

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

JUL 11 2013

S.C. Supreme Court

BRIAN CHRISTOPHER LESS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212884  
\_\_\_\_\_

PETITION TO FILE SUPPLEMENTAL APPENDICES  
\_\_\_\_\_

Pursuant to Rule 224 of the South Carolina Supreme Court Rules, the undersigned counsel requests leave in which to file supplemental appendices in the above titled appeal. The following facts are submitted in support of this motion.

1.) Petitioner Brian Christopher Less pled guilty to possession with intent to distribute marijuana during the April, 2007 term of the Greenville County General Sessions Court before Judge Edward W. Miller, and was sentenced to imprisonment for a period of five years, suspended upon time served and probation for a period of three years.

2.) On December 6, 2010, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court alleging that his trial attorney erred in failing to advise him of possible deportation consequences attached to his guilty plea per the rule announced in Padilla v. Kentucky

130 S.Ct. 1473 (2010). The respondent filed a return requesting that petitioner's PCR action be dismissed due to an untimely filing and because Padilla did not apply retroactively. On February 22, 2011, Judge Robin B. Stillwell issued a conditional order of dismissal echoing the same grounds presented in the respondent's return and agreed to the summary dismissal of petitioner's PCR action. Nonetheless, a PCR hearing in the matter was convened on March 2, 2012, at the Greenville County Courthouse before Judge P. Garrison Hill. App. 21 – 34. Neither petitioner nor his trial counsel appeared at the PCR hearing.

3.) On August 6, 2012, Judge Hill issued an order of dismissal on the ground of untimeliness and because Padilla did not apply retroactively to his case. Petitioner appealed Judge Hill's order of dismissal. A Johnson Petition for Writ of Certiorari was filed on appeal on May 6, 2013, addressing the issue of the PCR judge's error in holding a PCR hearing and issuing an order without requiring petitioner and/or trial counsel to appear to testify at that time in order to resolve this question of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).<sup>1</sup>

4.) Padilla was decided on March 31, 2010, and petitioner filed his PCR action via Padilla on December 6, 2010, which was timely per the one-year limit to file after the pronouncement of a new rule of law under S.C. Code Ann §17-27-45(B). On February 20, 2013, the United States Supreme Court held in Chaidez v. United States, 133 S.Ct. 1103 (2013), that the rule in Padilla was not retroactive. However, this did not cure the lack of testimony on the Padilla issue at the PCR hearing held in the case. Therefore, the transcript of petitioner's guilty plea proceeding<sup>2</sup> in the case is

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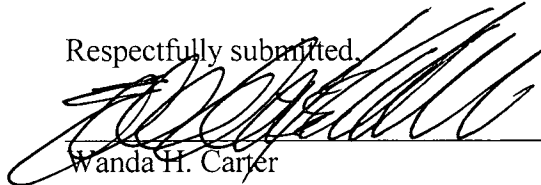
<sup>1</sup> Where the application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.

<sup>2</sup> The order for the guilty plea transcript was placed on March 11, 2013. The Johnson Petition for Writ of Certiorari was filed on May 6, 2013. The guilty plea transcript was received on July 2, 2013.

relevant to this PCR appeal per Rule 226(e), SCACR, in order to discern whether the Padilla issue (or any other) rose at the guilty plea proceeding.

WHEREFORE, the undersigned counsel requests leave in which to file supplemental appendices in the case.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

This 11th day of July, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Greenville County  
D. Garrison Hill, Circuit Court Judge

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BRIAN CHRISTOPHER LESS,

PETITIONER,

V.

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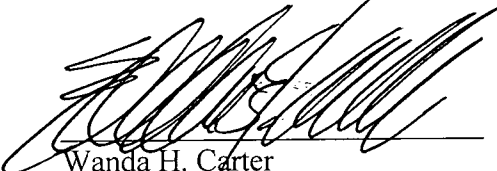
Appellate Case No. 2012-212884

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CERTIFICATE OF SERVICE

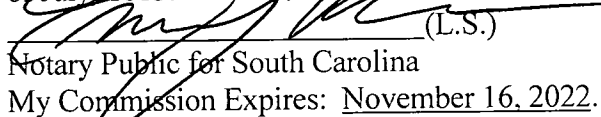
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The undersigned attorney hereby certifies that a true copy of the Petition to file the supplemental appendix in the above-entitled case has been served upon Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of July, 2013.



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 11th day  
of July, 2013.

  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: November 16, 2022.