

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge  
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**RECEIVED**

SEP - 5 2013

**S.C. Supreme Court**

GERALD L. GANTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000016  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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### ISSUE PRESENTED

The PCR judge abused his discretion in dismissing petitioner's PCR action for failure to prosecute because the requirements needed to support such a dismissal were not met, particularly when the grant of a continuance would have been the appropriate remedy in the case.

## STATEMENT

Petitioner Gerald Gantt pled guilty to assault and battery of a high and aggravated nature during the July 2011 term of the Richland County General Sessions Court before Judge DeAndrea G. Benjamin. Petitioner was sentenced to imprisonment for a period of five years. Courtney A. Gibbes represented petitioner at the plea proceeding. App. 24-38.

Petitioner appealed his conviction and sentence and submitted a pro se explanation for the basis of an appeal per Rule 203 (d) (1)(B)(iv), SCACR, but the appeal was dismissed by Order of the South Carolina Court of Appeals because the issues raised by petitioner were not preserved for appellate review at the guilty plea proceeding. Ap. 43-45.

On March 12, 2012, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 48-56. The respondent filed a return dated April 30, 2012, requesting that a PCR hearing be held in the case. App. 57-63.

A PCR hearing was convened on December 4, 2012, at the Richland County Courthouse before Judge J. Ernest Kinard. David Belding, who was petitioner's PCR counsel, was present at the PCR hearing, but petitioner did not appear at the hearing. App. 65-66. On December 4, 2012, Judge Kinard issued an order dismissing the case for failure to prosecute. App. 70-71.

Petitioner appealed Judge Kinard's Order dismissing the case. This petition follows.

## ARGUMENT

The PCR judge abused his discretion in dismissing petitioner's PCR action for failure to prosecute because the requirements needed to support such a dismissal were not met, particularly when the grant of a continuance would have been the appropriate remedy in the case.

At the plea proceeding, the solicitor apprised the trial judge of the facts of the case. Apparently, petitioner stabbed Esau Collins in the abdomen after an argument and a physical altercation between the two of them occurred on July 20, 2009. App.34, l. 21 – p. 35, l. 19.

The PCR hearing transcript, which consisted of two (2) pages, contained the following colloquy on the subject of failure to prosecute as follows:

Attorney General: It's my understand[ing] that [petitioner] has been unable to be located, and for that cause, Your Honor, the State would move to dismiss the application for failure to prosecute.

The Court: Okay. Mr. Belding, I have read an affidavit that you filed along with some attachments where you diligently tried to contact him to no avail.

PCR Counsel: I even tried one phone number I found through the internet, and I got no answer at that line either, Judge. I just...

The Court: Well, he can't file it and then not be available. So you diligently tried to contact him according to your affidavit, so I think you're going to be protected on that. If he is not here, we're just going to dismiss it.

App. 67, l. 24-p. 68, l. 17.

The PCR judge found that PCR counsel made diligent and reasonable efforts to contact petitioner via phone and mail, and that he had no contact with petitioner since his appointment to the PCR case, and then dismissed petitioner's case for failure to prosecute. App. 70.

Upon review of a motion to dismiss for failure to prosecute pursuant to Rule 4(b) SCRCF, an appellate court may reverse the trial court's decision upon an abuse of discretion. In the Matter of the Care and Treatment of James Carl Miller, 393 S.C. 248, 713 S.E. 2d 253 (2011). Cases

dismissed on failure to prosecute usually involve instances where repeated warnings have been given and unreasonable neglect exists, and where there is a showing of indifference by the moving party to the rights of the defendant(s) in the case. McComas v. Ross, 368 S.C. 59, 626 S.E. 2d 902 (2006). Dismissal for failure to prosecute is a harsh sanction for use in extreme cases only. In McComas, supra, the Court outlined the following factors to consider before dismissing a case for failure to prosecute:

- (1) the plaintiff's degree of personal responsibility;
- (2) the amount of prejudice caused the defendant;
- (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and
- (4) the effectiveness of sanctions less drastic than dismissal.

In the case at bar, the reasons for petitioner's unavailability prior to the PCR hearing and his absence from the PCR hearing were unknown. The record did not reflect why PCR counsel's attempts to contact petitioner were unsuccessful. Therefore, it cannot be concluded or assumed that petitioner was unreasonably neglectful in the matter because he was unavailable and absent for reasons unknown. Likewise, petitioner's absence from court cannot be assumed to have been a deliberate move to delay the PCR proceeding without an explanation for his absence. Moreover, the respondent would not have been prejudiced by the delay due to the nature of PCR cases in that the evidence and witnesses needed in PCR hearings are easily retrieved and produced, and because continuances are routinely granted in numerous PCR cases. Finally, dismissing petitioner's PCR case was a drastic and extreme remedy that was unnecessary since the facts surrounding petitioner's prior unavailability and absence from the PCR hearing were unknown, and because the remedy of a continuance would have been the better and more appropriate remedy under these circumstances.

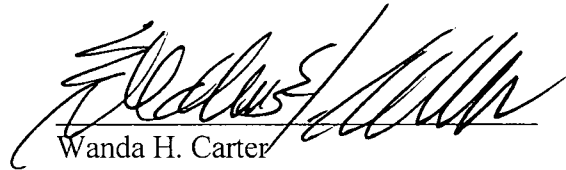
Clearly, the PCR judge erred in dismissing the case for failure to prosecute since the factors needed to issue such a remedy were not met in this case and because a continuance would

have been a less drastic and more suitable remedy in the case. The PCR judge's dismissal of petitioner's PCR action due to failure to prosecute constituted an abuse of discretion in the case.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,

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 5th day of September, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY

J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

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GERALD L. GANTT,

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PETITION TO BE RELIEVED AS COUNSEL

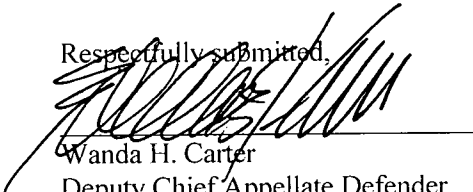
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Counsel for Gerald L. Gantt states:

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 December 4, 2012. 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 Gerald L. Gantt.

Respectfully submitted,



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Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 5th day of September, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
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GERALD L. GANTT,

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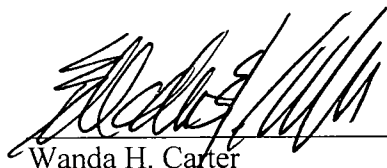
V.

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 Megan Harrigan, Esquire, Assistant Attorney General, office of the Attorney General, Rembert Dennis Building, 1000 Assembly St. Rm. 519, Columbia, SC 29201 and served upon Mr. Gerald L. Gantt, 901 Colleton St., Apt. 4B, Columbia, SC 29203,, this 5th day of September, 2013.



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Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day  
of September, 2013.

\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022