

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

G. Edward Welmaker, Circuit Court Judge

**RECEIVED**

MAY 28 2014

**S.C. Supreme Court**

DONNIE MACK HAGINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002151

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE  
\_\_\_\_\_

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in advising petitioner that the state's six-year plea offer expired when he opted for a jury trial rather than later after he "backed out" of his request for a jury trial in the case.

## STATEMENT

Petitioner Donnie Mack Hagins pled guilty to distribution of crack cocaine and distribution of crack cocaine within proximity of a public park during the April 2007 term of the York County General Sessions Court before Judge John C. Hayes, III. Petitioner was sentenced to imprisonment for a period of fifteen years on the distribution conviction and ten years (concurrent) on the distribution within proximity of a park conviction. App. 1 – 15. Melissa Inzerillo represented petitioner at the plea proceeding and Assistant Solicitor E. B. Springs, III, appeared on behalf of the state. Petitioner did not appeal his trial court convictions and sentences in the case.

On January 30, 2008, petitioner filed a PCR application with the York County Office of the Clerk of Court. App. 17 – 25. The respondent filed a return dated May 22, 2008, requesting that a hearing be held in response to petitioner’s PCR application. App. 26 – 29.

A PCR hearing was convened on February 4, 2009, at the York County Courthouse before Judge Lee S. Alford. Petitioner was present at the hearing and represented by Mathew R. Niemiec, and Assistant Attorney General Ashley A. McMahan appeared on behalf of the state. App. 33 – 59. On February 13, 2009, Judge Alford signed an Order of Dismissal in the case.<sup>1</sup> App. 61 – 67.

Petitioner did not enjoy the benefit of an appeal of Judge Alford’s PCR Order of Dismissal issued in his case. As a result, petitioner filed a second PCR application on December 3, 2012, with the York County Clerk’s Office requesting a belated PCR appeal. App. 69 – 75.

On February 21, 2013, the respondent filed a return and motion to dismiss all PCR claims (fraudulent indictment and belated direct appeal) raised in the second PCR application save the Austin<sup>2</sup> review claim, and requested that a hearing be held on the belated PCR appeal issue. App.

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<sup>1</sup> The Order of Dismissal was filed on February 16, 2009.

<sup>2</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

76-81. A second PCR hearing was held on August 16, 2013, at the York County Courthouse before Judge G. Edward Welmaker. App. 85 – 89. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state. Petitioner’s first PCR attorney was not present at the second PCR hearing.

On August 25, 2013, Judge Welmaker issued an Order granting petitioner an Austin appeal, but denied all other PCR claims (fraudulent indictment and belated direct appeal) raised in his second PCR application. App. 91 – 93. Note that the belated direct appeal claim was addressed in petitioner’s first PCR action. Petitioner appealed Judge Welmaker’s Austin order. This petition follows.

#### ARGUMENT

Trial counsel erred in advising petitioner that the state’s six-year plea offer expired when he opted for a jury trial rather than later after he “backed out” of his request for a jury trial in the case.

A confidential informant bought crack cocaine from petitioner at his (petitioner’s) house on October 14, 2006. App. 9, lines 9 – 23. Petitioner was arrested and charged on the drug offenses to which he plead guilty as charged.

During the first PCR hearing, petitioner explained his understanding of the expiration of the state’s six-year plea deal as follows:

I have fifteen because at the time I had told her that I really wanted to take my case to trial, and she told me up and to that point that if I – if I **backed out** of trial, that I had to plead guilty to fifteen instead of six. App. 39, lines 2-5.

Trial counsel testified at the first PCR hearing and explained that she informed petitioner that the plea offer would expire if he requested a jury trial, which he so requested, but then changed his mind and pled guilty as charged. App. 51, l. 5 – p. 52, l. 2; Tr. 53, l. 17 – 22.

The first PCR judge ruled that petitioner failed to provide proof that counsel's representation was ineffective in regard to the allegations raised against counsel in his case. App. 61 – 67.

Undoubtedly, trial counsel erred in failing to make unmistakably and crystal clear what actions would result in the expiration of the six-year plea offer presented by the state in the case. See Kolle v. State, 386 SC 578, 690, S.E. 2d 73 (2010), where the Court held that trial counsel was ineffective in providing the defendant with incorrect information regarding the time limits for which the plea would remain open and that as a result, said defendant was unable to accept a negotiated sentence of ten years suspended upon the service of five years and three years probation where the sentencing range for a trafficking in cocaine conviction was seven to twenty-five years. In Kolle, counsel advised that the plea offer would remain open until after the suppression hearing ended, but in reality, the offer expired at the close of the suppression hearing held in the case.

Compare, Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), where the Court held that trial counsel was ineffective in failing to communicate the state's initial fifteen-year plea offer where the offer expired before the client could accept the offer and where the client stated that he would have accepted the offer and avoided the twenty-year prison sentence handed down in the case but for counsel's error. In Davie, the client was prejudiced because he was unable to respond, i.e., accept the offer in a timely manner before the offer expired.

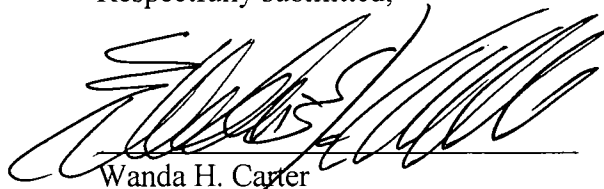
A defendant has a right to effective assistance of counsel during the plea bargaining process. Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Also, a guilty plea must represent a voluntary and intelligent choice among the alternative causes of action

open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985). Here, counsel's error in failing to make unmistakably and crystal clear to petitioner the exact actions which would result in the expiration of the state's six-year plea offer constituted ineffective assistance of counsel in the case. Counsel's omission in this regard violated petitioner's right to receive effective legal assistance in his case as guaranteed under the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, supra. Petitioner was prejudiced because he would have accepted the six-year plea offer and not received a greater sentence upon pleading guilty but for counsel deficient representation regarding what actions would result in the expiration of the state's plea offer in the case.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of May, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO YORK COUNTY  
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

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DONNIE MACK HAGINS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002151

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PETITION TO BE RELIEVED AS COUNSEL

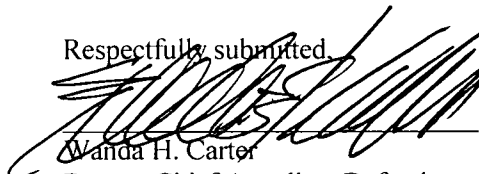
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Counsel for Donnie Mack Hagins states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 4, 2009. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Donnie Mack Hagins.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of May, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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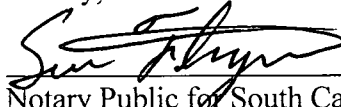
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Donnie Mack Hagins, 156 Haney Road, Buffalo, SC 29321, at this 28th day of May, 2014.

  
\_\_\_\_\_  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of May, 2014.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.