

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

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MICHAEL AUSTIN SPENCER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001594

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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S.C. SUPREME COURT

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<sup>1</sup> Bolin v. South Carolina Department of Corrections, 415 S.C. 276, 781 S.E.2d 914 (S.C. Ct. App. 2016).

### **ISSUE PRESENTED**

Trial counsel erred in allowing petitioner to accept a negotiated plea that contained a split sentence that carried a five-year probation attachment despite the fact that Bolin<sup>2</sup> changed his SCDC classification from an 85% parole eligibility status to a 65% parole eligibility status because the risk of returning to jail in the event of a probation violation denied petitioner the true benefit and advantage of an earlier release via his 65% parole eligibility status.

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<sup>2</sup> Bolin v. South Carolina Department of Corrections, 415 S.C. 276, 781 S.E.2d 914 (S.C. Ct. App. 2016).

## STATEMENT

Petitioner Michael Austin Spencer entered Alford<sup>3</sup> pleas to two counts of possession with intent to distribute methamphetamine (both second offenses) during the February 2014 term of the Spartanburg County General Sessions Court before Judge Roger L. Couch, who sentenced petitioner to two concurrent thirty-year terms, suspended to ten years on both, and five years of probation. App. 1-26. Albert Smith, Esquire, represented petitioner at the plea proceeding and Assistant Solicitor Hayes Holliday appeared on behalf of the state.

On November 5, 2014, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 29-36. The respondent filed a return and motion to dismiss dated May 22, 2015, on the ground that petitioner's complaint was a non-collateral claim<sup>4</sup> and therefore not a cognizable PCR claim. App. 37-40. A Conditional Order of Dismissal was filed echoing the grounds for dismissal stated in the return and motion to dismiss. App. 43-46. Petitioner filed a motion to amend the PCR application on February 1, 2016, which was granted by Judge R. Ferrell Cothran on July 12, 2016. App. 47-48. Petitioner's amended PCR application contained the following allegation:

The Applicant alleges that his plea counsel, Albert Smith, Esq., provided constitutionally ineffective assistance of counsel in advising him that his guilty plea was to a crime that was qualified as non-violent...[and] but for this erroneous advice, the Applicant would have proceeded forward to trial. App. 47.

A PCR hearing was convened on September 19, 2016, at the Spartanburg County Courthouse before Judge Paul M. Burch. Petitioner was present at the hearing and represented

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<sup>3</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>4</sup> Petitioner stated that his convictions were listed parole eligible after 85% service time rather than parole eligible after 65% of service time. App. p. 30-31.

by J. Brandt Rucker, and Assistant Attorney General Ruston W. Neely appeared on behalf of the state. App. 49 – 84.

On May 24, 2017, Judge Burch issued an Order of Dismissal in the case. App. 85-94. Petitioner appealed. This petition follows.

### **ARGUMENT**

Trial counsel erred in allowing petitioner to accept a negotiated plea that contained a split sentence that carried a five-year probation attachment despite the fact that Bolin<sup>5</sup> changed his SCDC classification from an 85% parole eligibility status to a 65% parole eligibility status because the risk of returning to jail in the event of a probation violation denied petitioner the true benefit and advantage of an earlier release via his 65% parole eligibility status.

Petitioner was indicted for PWID methamphetamine, third offense, and trafficking in methamphetamine, third offense, but the plea bargain allowed petitioner to plead guilty to two counts of PWID methamphetamine, second offense. App. 20, lines 8 – 23.

During the PCR hearing, trial counsel testified that the ten-year plea deal was a good deal because petitioner faced a 25-to-30-year prison sentence if he had been tried on the trafficking in methamphetamine (third offense) charge, which was reduced to a PWID methamphetamine charge as a second offense, or on the third offense PWID methamphetamine charge that was reduced to a second offense charge also. App. 71, l. 17 – p. 80, l. 14.

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<sup>5</sup> Bolin v. South Carolina Department of Corrections, 415 S.C. 276, 781 S.E.2d 914 (S.C. Ct. App. 2016).

Petitioner testified during the PCR hearing as follows:

Q. Did you write a letter to him asking what happened with the sentence?

A. I, I – well, actually when I got to Court, I – I mean I got to, when I got back to SCDC and found out that my sentenced was, was a 85 percent sentence, actually got in touch with Mr. Smith several times about trying to get it fixed and that – and then I – and then he told me that it, it was up to the Clerk of Court. But, anyway, to make a long story short, it was – it ended up, it ended up going to 65 but not – it was through SCDC.

Q. Okay. Did that affect your case?

A. Very little because of my suspended sentence that they – see, they didn't give me the same thing as my codefendants. If they would of – it would of affected it if I'd of got a ten year but, with my 30 years with five years' probation, no, it don't affect t cause it don't give me no parole date. It's just like I'm just doing – you know, I don't have no parole or no – you know what I mean? None of that. Tr. 59, l. 10 – p. 60, l. 8.

Q. What was your release date initially whenever you were sentenced? Was it, was it September 7<sup>th</sup>, 2021? Does that sound about right?

A. I, I mean I guess that could be right, yeah.

Q. Okay. And your release now, do you, do you know what that is?

A. Since SCDC changed it, I think it's in '18. Somewhere in '18.

Q. Does May 28<sup>th</sup>, 2018, sound about right?

A. I think so. Tr. 61, l. 8-19.

The PCR judge ruled that petitioner's sentences were been properly classified as 65% parole eligible offenses and that his classification objection was a moot point and that no deficiency or prejudice resulted. App. 90-91.

Previously, the rule was that a conviction for a no parole offense meant that parole eligibility did not occur until 85% of one's service time had been satisfied. See S.C. Code. § 24-13-100 - 150 where no parole offenses were categorized as either an A felony (not more than 30 years imprisonment) or a B felony (not more than twenty years imprisonment), which meant that PWID methamphetamine, second offense, under S.C. Code Ann. § 44-53-375 (B) was previously a no parole offense. Note that petitioner pled guilty to two counts of PWID methamphetamine, both as second offenses. However, later in Bolin, the Court acknowledged that as of June 2, 2010, an amendment exempted a second offense of PWID methamphetamine under S.C. Code Ann. 44-53-375 (B) as a no parole offense.

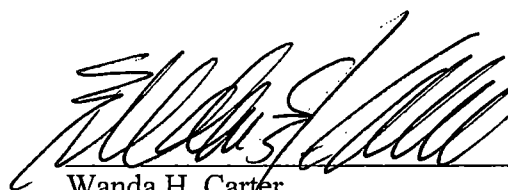
In the case at bar, SCDC ultimately corrected petitioner's eligibility status within the requirements of Bolin, but petitioner's receipt of a split sentence was the problem because the five-year probation attached to his 10-year sentence placed him in jeopardy of ultimately receiving a sentence that was beyond and longer than ten years (due to the nature of probation and possible revocation) despite his 65% parole eligible status for which he in effect received no benefit. Thus, petitioner's sentence objection was not moot because of the possibility of continued harm via his split sentence, which means the existing complaint or controversy remains regardless of the fact that SCDC has corrected his classification under Bolin. A case is moot if an inmate is no longer incarcerated and there is no existing controversy on the legal issue. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001); Hayes v. State, 413 S.C. 553, 777 S.E.2d 6 (2015). Petitioner's split sentence could result in re-incarceration regardless of his 65% parole eligibility status.

Trial counsel erred in failing allowing petitioner to accept the negotiated split sentence in the case and in failing to foresee that the probation portion of petitioner's split sentence meant

that he might not receive the benefit of the 65% parole eligibility classification. Hence counsel's assistance was legally ineffective in this case, which in turn violated the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985). Clearly, but for counsel's error in this regard, a reasonable probability exists that another sentencing outcome would have been the result in the case.

**CONCLUSION**

Based on the foregoing argument, counsel for petitioner would request that this Court allow full briefing on above-raised issue.

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

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

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MICHAEL AUSTIN SPENCER,

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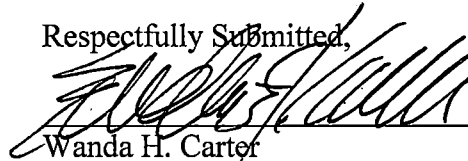
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Michael Austin Spencer states that:

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 record of petitioner's trial before Judge Paul M. Burch, which was held on June 14, 2016, 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 Michael Austin Spencer.

Respectfully Submitted,




Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 13th day of April, 2018.

**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."



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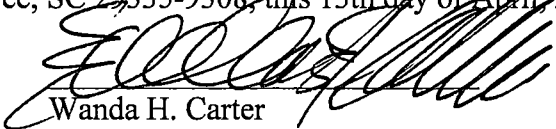
RESPONDENT

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CERTIFICATE OF SERVICE

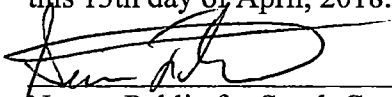
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly 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 Michael Austin Spencer, #315380, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 13th day of April, 2018.



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 13th day of April, 2018.



(L.S)  
Notary Public for South Carolina

My Commission Expires: 10/30/2022