

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Chester County

S.C. Supreme Court

Brian M. Gibbons, Circuit Court Judge

ANDREW J. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000645

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to clarify petitioner's prior record for the benefit of the sentencing judge.

STATEMENT

Petitioner Andrew J. Mack pled guilty to trafficking in crack cocaine (28 to 100 grams) and possession of a firearm during the commission of a violent crime, second offense, during the December 2012 term of the Chester County General Sessions Court before Judge Brooks P. Goldsmith. Petitioner was sentenced to imprisonment for an aggregate period of seven years. App. 1-16. Everett Stubbs represented the petitioner at the plea proceeding and Assistant Solicitor Julie Hall appeared on behalf of the state.

Petitioner filed a PCR application on June 25, 2013, with the Chester County Office of the Clerk of the Court. App. 18-27. The respondent filed a return dated November 12, 2013, requesting that a hearing be held in response to petitioner's PCR action. App. 28-31.

A PCR hearing was convened on February 3, 2014, at the Chester County Courthouse before Judge Brian M. Gibbons. App. 33-62.

Petitioner was present at the hearing and represented by Nathan Sheldon, Esquire, and Assistant Attorney General Mary Williams appeared on behalf of the State. App. 33-62. On February 23, 2014, Judge Gibbons issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of counsel in the case. App. 63 – 68.

Petitioner appealed Judge Gibbons' Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to clarify petitioner's prior record for the benefit of the sentencing judge.

At the plea proceeding, the solicitor apprised the plea judge of the facts of the case. Upon receipt of a tip, police officers stopped petitioner's vehicle upon his arrival at Mill Street Apartments located in Chester, South Carolina, on June 15, 2012. A search of the vehicle petitioner was driving at that time yielded the presence of cocaine. App 6, l. 10 – p. 7 l. 24.

Also during the plea proceeding, the solicitor advised the plea judge of petitioner's prior 2007 conviction from Richland County for simple possession of crack cocaine, and his prior 2011 conviction from Fairfield County for simple possession with intent to distribute (crack cocaine). App. 7, lines 12-16. At that time, petitioner explained that he did not have a prior intent to distribute conviction. App. 9, l. 3-4. The trial judge agreed and stated that the solicitor "misspoke" in that regard. App. 9, l. 9-21.

During the PCR hearing, petitioner explained in effect that he had only one prior crack cocaine conviction and that his Richland County prior was misread as a possession of crack cocaine conviction when in actuality said prior was for possession of "pills." Petitioner stated that it mattered that he not be viewed as having been convicted twice on crack cocaine charges when he had only had one crack cocaine possession prior. Petitioner added that counsel erred when he made no attempt to object to an improper reading of his prior record, particularly since he gave counsel of an accurate list of his priors before the plea proceeding. App. 40, l. 15 – 43; l. 10, App. 48, l. 2-7; App. 52, l. 1-13; App. 41, l. 15-17.

Trial counsel testified at the PCR hearing and explained in effect that petitioner's instant drug charge was a third drug offense regardless of a correct reading of his prior record. App. 51, l. 11; p. 52, l. 16; App. 55, l. 8 – p. 56, l. 5.

The PCR judge ruled that there was no evidence in the record that the solicitor would have offered any additional benefits at sentencing during the plea proceeding had a different reading of petitioner's prior record been submitted; and therefore, there was no proof that counsel was ineffective with his representation of petitioner with regard to this matter. App 68-70.

A sentencing judge should know all material facts, including any information material to punishment and the defendant's prior record. State v. Franklin, 276 S.C. 240, 226 S.E. 2d 896 (1976). See United States v. Tucker, 404 U.S. 443 (1972), where the Court reversed a sentencing judge's sentence because the sentence was based upon misinformation of constitutional magnitude because the trial judge considered the defendant's prior unconstitutional convictions in determining his sentence. Compare the remand in State v. Rich, 269 S.C. 701; 239 S.E. 2d 731 (1977), where the trial judge misapprehended petitioner's list of offenses by considering a charge that was discharged (assault and battery with intent to ravish) in order to enhance that defendant's assault and battery with intent to ravish conviction, and by considering another charge (indecent exposure) where no disposition had been entered. This was prejudicial because the trial judge in Rich referenced the defendant as a "habitual sex offender." Note that both Courts in Rich and Franklin cited to the holding in Townsend v. Burke, 334 U.S. 736 (1948), where the United States Supreme Court held that due process at sentencing is violated if a trial judge sentences the defendant "on the basis of assumptions concerning his criminal record which were materially untrue."

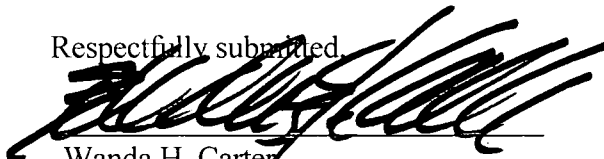
In the case at bar, counsel erred in failing to correct petitioner's prior record for the benefit of the sentencing judge in the case. Counsel's error constituted deficient representation at petitioner's

plea proceeding in violation of the Sixth Amendment to the United States Constitution. See also Hill v. Lockhart, 484 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition on the issue presented herein.

Respectfully submitted,

A large, bold, handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHESTER COUNTY
BRIAN M. GIBBONS, CIRCUIT COURT JUDGE

ANDREW J. MACK,

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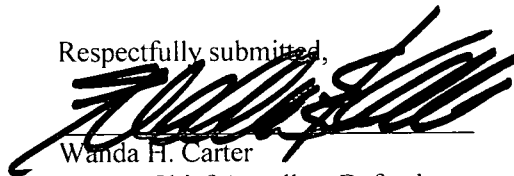
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Andrew J. Mack 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 3, 2014. 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 Andrew J. Mack.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of November, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Chester County

Brian M. Gibbons, Circuit Court Judge

ANDREW J. MACK,

PETITIONER,

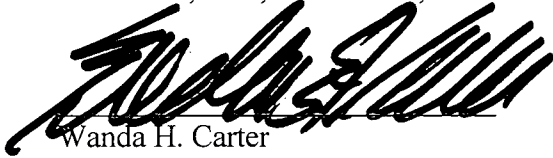
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

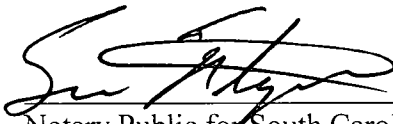
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Andrew J. Mack, #353612, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 18th day of November, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of November, 2014.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.