

2010 - 163372

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

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DEVARIO MARSHATT SIMPSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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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, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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## ISSUES PRESENTED

Trial counsel erred in failing to file a motion to be relieved as counsel after petitioner filed a grievance against him prior to trial because the summary of the complaint was in effect that his defense was compromised due to counsel's failure to properly investigate into the case in that he did not view the police videotape or present certain defense witnesses at trial.

## STATEMENT

Petitioner Devario Marshatt Simpson was convicted of trafficking in cocaine and resisting arrest per a jury trial held during the April 2005 term of the Greenville County General Sessions Court before the Honorable G. Edward Welmaker, Judge. Petitioner was sentenced to imprisonment for a period of thirty years. App. 1-322. Petitioner appealed, but his convictions and sentences were affirmed. See State v. Simpson, Op. No. 2007-UP-304 (S.C. Ct. App. filed June 8, 2007).

On June 3, 2008, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 328-333. The respondent filed a return requesting that a hearing be held in the case. App. 334-338.

A hearing was convened on February 23, 2010, at the Greenville Courthouse before the Honorable Edward W. Miller, Judge. App. 340-419. On April 26, 2010, Judge Miller issued an order of dismissal in the case. App. 421-429.

Petitioner appealed Judge Miller's order of dismissal. This petitioner follows.

## ARGUMENT

Trial counsel erred in failing to file a motion to be relieved as counsel after petitioner filed a grievance against him prior to trial because the summary of the complaint was in effect that his defense was compromised due to counsel's failure to properly investigate into case in that he did not view the police videotape or present certain defense witnesses at trial.

At trial, Police Officer Chris McBee testified that he encountered petitioner on the evening of April 19, 2003, while he was on patrol on Potomac Street in Greenville County when he reached a stop at the intersection of Potomac Street and Prosperity Drive. Officer McBee saw a vehicle in front of him that was about to turn right. Then, Officer McBee turned on his signal indicating he would turn left. At that point, the driver of the vehicle, i.e. petitioner, flashed bright lights indicating to Officer McBee that he could turn left first. Officer McBee responded by waving the vehicle on suggesting that it turn right first. As a result, the driver of the vehicle decided not to turn right, but rather drive straight through the intersection. Officer McBee stated that after he noticed that the driver steered the vehicle a bit to the left of the center lane, he decided to follow the vehicle. Thereafter, the driver of the vehicle began to speed and ultimately pulled into a residential driveway in the area. Officer McBee stated he parked, exited his car, approached petitioner, and detained the driver. Officer McBee called for back up assistance and Officer Kevin Rudy arrived on the scene. Later, as the detention continued, petitioner was arrested and a search of the vehicle which followed. Cocaine (800 grams) was found per the search of the vehicle. App. 160, l. 23 – p. 185, l. 10.

During the PCR hearing, petitioner testified that trial counsel met with him only two times prior to trial and never interviewed any of his witnesses and did not discuss the elements of the offenses, available defenses, or sentencing consequences in the case. App. 374, l. 23 – p. 378, l. 5;

App. 386, l. 22 – p. 388, l. 24; App. 347, l. 2 – p. 351, l. 19; App. 367, l. 1 – p. 370, l. 13. Petitioner testified that counsel did not even view the videotape of the traffic stop, arrest, and search. App. 352, l. 22 – p. 353, l. 10. Petitioner admitted that prior to trial, he filed a grievance against trial counsel because it appeared he had no interest in representing him. Nonetheless, counsel never moved to relieve himself as counsel prior to trial or during the trial. Ultimately, the grievance was dismissed. App. 353, l. 11 – p. 357, l. 14; App. 359, l. 7-13; App. 363, l. 12 – p. 364, l. 5.

Note that the issue of petitioner’s displeasure was addressed at trial. Prior to trial, counsel apprised the court of petitioner’s complaints regarding his representation, but rather than move to be relieved, he simply went on to state that PCR would serve as the remedy petitioner needed and continued to represent petitioner at trial. App. 114, l. 8 – p. 116, l. 19. Also, midway through the trial, petitioner entered a request before the trial judge to remove counsel and allow him to retain another attorney because he was “being misrepresented by counsel and [knew] it’s (sic) not in [his] best interests to proceed at this time.” Petitioner added that “there’s a conflict of interests because I wrote the Bar Association on [trial counsel] and I think he’s (counsel’s) kind of mad at me for that.” App. 227, l. 13 – p. 231, l. 21; App. 358, l. 3 – p. 259, l. 13. The court advised that this appointed counsel would remain his trial attorney. App. 231, l. 19-25.

Trial counsel testified during the PCR hearing and stated that petitioner complained at trial and with the Bar regarding extreme displeasure with his representation, but he did not move to be relieved. App. 392, l. 7 – p. 394, l. 17. Counsel admitted that he did not interview and call witnesses Thomas Nix, Ikeetha Brown and Steve Smith, and could not recall if he viewed the videotape of the police stop in the case. App. 394, l. 18 – p. 397, l. 23. Counsel admitted that had

these defense witnesses been called, their testimony might have reduced the credibility of the police officers' testimony in the case. App. 397, l. 4 – p. 398, l. 1.

The PCR judge ruled that petitioner failed to prove that trial counsel erred in not contacting and calling the witnesses in question and in failing to move to relieve himself as counsel in the case. App. 426 – 427.

When a grievance has been filed, the relationship between the attorney and client has usually deteriorated to such a point that the attorney will find it necessary to withdraw from further representation, and the attorney who seeks to withdraw from representation due to the grievance filed may state that a grievance has been filed in support of his request for removal. In Re: Anonymous Member of the Bar, 298 S.C. 239, 379 S.E.2d 723 (1989). See Torrence v. Ozmint, 2008 WL 6286004 (March 5, 2008), where the Court upheld trial counsel's motion to be relieved as counsel where a grievance was filed by the client against him. Here, petitioner filed a grievance because counsel appeared to be uninterested in preparing a defense in the case.

Several witnesses would have enhanced petitioner's defense at trial. For example, had Thomas Nix, who testified at the PCR hearing and admitted that the vehicle belonged to him<sup>1</sup>, been called to testify at trial, then the jury would have known that the vehicle stopped on that date belonged to Nix rather than petitioner. Then, counsel could have argued that petitioner had neither actual nor constructive possession of the drugs and was merely present at the crime scene. See State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009), where the Court held that the defendant was merely present at the crime scene and had no knowledge of drug activity in the case.

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<sup>1</sup> App. 386, l. 22 – p. 388, l. 24

Also, had girlfriend Ikeetha Brown, who testified at the PCR hearing that petitioner was not nervous during his detention<sup>2</sup>, been called to testify at trial, she would have refuted Officer McBee's testimony that petitioner seemed nervous during his detention. This would have weakened the state's argument for a probable cause justification of the stop and search that followed. One's nervousness cannot be considered alone in a probable cause analysis on a fourth amendment action. Illinois v. Wardlaw, 528 U.S. 119 (2000). Also, Steve Smith would have added that the scenario Officer McBee summarized regarding petitioner's attempt to flee was not an accurate account of what happened at the scene.

Clearly, trial counsel failed to conduct proper investigations into petitioner's case and as a result, an inadequate defense was presented on his behalf at trial. Hence, petitioner's grievance regarding counsel's ineffectiveness, although dismissed, contained merit, and therefore, counsel erred in failing to file a motion to be relieved as counsel as a result. Undoubtedly, counsel's representation in both aspects (failure to investigate and present a defense and his failure to move to be relieved) constituted deficient legal representation in the case. This violated petitioner's right to effective assistance of counsel guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984). But for counsel's deficient representation, the outcome of petitioner's trial would have been different. Trial counsel erred in not filing a petition to be relieved as counsel in the case.

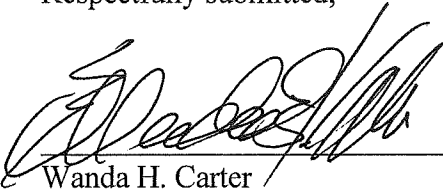
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<sup>2</sup> App. 374, l. 22 – p. 378, l. 5

CONCLUSION

Based on the foregoing argument, petitioner's petition should be granted in order to allow full briefing on the issue.

Respectfully submitted,

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

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of March, 2011.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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DEBARIO MARSHATT SIMPSON,

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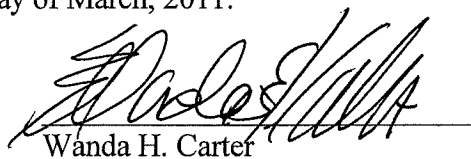
RESPONDENT

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CERTIFICATE OF SERVICE

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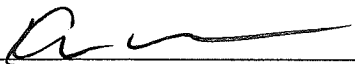
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of March, 2011.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day  
of March, 2011.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.