lines 1-18). When asked why Petitioner went forward with a trial knowing that he faced a sentence of life without parole he testified, "Yes, ma'am, but only knowing that LWOP was the highest number I could reach. I didn't know that it was the only number I could reach or I would have accepted the plea." (App. p. 560, lines 11-13). When asked if his lawyer advised him that a sentence of life without parole would be mandatory upon conviction, Petitioner testified, "No." (App. p. 561, lines 12-16).

Trial counsel testified at the PCR hearing, "To the best of my recollection what I would explain to him about LWOP was that because the solicitor's office had served notice to seek life without parole, that upon conviction of a qualifying offense, which armed robbery would have been a qualifying offense, that the court would have absolutely no discretion in terms of sentencing, that the only thing the court could sentence at that point was life without parole." (App. p. 593, line 23 – p. 594, lines 1-5).

In the order of dismissal the PCR judge wrote:

> This Court finds Applicant has failed to show that counsel failed to relay any plea offers to him or failed to adequately advise Applicant on the nature of a notice of life without parole. Accordingly, the Court finds Applicant has failed to show any deficiency in Counsel's performance in advising him of any plea offers. Furthermore, this Court finds Applicant has failed to demonstrate that any alleged deficiency prejudiced him because Applicant maintained his innocence and did not wish to plead guilty. Therefore, this allegation is denied and dismissed.

(App. p. 612). The PCR judge erred. While Petitioner maintained his innocence, if properly advised about the mandatory nature of the LWOP sentence, Petitioner would not have risked the harsh sentence of life without parole at trial and instead could have entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Trial counsel was ineffective in failing to adequately explain the mandatory nature of the LWOP sentence. See Lafler v. Cooper, 132 S. Ct. 1376, 1383, 182 L. Ed. 2d 398 (2012). In Bell v. State, 410 S.C. 436, 440-41, 765 S.E.2d 4, 6 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

> Our supreme court has also held "a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie, 381 S.C. at 607, 675 S.E.2d at 419. "[A]s 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." Frye, 132 S.Ct. at 1408; see also Davie, 381 S.C. at 609, 675 S.E.2d at 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance").

While trial counsel conveyed the plea offer in the present case, her failure to ensure that Petitioner understood the mandatory nature of the LWOP sentence, if convicted at trial, constitutes deficient performance. The failure to adequately explain the benefit in the State withdrawing the intent to seek life without parole is the functional equivalent of failing to convey the State's offer. Trial counsel's testimony at the PCR hearing was "to the best of her recollection." (App. p. 593, line 23). Petitioner, however, testified, "Now that I look back on it, there is no way I could have understood it, because I was – a person with my past record would have never accepted an LWOP situation knowing that I had a twenty year plea, a fifteen year plea or a twenty-five year plea, whatever the plea was that day. I can't remember." (App. p. 561, lines 6-11). Petitioner repeated that if he had known that LWOP was mandatory that he would have accepted the plea offer. (App. p. 567, line 25 – p. 568, line 1).

Petitioner was prejudiced by counsel's deficient performance. In Bell the South Carolina Court of Appeals, citing Davie v. State, 381 S.C. 601, 675 S.E.2d 416, (2009), addressed prejudice writing:

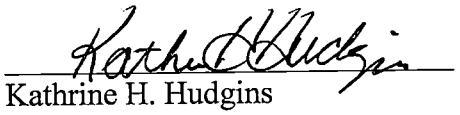
> Once an applicant proves counsel's performance was deficient, the applicant generally must show actual prejudice. Id. In determining prejudice for counsel's

> failure to convey a plea offer, the supreme court advocated "a case-by-case approach ... of assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." Id. at 613, 675 S.E.2d at 422. Noting "presumed prejudice is reserved to very limited situations," the supreme court in Davie acknowledged Davie had to show actual prejudice. Id. However, the court stated, "it is not always necessary for a[n applicant] to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a[n applicant's] self-serving statement may be sufficient to establish actual prejudice." Id. The supreme court concluded the difference in the sentence Davie received and the plea offer was proof of prejudice. Id. at 614, 675 S.E.2d at 423.

Petitioner's statement that he would have accepted the plea offer if he had known that an LWOP sentence was mandatory establishes prejudice. Additionally, the difference between a term of years that would have been imposed following a plea and the imposed sentence of life without parole establishes prejudice. Petitioner is entitled to post conviction relief.

## CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 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."

Kathrine H. Hudgins
Appellate Defender

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Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 12th day of December, 2016.

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IN THE COURT OF APPEALS

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SC Court of Appeals

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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, Benjamin Aplin, 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 Marion Stewart, #221024, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of December, 2016.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2016.

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

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Marion Stewart 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 Roger L. Couch, which was held on April 13, 2011, 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 Marion Stewart.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of December, 2016.