

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge  
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ORIGINAL  
**RECEIVED**  
MAR 29 2018  
S.C. SUPREME COURT

HENRY LEE KINLAW, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001825  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Robert M. Pachak  
Appellate Defender

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether plea counsel was ineffective in failing to communicate to petitioner when a 5 year plea offer would expire?

## STATEMENT

On November 3, 2014, petitioner appeared before the Honorable John C. Hayes in Horry County and pled guilty to trafficking in cocaine base 28 to 100 grams, second offense; possession with intent to distribute cocaine base or meth, second offense; and trafficking in cocaine, 28 to 100 grams, second offense. Fifteen (15) year sentences were imposed on each charge. Russel B. Long, Esq. was plea counsel. J. Stephen Grooms, Esq. and M. Travis Hyman, Esq. were the assistant solicitors. (App. p. 1-p. 80)

On May 19, 2015, petitioner filed an application for post-conviction relief with supporting documents. (App. p. 81-p. 252). Respondent filed a return dated February 17, 2016. (App. p. 253-p. 259). An evidentiary hearing was held before the Honorable Roger E. Henderson on May 24, 2017. Petitioner was present and was represented by Steven W. Fowler, Esq. Respondent was represented by Johnny E. James, Jr., Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 260-357). On July 31, 2017, Judge Henderson issued an order denying and dismissing the application for post-conviction relief. (App. p. 258-377).

This petition follows.

## ARGUMENT

Plea counsel was ineffective in failing to communicate to petitioner when a 5 year plea offer would expire.

The post-conviction relief attorney asked petitioner about the plea offer as follows:

Q. Okay. And as a final question, you basically have stated to me and you said in the application that your counsel failed to thoroughly explain the plea agreement to you. Could you articulate why you feel and have said that counsel failed to thoroughly explain the plea agreement to you base on that transcript that we referred to today.

A. Oh, yes. Because in July of 2014 after my last roll call, he informed me that the State was offering a five-year plea agreement. But my attorney did not explain the specific details of the plea agreement to me, did not inform me of the facts that well, is this plea agreement would be nonviolent five-year plea agreement which I have to do two years in a half, or was it a violent plea agreement which I would have to do four years and three months.

He specifically did not inform me that this was the State's final plea agreement, and then if I did not take it by a certain time, it would expire and there would be no more plea agreement, I would have to go to trial.

And during that time I went back to him end of October, and that day he informed me that the plea agreement has expired, and I'm not – I have to go to have to go to trial, which was a week prior to – I mean, a week later would be November the 3rd. But he did not inform me of the actual details of the plea.

Q. Okay.

A. Based on the fact he did not inform me of the details of the plea, I was not allowed to make a known decision as to whether to accept the plea agreement or to deny it when weighed against all the evidence and it would expire.  
(App. p. 308, line 13- p. 309, line 20)

In Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) a defense attorney was held ineffective in failing to convey the State's initial plea offer to his client. The Court explained:

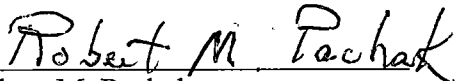
Applying these principles to the facts of the instant case, we conclude that Petitioner has proven he was prejudiced by plea counsel's deficient performance. Initially, we conclude that the difference in the sentence Petitioner received and the plea offer is proof of prejudice. We reach this conclusion for several reasons. First, the solicitor and plea counsel both acknowledged that the State originally offered fifteen-year sentence in exchange for Petitioner's guilty plea. Secondly, plea counsel admitted that he failed to communicate this offer to Petitioner. Thirdly, both plea counsel and Petitioner testified that had this offer been communicated Petitioner would have accepted the original offer, he would have received a significantly lower sentence than the twenty-seven-year sentence that was imposed.

381 S.C. at 614, 675 S.E. 2s at 423.

Plea counsel in this case did convey the plea offer but not all of it. He failed to convey whether the 5 year sentence was to classified as violent or non-violent. He also failed to convey if there was an expiration date for the offer. Failing to convey an incomplete plea offer should be just as egregious as not conveying one at all.

**CONCLUSION**

Plea counsel should be held ineffective and petitioner should have the benefit of the 5 year sentence.

  
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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

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HENRY LEE KINLAW, JR.,

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PETITION TO BE RELIEVED AS COUNSEL

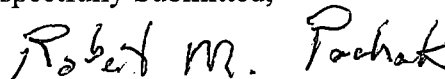
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Counsel for Henry L. Kinlaw states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Roger E. Henderson, which was held on May 24, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Henry L. Kinlaw.

Respectfully Submitted,

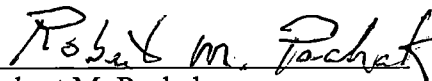


Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 29th day of March, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his 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."



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ATTORNEY FOR PETITIONER

This 29th day of March, 2018.

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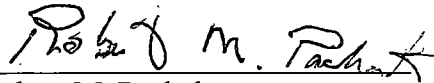
RESPONDENT

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CERTIFICATE OF SERVICE

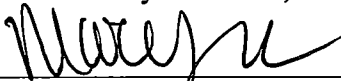
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly 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 Henry L. Kinlaw, #271267, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of March, 2018.



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 29th day of March, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.