

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

MAY 14 2015

**S.C. Supreme Court**

LENSON CLYBURN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-197712

PETITION FOR APPELLATE REVIEW  
DESPITE PETITIONER'S DEATH PER  
THE MOOTNESS EXCEPTION

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for PCR appellate review of this appeal despite petitioner's death because the issues in this case are not moot, but yet capable of repetition yet evading review. In support of this motion, counsel would submit the following information.

Petitioner pled guilty to possession of marijuana with intent to distribute and possession of crack cocaine with intent to distribute during the November 2007 term of the Chesterfield County General Sessions Court before Judge Edward B. Cottingham. Petitioner was sentenced to two seven-year concurrent sentences, suspended upon successful completion of the drug court program. App. 1-15. Patricia Rivers was listed as counsel of record for petitioner at the guilty plea proceeding and Assistant Solicitor Daniel Jones appeared on behalf of the state.

On August 6, 2009, petitioner appeared before Judge Edwin M. Davis at the Chesterfield County Courthouse for a drug court termination hearing. At that time, his guilty plea probation sentence was revoked and his original two concurrent seven-year guilty plea sentences were imposed. App. 17-20. Petitioner's attempt to appeal the drug court termination proceeding failed, and the appeal was dismissed. Assistant Solicitor Adam Ford appeared on behalf of the state, but petitioner was not represented by counsel at the drug court termination hearing proceeding.

On March 29, 2010, petitioner filed a post-conviction relief application with the Chesterfield County Office of the Clerk of Court. App. 22-27. The respondent filed a return and partial motion to dismiss dated May 14, 2010, conceding that an evidentiary hearing could be held in reference to the drug court termination issues, but contending that the PCR action referencing petitioner's guilty pleas should be dismissed as untimely filed. App. 28-32.

A PCR hearing was convened on June 9, 2011, at the Chesterfield County Courthouse before Judge J. Michael Baxley, who ruled that the PCR hearing issues to be addressed would include the drug court termination issues and whether petitioner was denied his right to a direct appeal of his guilty plea proceeding. Judge Baxley granted the state's motion to bar the remaining guilty plea proceeding issues from being presented at the PCR hearing. App. 33-94. Petitioner was present at the PCR hearing and represented by Melissa Gay, and Assistant Attorney General Karen C. Ratigan appeared on behalf of the state.

On July 15, 2011, Judge Baxley issued an order of dismissal ruling that no constitutional violations were found in connection with petitioner's drug court termination case and that petitioner was not denied the right to appeal his guilty plea proceeding. App. 96-104. Judge Baxley's order of dismissal in the case was appealed by petitioner.

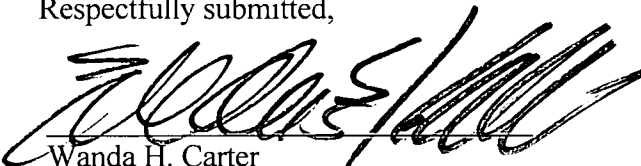
On appeal, a petition for writ of certiorari was filed on petitioner's behalf on March 26, 2012. The respondent filed a return on August 9, 2012. On July 11, 2014, this Court granted petitioner's petition for writ of certiorari and a brief of petitioner was filed on August 11, 2014. On February 4, 2015, this Court ordered the parties to brief an additional issue on the question of subject matter jurisdiction in the case. An amended brief of petitioner was filed on March 4, 2015.

It has recently come to the undersigned counsel's attention during the week of April 6, 2015, that petitioner Lenson Clyburn died on August 5, 2014. Petitioner's death certificate is attached. However, this Court has granted petitioner's petition for writ of certiorari and requested additional briefing on a jurisdictional issue regarding whether a probate court has subject matter jurisdiction over drug court matters. Also, it appears that petitioner appeared in drug court sans the assistance of counsel, and that his drug court pleas were conditional pleas, which are prohibited, because he was required to relinquish the right to appeal his drug court proceeding in exchange for reaping the benefits of a drug court adjudication.

Apparently, the inference seems to be that these constitutional violations listed in the above paragraph are routinely occurring in drug court proceedings. Therefore, since these issues appear to be ongoing, then the same would qualify as exceptions to the mootness doctrine; and thus petitioner's questions presented in his PCR appeal remain alive and are capable of repetition yet evading review. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911); Sosna v. Iowa, 419 U.S. 393 (1975). Powell v. McCormick, 395 U.S. 486 (1969).

WHEREFORE, counsel for petitioner would request that this Court not dismiss this appeal, but rather continue its appellate review in the case despite the fact that petitioner is deceased since as the issues on appeal are not moot.

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

This 14th day of May, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Chesterfield County  
J. Michael Baxley, Circuit Court Judge

S.C. Supreme Court

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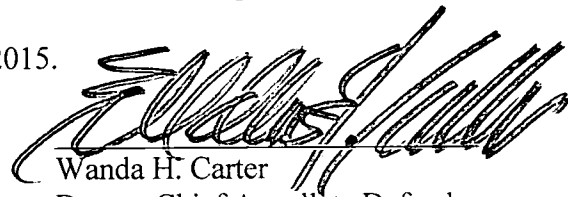
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STATE OF SOUTH CAROLINA,

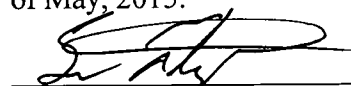
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Appellate Review Despite Petitioner's Death Per The Mootness Exception in the above-entitled case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 14th day of May, 2015.

  
Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day  
of May, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.