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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Roger L. Couch, Circuit Court Judge  
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S.C. Supreme Court

CLAUDE DUNAGIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001007  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

SUSAN B. HACKETT  
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ATTORNEY FOR PETITIONER

INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT

    Trial counsel’s failure to ensure Petitioner received credit for time  
    served on home detention violated petitioner’s right to the effective  
    assistance of counsel pursuant to the Sixth and Fourteenth  
    Amendments to the United States Constitution. .... 5

CONCLUSION ..... 12

PETITION TO BE RELIEVED AS COUNSEL..... 13

ISSUE PRESENTED

Did trial counsel's failure to ensure Petitioner received credit for time served on home detention violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

## STATEMENT

On October 29, 2008, a Spartanburg County grand jury indicted Petitioner for arson in the second degree. App. 666 – 667. The state, represented by Derrick Balsa, called the case for trial before the Honorable Derham Cole. App. 1. Doug Brannon represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 549, lines 8 – 11. Judge Cole sentenced Petitioner to imprisonment for twenty-five years. He suspended the sentence upon the service of sixteen years' imprisonment and five years of probation. Additionally, Judge Cole ordered Petitioner to pay restitution. App. 553, lines 5 – 18; App. 668.

Petitioner filed a notice of appeal. Appellate counsel, Robert Pachak, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 556 – 566. Petitioner filed a pro se brief. App. 567 – 569. On December 6, 2011, the Court of Appeals dismissed the appeal. App. 570 – 571. Remittitur was sent on December 22, 2011. App. 572.

On May 2, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 573 – 584. An evidentiary hearing convened on September 18, 2014 before the Honorable Roger L. Couch. App. 592. Suzanne White represented the state, and Shawn Campbell represented Petitioner. App. 592. By an order filed March 27, 2015, Judge Couch denied Petitioner relief from his conviction and sentence. App. 652 – 665.<sup>1</sup>

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<sup>1</sup> According to the Order, Petitioner “offered no testimony or evidence to support his claim that counsel’s decision to not make an opening or closing statement was anything less than sound trial strategy. Furthermore, [Petitioner] failed to demonstrate that had counsel made an opening or closing statement, the outcome of [Petitioner]’s trial would have been any different. Therefore, this claim is denied and dismissed.” App. 662. Petitioner made no allegation regarding trial counsel failing to make an opening statement and closing argument. Such a claim would have been without merit as the transcript clearly shows trial counsel delivered both. The PCR judge’s inclusion of this language in the order is troubling in light of the fact that no allegation of this nature was made. It is also troubling that PCR counsel did not catch this obvious error in a review of the order or alert the PCR judge of this error in a motion pursuant to Rule 59, SCRPC.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

Trial counsel's failure to ensure Petitioner received credit for time served on home detention violated petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

### **Relevant facts**

#### *Trial facts*

In January of 2008, John Floyd was building a home in Spartanburg County. The home had been under construction for six months, but was not close to completion. App. 177, line 24 – App. 178, line 18. Floyd planned to develop the additional acreage around his home as well. He owned approximately 270 acres and planned to build “a residential secluded neighborhood” for doctors who worked at two nearby hospitals. App. 173, lines 18-19; App. 174, lines 5-8. Floyd explained “if any doctor wanted a place to live, and his wife liked to ride horses, we would be able to give them both things with them not having to live in Tryon and have to drive thirty minutes into town. App. 173, line 16 – App. 174, line 1.

On January 23, 2008, Floyd and his wife were on vacation. App. 178, lines 19-22. He received a phone call at 4 a.m. from his secretary telling him there had been a fire and that the house under construction was gone. App. 178, line 23- App. 179, line 3. Floyd and his wife quickly returned to Spartanburg. App. 179, lines 3-5. Realizing the police were unable to determine the cause of the fire, Floyd offered a \$10,000 reward for information and posted billboards near the property advertising the reward. App. 184, lines 7-18.

At approximately 2:30 a.m. on January 24, 2008, Carey Pruitt saw “something on fire down in the woods” near his home. App. 44, lines 18-25. Pruitt called 911 to report the fire. App. 48, line 25 – App. 49, line 2. Upon arrival, the firefighters realized there was no way to

save the main building and focused their efforts on an outbuilding. App. 63, lines 3-25. Although the Fire Chief believed the fire started inside the structure based on his training and experience, the investigator from the sheriff's office disagreed with the Fire Chief on the exact location inside the structure for the origin. App. 65, lines 7-12; App. 68, lines 5-13. The investigator with the sheriff's office admitted there was no evidence at the scene in order to determine the cause of the fire. App. 155, lines 13-16. However, he believed the fire "kind of appeared to have maybe started around where the elevator shaft had been." App. 155, lines 17-22.

On the day before the fire, straw was placed around the base of the main structure because the stone masons had started cutting stones that day. App. 79, lines 2-4; App. 115, lines 15-25. To cut the stones, the masons used a chain saw with a diamond tip blade. Occasionally, the saw would throw sparks while cutting the stones. App. 125, lines 1-14. Additionally, construction workers were permitted to smoke on the premises as long as they did not smoke inside the structure. App. 84, line 24 – App. 85, line 2; App. 108, lines 3-10; App. 119, lines 2-13. Despite the cold January day, there were no "warming fires" on the construction site that day. App. 84, lines 1-15; App. 118, line 24 – App. 119, line 1. The structure was due for a pressure test on the gas line the following day. App. 100, lines 6-13. As a result, the heating and air contractor "put air in the system up to 28 to 30 pounds" to ensure the system would hold the pressure until the next day when the inspector arrived. App. 100, lines 21-24.

Months after the fire, the police received a tip from Crime Stoppers. App. 207, lines 11-18. The tipster, Amanda Wyatt, claimed Petitioner had set the fire. App. 208, lines 7-15; App. 294, line 22 – App. 295, line 2; App. 299, line 4; App. 299, lines 8-12; App. 301, lines 11-13. Petitioner owned property adjacent to the property owned by Floyd. App. 456, lines 10-21; App.

459, line 7 – App. 462, line 2. In fact, Petitioner had sold three parcels of land to Floyd over the years. App. 467, line 1 – App. 469, line 11. Amanda claimed the structure that was burned was situated on land once owned by Petitioner, but the undisputed evidence was the structure was being built on a parcel, which was never owned by Petitioner or his family. App. 302, line 25 – App. 303, line 5.

According to Amanda, Petitioner was upset the adjacent property was being developed. In fact, she claimed Petitioner said “the first house that goes up will be the first house that comes down.” App. 294, lines 1-17. However, Amanda waited months to tell the police about Petitioner’s alleged confession. She only went to the police because she believed Petitioner had set up her brother, which resulted in her brother being incarcerated. App. 300, lines 4-22. Further, Amanda had borrowed money from Petitioner to pay for medical bills associated with her cancer treatment and not re-paid Petitioner the money she owed. App. 303, lines 7-24.

At the trial, Petitioner’s girlfriend, Barbara Cash, testified that on the night of the fire, she was staying with Petitioner in a house on the property near the Floyd property. App. 245, lines 18-20; App. 245, line 24 – App. 246, line 6. After 8 p.m., Petitioner went out to work in the barn. He returned at midnight. App. 253, lines 12-14; App. 253, lines 24-25. When she was interviewed by the police months after the fire and years before the trial, she was mad with Petitioner because he was seeing another woman. App. 255, line 21 – App. 256, lines 2; App. 260, lines 10-14. To get revenge, she told the police that Petitioner wore different shoes when he returned to the house and told her he had burned his other shoes. App. 255, line 7 – App. 257, line 3. She also told the police that Petitioner had two cans of camp fuel, which disappeared sometime around the fire. App. 259, line 8 – App. 260, line 1. However, Cash told the police

and the jury that Petitioner never said he set fire to the Floyd structure. App. 266, line 14 – App. 267, line 5; App. 269, lines 18-22.

### *Sentencing*

During the sentencing portion of the trial, trial counsel informed the trial judge that petitioner served eighty-five days in the detention center prior to trial. App. 553, lines 2 – 4.

### *PCR Hearing*

Petitioner testified that he was arrested in June 2008. App. 596, lines 15 – 18. He was released on bond and placed on home detention with electronic monitoring. App. 597, lines 5 – 11. Petitioner further testified he never received credit for the time he spent on house arrest prior to trial. App. 616, line 18 – App. 617, line 4.

### *Order denying relief*

The PCR court found trial counsel “adequately conferred with [Petitioner], conducted a proper investigation, was thoroughly competent in his representation, and that counsel’s conduct does not fall below the objective standard of reasonableness.” App. 664. The court found Petitioner “failed to present specific and compelling evidence that counsel committed errors or omissions in his representation of [Petitioner].” App. 664. Additionally, the court held Petitioner failed to prove that he was prejudiced by trial counsel’s performance. App. 664.

## **Discussion**

### *Preservation*

Although the PCR court’s order failed to address the issue presented in a specific way, the order made sweeping and generalized statements concerning trial counsel’s representation. By doing so, the PCR judge made a final determination concerning *all* claims of ineffective assistance presented during the PCR hearing. Without question, this issue was presented for the PCR judge’s

determination regarding the effectiveness of counsel's performance in ensuring Petitioner received credit for all time served. Petitioner respectfully requests this Court review the issue presented despite the PCR court's failure to address the matter specifically in the order.

*Statutory Requirement of Credit for Time Served*

The evidence presented at the PCR hearing was undisputed that Petitioner served almost two years in pre trial detention. Petitioner was arrested in June 2008 and served eighty-five days in the detention center. Although petitioner was released on bond prior to trial, he was placed on house arrest with electronic monitoring until his trial in March 2010. According to section 24-13-40 of the South Carolina Code, "[i]n every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest." The section concerning the ability of a trial judge to give credit for time spent on monitored house arrest was added in 2013. 2013 S.C. Acts 34.

The statute was amended to reflect the legislature's desire that individuals serve less time in prison when individuals have served time during pre-trial detention, even if the detention were home confinement. Further, the legislature sought to ensure that sentences more accurately reflect the amount of time and individual had *actually* served, which would necessarily consider the amount of time an individual's freedom was restricted. The amendment was necessary in light of this Court's decision in State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004). In that case, this Court held "it would be illogical" to give an individual credit for time served while the individual was released on bond, even if the individual were placed on house arrest as a condition of bond. Id. at 385, 593 S.E.2d at 182. Interpreting the language of the statute, this Court held the "legislature only intended to award sentencing credit to those who actually spend time confined in a

penal institution.” Id. Thereafter, the legislature amended the statute to reflect the General Assembly’s desire that individuals receive credit for time served on monitored house arrest.

It has long been settled that the section of the statute discussing credit for time served prior to trial is mandatory. Section 24-13-40 of the South Carolina Code “mandates prisoners receive credit for the time they served prior to trial unless one of two exceptions exist, either: (1) the prisoner was an escapee or (2) the prisoner was already serving a sentence on a different offense. Because the language of section 24-13-40 is mandatory, a judge cannot deny a defendant credit for time served prior to trial unless one of the two exceptions applies.” State v. Boggs, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2002). However, the statutory provision also provides that “full credit against the sentence ... may be given for any time spent under monitored house arrest.” S.C. Code Ann. § 24-13-40. This provision permits a judge to craft a sentence that accurately reflects the amount of time a person actually served and is required to serve thereafter.

Even if this Court were to determine the new statute is not applicable to Petitioner due to his having been sentenced in 2010, Petitioner respectfully requests application of the statute to his sentence. The added condition of monitoring while on house arrest as a condition of his bond curtailed Petitioner’s liberty rights, which in turn meant that his home detention coupled with GPS monitoring as condition of bail resulted in a status equivalent to that of a prisoner confined to a penal facility and fit well within the prerequisites to receive time served credit under Higgins. Many courts have addressed the liberty restraints connected to GPS electronic monitoring and the continual surveillance that GPS monitoring brings as infringements on one’s right to be free from government interference and move about freely at will and without restrictions. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)(citing United States V. Merritt, 612 F. Supp. 2d 1074 (2009); State v. Stines, 200 N.C. App. 193, 683 S.E.2d 411 (2009); United States v. Smedley, 611 F. Supp.

2d 971 (2009)0; see also United States v. Arzberger, 592 F. Supp. 2d 590 (2008); Commonwealth v. Carry, 454 Mass. 559, 911 N.E.2d 187 (2009). Therefore, any home detention coupled with GPS monitoring and its liberty restrictions would elevate such a house arrest to a level similar to the restrictions placed upon prisoners in penal institutions, and would thus warrant time served credit.

Here, the added factor of GPS electronic monitoring that was placed upon Petitioner as a condition of bail combined with his service time on house arrest prior to his adjudication on the charge against him placed liberty restraints on him that raised him to a sphere beyond house arrest. The restrictions on Petitioner's movements and constant monitoring of his movements during home detention catapulted him to the level of a prisoner confined in a penal facility who was deserving of time served credit in the case.

Therefore, not only does the new statutory mandate allow for time served credit to be given in monitored home detention cases, the nature of any GPS monitoring of a house arrest pre-trial detainee as a condition of bail should result in the grant of credit for time served due to the liberty restrictions of GPS monitoring and a GPS due process hearing as well.

To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Trial counsel erred in failing to request Petitioner receive credit for time served while on monitored house arrest. His deficient performance resulted in prejudice to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant the petition and order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of November, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO SPARTANBURG COUNTY  
ROGER L. COUCH, CIRCUIT COURT JUDGE

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CLAUDE DUNAGIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Claude Dunagin states:

1. She is an 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 September 18, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has 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 Claude Dunagin.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of November, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

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CLAUDE DUNAGIN,

PETITIONER,

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STATE OF SOUTH CAROLINA,

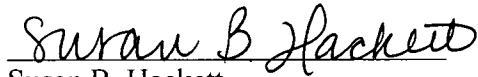
RESPONDENT

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CERTIFICATE OF SERVICE

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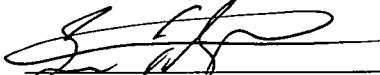
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Claude Dunagin, #339745, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 16th day of November, 2015.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day  
of November, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.