



# The Supreme Court of South Carolina

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April 4, 2012

Appellate Defender Kathrine H. Hudgins  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: McHam, Gregory v. The State

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) **bound** copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before May 4, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

CLERK

DES/jj

cc: Assistant Attorney General Suzanne H. White

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,


Respondent.


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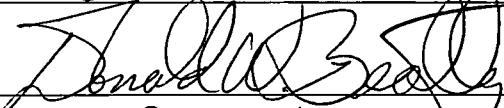
## ORDER

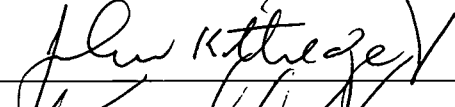
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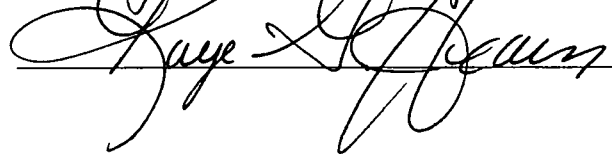
This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

  
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c.j.

  
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Columbia, South Carolina

April 4, 2012

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

DEC - 8 2010

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Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge  
\_\_\_\_\_

S.C. Supreme Court

GREGORY MCHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective, based on the erroneous assumption that the Court of Appeals ruled upon an unpreserved search issue in the direct appeal review pursuant to Anders v. California, 386 U.S. 738 (1967), for failing to preserve for appellate review the admission of drug evidence seized as the result of an unlawful search when counsel moved pre-trial to suppress the drug evidence but then failed to object during trial when the drugs were introduced in evidence?

## STATEMENT

In August of 2002, the Spartanburg County Grand Jury indicted McHam for possession with intent to distribute crack cocaine and trafficking cocaine, indictments #2002-GS-42-4169, 4170. On September 10, 2003, McHam proceeded to jury trial before the Honorable J. Derham Cole. The jury found McHam guilty of trafficking in cocaine and the lesser included offense of possession of crack cocaine. Judge Cole sentenced McHam to 25 years for trafficking and a concurrent 10 years for the possession charge. A timely notice of intent to appeal was filed. Appellant counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. McHam, 2005-UP-460 (S.C.Ct.App. filed July 26, 2005). On November 14, 2006, the South Carolina Supreme Court dismissed McHam's petition for writ of certiorari.

On January 26, 2007, McHam filed an application for post conviction relief. The State filed a return on August 6, 2008. On April 8, 2009, an evidentiary hearing was held before the Honorable Roger L. Couch. In a written order filed March 24, 2010, Judge Couch denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 13, 2010. this petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find counsel ineffective, based on the erroneous assumption that the Court of Appeals ruled on the merits of an unpreserved search issue in the direct appeal review pursuant to Anders v. California, 386 U.S. 738 (1967), for failing to preserve for appellate review the admission of drug evidence seized as the result of an unlawful search when counsel moved pre-trial to suppress the drug evidence but then failed to object during trial when the drugs were introduced in evidence.

Appellant and co-defendant Kobe Carter were stopped by the South Carolina Highway Patrol at a vehicle check point. Appellant was driving and Carter was seated in the front passenger seat. Officers testified that they found 124 .92 grams of cocaine underneath the front seat and 4.83 grams of crack cocaine between the passenger seat and the door. (App. p. 126, lines 23-25; p. 131, lines 3-4; p. 290, line 21 – p. 291, line 1). The officers found over \$5370 on appellant. (App. p. 138, lines 23-24). They found marijuana and \$242 on Carter. (App p. 130, lines 20-24).

Appellant and Carter challenged the validity of the search and moved to suppress the drug evidence used against them at trial. Carter's attorney submitted a written brief in support of his motion to suppress the evidence, in which appellant joined. (App. p. 8, lines 15-17). The judge held an *in camera* hearing on the motion. (App. pp. 9-88). The judge denied the motion and ruled that the evidence was admissible. (App. p. 86, lines 16-21). The judge erred in admitting the drug evidence discovered as a result of an unlawful search.

During the *in camera* hearing, Officer James Crawford of the South Carolina Highway Patrol testified that he was working a traffic checkpoint in Spartanburg County on May 22, 2002. (App. p. 15, lines 7-12). The purpose of the checkpoint was to "combat aggressive drivers." (App. p. 15, lines 2-5). At 10:50 p.m., a white Ford with mechanical difficulties, driven by appellant, approached the checkpoint. Carter was a passenger and neither was wearing a seat belt. (App. p.

16, line 25 – 17, line 25). Appellant gave the officer his license but could not immediately find his registration and insurance cards. (App p. 5, lines 5-7). The officer testified that Carter and appellant started looking for the card in places that “I wouldn’t normally, you know, expect someone to keep a registration card – underneath the seats and between the seats.” (App p. 18, lines 8-12). He added they were making “a lot of furtive movements.” (App. p. 18, lines 12-13).

The officer stated he then moved to the passenger’s side because he could not see what the passenger was doing and he wanted to make sure they “weren’t accessing a weapon or anything like that.” (App. p. 19, lines 14-22). He then stated that “for [his] safety,” he opened the passenger door to watch them while they were looking for the registration. (App p. 20, lines 4-6). When he opened the door, he saw a baggy of crack on the area between the seat and passenger’s door. (App. p. 20, lines 10-14). He called for assistance, pretended he did not see it and asked the driver to turn off his vehicle. (App. p. 20, lines 15-23).

When the other officer arrived, Officer Crawford “grabbed the crack and put it in my pocket and reached in and shut the car and took the keys out of the ignition.” (App p. 21, lines 3-5). He told Carter he was under arrest. Carter then lunged underneath the seat. The officers thought he was going for a weapon and drew their weapons. They then handcuffed him. (App p. 21, lines 11-20). They got appellant out of the car and searched it, finding the bag of cocaine. The officer testified he found two bags of marijuana and a blunt on Carter and scales in “close proximity” to where they “took him down to the ground.” (App p. 22, lines 3-15). They found over \$5000 on appellant.

The officer testified he planned on ticketing appellant for not wearing a seatbelt and for driving with defective equipment, including bad brakes, bald tires, and faulty steering, even before the drugs became an issue. (App. p. 31, line 13 – p. 32, lines 1- 9).

Carter testified that he initially found the wrong registration but that he found the correct registration in the glove compartment within three minutes. He handed it to the officer through the passenger window and was then taken forcibly out of the car and arrested. (App. pp. 73-75). The owner of the car testified that the driver's side window did not open. (App. pp. 68-70). McHam did not testify.

Counsel for Carter and appellant jointly argued that the search and seizure was invalid, specifically arguing that the police officer had no reason to open the passenger side door. (App. pp. 79-83). They did not challenge the validity of the checkpoint under Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).

The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of an arrest. Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity " 'may be afoot,' " Terry, supra, at 30, 88 S.Ct. 1868). See also U.S. v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 750 (2002).

Temporary "detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." Whren v. United States, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Thus, an automobile stop is "subject to the constitutional imperative

that it not be unreasonable under the circumstances.” *Id.* at 810, 116 S.Ct. 1769. Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se. *Id.*

Once “a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures.” *State v. Williams*, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed2d 331 (1977). The *Mimms* rule applies to passengers as well as the driver. *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L. Ed 2d 41 (1997). In “carrying out the stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation.” *Id.* quoting *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir.1998). “Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime.” *Id.* Therefore, opening the car door was not a reasonable action by the police without an articulable suspicion that crime was afoot.

Pursuant to *Mimms* and *Wilson*, the officers could have asked both McHam and Carter to exit the vehicle. The officers, however, did not have the requisite articulable suspicion to justify opening the car door. The search was unlawful.

The trial judge ruled, “So in this case the fact that the officer opened the door so that he could see better is not an unreasonable search; and therefore any seizure was not violative of any constitutional provision. And so the motion to suppress is denied.” (App. p. 88, lines 1-5). The trial judge erred. During the trial the crack and cocaine were admitted in evidence as State’s

exhibits #8 and #10 (App. pp. 327-335). Counsel, however, did not renew his objection to the admission of the drugs based on the unlawful search.

In the direct appeal, appellate counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The issue raised in the Anders brief was whether the lower court erred in refusing to suppress the evidence that was seized as a result of an unlawful search of the vehicle appellant was driving, which occurred when the officer opened the passenger door without an articulable reason that crime was afoot. The South Carolina Court of Appeals dismissed the appeal writing, “McHam appeals his conviction arguing the trial court erred in refusing to suppress evidence against him because it resulted from an unlawful search of the vehicle he was driving. In addition, McHam filed a pro se brief arguing the trial court erred in denying his motion for a directed verdict on both charges. After a thorough review of the record pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel’s petition to be relieved.” State v. McHam, 2005-UP-460 (S.C.Ct.App. filed July 26, 2005)

During the PCR hearing when asked if he objected to the admission of the drugs based on the unlawful search, trial counsel testified, “Going back through the transcript it doesn’t look like I did object to or at least preserve my objection during the course of the trial.” (App. p. 495, lines 2-4). When asked if he was ineffective in failing to preserve the issue, trial counsel testified, “Kind of puts me on the hot seat on that one, yeah, but if that, if that was the reason that he did not get to argue the most critical, yeah, I’d say so.” (App. p. 495, lines 20-22).

In the order of dismissal the PCR judge wrote, “This Court has reviewed the opinion issued by the Court of Appeals and it appears that the Court of Appeals did review the appeal submitted by

Applicant on this issue and found no merit under the cases of Anders and Williams. The dismissal of the appeal appears to be on the merits rather than for a failure to preserve as suggested by the Applicant. Anders requires a review of the appeal to determine if any issue briefed has merit. In this case, the issue was raised and found to be without merit. Therefore, attorney error, if any, was harmless.” (App. p. 510). The PCR judge erred.

“In most cases, ‘[m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.’” State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) quoting State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). The Court of Appeals would not have reached the issue in regard to the unlawful search because trial counsel failed to renew his objection when the drugs seized pursuant to the illegal search were introduced in evidence. The issue was not preserved for appellate review. A review by the Court pursuant to Anders is not a review of unpreserved errors.

In State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), the Court clarified the Anders procedure stating that when a brief is filed pursuant to Anders, the Court will review the entire record. If no issue of arguable merit is discovered, the appeal will be dismissed and counsel's petition to be relieved will be granted. In the event the Court finds any issues of arguable merit, the parties will be directed to submit new briefs. While not specifically addressed in the Williams case, in order for an issue to be of “arguable merit” it must have been preserved for appellate review. In State v. Lawrence, 349 S.C. 129, 130, 561 S.E.2d 633, 634 (Ct.App. 2002), the Court wrote, “After a thorough review of the record in accordance with Anders v. California and State v. Williams we find the only preserved issue at trial is whether the trial court erred in

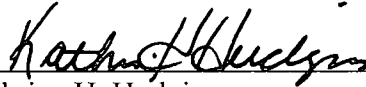
denying Lawrence's motion for a directed verdict on the charge of discharging a firearm into an occupied structure.” In reviewing the record in Lawrence the Court only looked at preserved issues. In the present case, the Court of Appeals only reviewed the record for preserved issues. The Court of Appeals did not reach the merits of the search issue because the issue was not preserved.

Trial counsel was ineffective in failing to preserve the search issue for appellate review. McHam was prejudiced by counsel's deficient performance. As discussed above, the search was unlawful. If counsel had objected to the admission of drugs at trial, the appellate court could have reached the merits of the search issue, corrected the trial court's error in admitting the drugs seized pursuant to an unlawful search and granted a new trial.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2010.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Roger L. Couch, Special Circuit Court Judge

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GREGORY MCHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

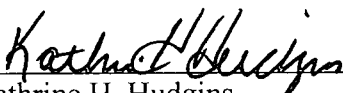
RESPONDENT

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CERTIFICATE OF SERVICE

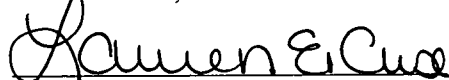
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire this 8th day of December, 2010.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day  
of December, 2010.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA  
In The Supreme Court

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**RECEIVED**

APR 25 2011

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable Roger L. Couch, Circuit Court Judge

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**ORIGINAL**

Case No. 2007-CP-42-0302

Gregory McHam, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

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    The PCR Court properly held that Counsel was not ineffective for failing to object and renew a pretrial suppression motion when the evidence seized was properly admitted at trial and when Petitioner failed to establish the requisite prejudice from Counsel’s alleged deficient performance .....3

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## **QUESTION PRESENTED**

Did the PCR Court properly hold that Counsel was not ineffective for failing to object and renew a pretrial suppression motion when the evidence seized was properly admitted at trial and when Petitioner failed to establish the requisite prejudice from Counsel's alleged deficient performance?

## STATEMENT OF THE CASE

The Petitioner was indicted at the August 2002 term of the Spartanburg County Grand Jury for possession with intent to distribute crack cocaine (2002-GS-42-4169) and trafficking in cocaine (2002-GS-42-4170). Thomas A.M. Boggs, Esquire, represented the Applicant. On September 10, 2003, the Petitioner proceeded to trial and was convicted of trafficking cocaine and the lesser-included offense of possession of crack cocaine. The Honorable J. Derham Cole sentenced the Petitioner to confinement for a period of twenty-five (25) years for trafficking in cocaine and ten (10) years for possession of crack cocaine; all sentences running concurrently.

On September 17, 2003, a timely Notice of Appeal was filed on the Applicant's behalf. Appellate counsel for the Petitioner filed an Initial Anders<sup>1</sup> Brief and Petition to be Relieved as Counsel. The South Carolina Court of Appeals dismissed the appeal on July 26, 2005. On November 14, 2006, the South Carolina Supreme Court dismissed the Applicant's Petition for Writ of Certiorari. The Remittitur was issued on November 16, 2006.

Petitioner then filed an Application for Post-Conviction Relief on January 26, 2007. The Respondent made its Return on or about August 6, 2008. An evidentiary hearing into the matter was convened on April 8, 2009, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by John E. Rogers II, Esquire. Michelle Parsons Kelley, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The Honorable Roger L. Couch signed an Order of Dismissal on March 24, 2010.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

- I. The PCR Court properly held that Counsel was not ineffective for failing to object and renew a pretrial suppression motion when the evidence seized was properly admitted at trial and when Petitioner failed to establish the requisite prejudice from Counsel’s alleged deficient performance.**

In this case, Petitioner and his co-defendant, Kobe Carter, were stopped at a vehicle check point. Petitioner was the driver of the vehicle and Mr. Carter was the passenger. Ultimately, 124.92 grams of cocaine was found underneath the driver’s seat, 4.83 grams of crack cocaine was found in between the passenger seat and door, and marijuana was found on Mr. Carter. Officers also found \$5370 on Petitioner and \$242 on Mr. Carter. An additional amount of \$7370 was found in the vehicle, but was not claimed by either Petitioner or Mr. Carter. Petitioner and Mr. Carter challenged the stop and subsequent search as invalid and moved to suppress the drugs and money prior to trial. However, after an in camera hearing before the judge and testimony by the arresting officer and both Petitioner and Mr. Carter, the motion to suppress was denied.

Counsel later objected during trial to the introduction of State’s Exhibit #10 (the 124.92 grams of cocaine), but objected on alternate grounds relating to chain of custody. Counsel’s objection was overruled and the cocaine was admitted into evidence.

Petitioner now asserts that the PCR Court erred in finding that Counsel's failure to renew the pre-trial objection to drug evidence did not result in the requisite prejudice to support Petitioner's claim of ineffective assistance of counsel pursuant to Strickland v. Washington. Specifically, the Petitioner asserts that Counsel's failure to object to drug evidence introduced at trial prevented review on direct appeal of a pretrial motion for suppression of drug evidence.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry,

300 S.C. at 117-18, 386 S.E.2d at 625. Here, Petitioner has failed to meet either prong of the Strickland test and has failed to show that Counsel was ineffective.

At the PCR evidentiary hearing, the Petitioner testified that the major issue at trial was whether or not the stop and subsequent search were illegal. (App. p. 486). The Petitioner also testified that his direct appeal was denied because Counsel failed to preserve the motion to suppress the drugs when he did not contemporaneously object to the introduction of the drugs at trial. (App. p. 486). However, Petitioner acknowledged that the opinion denying his appeal failed to include any language referencing a failure to preserve. (App. p. 490). Counsel testified that he filed motion in limine on Petitioner's behalf to suppress the drugs found in the vehicle and argued the motion before Judge Cole prior to trial. (App. p. 494). After reviewing the record and hearing the testimony presented, the PCR Court found that any attorney error, if any, was harmless because an Anders brief was submitted on Petitioner's behalf. (App. p. 510).

In Anders v. California, the United States Supreme Court announced the procedure an appointed attorney should follow if that attorney believes the client's appeal is frivolous and without merit. 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Supreme Court held the attorney could petition for permission to withdraw from the case, but that the petition for withdrawal must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498. Under Anders, the defendant must be given time to respond and to raise any additional points after his attorney submits the Anders brief. Id. The court then is obligated to conduct a "full examination" of the record to determine whether the appeal is "wholly frivolous." Id. According to Anders, if the reviewing court finds the appeal is frivolous, "it may grant counsel's request to withdraw and

dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498.

The Respondent submits that the PCR Court correctly concluded that the Petitioner failed to meet the second prong of Strickland – that he was prejudiced by trial counsel’s failure to renew his objection to admission of the drug evidence. Strickland, 466 at 689, 104 S.Ct. at 2065. The Petitioner failed to present any testimony or evidence of probative value suggesting there was a reasonable probability he would have prevailed on appeal had counsel renewed the pretrial motion for suppression. Rollison v. State, 346 S.C. 506, 509, 552 S.E.2d 290, 291 (2001).

Furthermore, the Respondent submits that there is probative evidence in the record to support the PCR Court’s finding that the Petitioner failed to meet the prejudice prong of Strickland. See Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997)(stating if there is any probative evidence to support the findings of the post-conviction relief judge, those findings must be upheld on appeal). First, the Petitioner would not have succeeded on appeal because there is probative evidence that establishes the warrantless search was justified, and the drug evidence was in plain view. A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others. State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (2004). In Michigan v. Long, 463 U.S. 1032, 1046 (1983), the Court authorized searches of automobile interiors during traffic stops since all “investigative detentions involving suspects in vehicles are especially fraught with danger to police officers.” Under the plain view doctrine, any object falling within the plain view of a law enforcement officer who is lawfully in a position to view the object is subject to lawful seizure. State v. Abdullah, 357 S.C. at 344.

Secondly, upon discovery of the drugs in plain view, the officer had probable cause to arrest the Petitioner and passenger. Where cash and drugs are found in a car during a routine traffic stop, probable cause exists to arrest all occupants of the vehicle, including passengers. Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795 (2003). Thirdly, the officer had authority to conduct a warrantless search of the automobile after the bag of drugs was observed because the drugs were in plain view, and the search was incident to a lawful arrest. New York v. Belton, 453 U.S. 454 (1981). Where probable cause to conduct a warrantless search exists, the police may search the entire vehicle to find the objects for which the probable cause exists. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982).

At the pre-trial hearing and during trial, Officer Crawford testified that during the evening hours law enforcement officers, including himself, set up traffic safety checkpoints in order to combat aggressive drivers. (App. p. 15; p. 118-9). Crawford testified that he stopped all cars at the checkpoint and required each driver to produce his or her driver's license, registration, and proof of insurance. (App. p. 16; p. 121). The officer testified that he stopped the Petitioner and the passenger at approximately 10:50 p.m., and he asked Petitioner to produce his license, registration, and insurance card. (App. p. 16-17; p. 122). The officer stated that both occupants of the car were looking all over the car and making many movements inconsistent with searching for the car's registration. (App. p. 18; p. 125). The officer could not see the passenger very well so he moved around the car to make sure the passenger was not accessing weapons. (App. p. 19; p. 126). The officer testified that he could not see the passenger's hands because it was dark, so he opened the door for his own safety. (App. p. 19-20; p. 23; p. 126). After he opened the door, the officer saw a bag of crack. (App. p. 20; p. 126). At that point, the officer called for backup, and once back up arrived, he arrested the passenger (App. p. 20-21; p. 127-8). Then, incident to

a lawful arrest, the officers searched both the vehicle and both occupants of the vehicle, finding additional drugs and drug related evidence. (App. p. 21-22; p. 130-132).

Contrary to the Petitioner's claims, the Respondent submits that the officer acted within his scope of authority when he opened the passenger side door and observed the bag of crack in plain view. Also, the Respondent submits that after the officer saw the drugs, he then had the authority to arrest the passenger and search the automobile without a warrant.

Here, the initial stop was at a safety checkpoint and was clearly lawful. See Delaware v. Prouse, 440 U.S. 648, 663 (1979)(upholding traffic safety checkpoints). The only reason the stop was prolonged was because Petitioner could not produce his registration. The suspicious movements of the occupants gave the officer reasonable initial concern for his safety. The officer was within his power to open the car door to better observe the occupants and to protect himself. Michigan v. Long, 463 U.S. 1032, 1046 (1983); State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (2004). The discovery of drugs was inadvertent and the incriminating nature of the drugs was immediately apparent to the officer. The officer then had authority to arrest the Petitioner and specifically the passenger when he saw the drugs in plain view. Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795 (2003). Any drugs found after the arrest of the passenger or Petitioner would have also been admissible as incident to a lawful arrest. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982). Thus, the record before this court reveals that the drug evidence was properly admitted, and the Petitioner's claim of error on appeal would have been unsuccessful. Therefore, the post-conviction relief judge's order finding that the Petitioner was not prejudiced by Counsel's failure to renew his objection to preserve the issue for appellate review is supported by the record.

Respondent submits that Petitioner has failed to meet his burden of proof as to this argument.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

SUZANNE H. WHITE  
Assistant Attorney General

By:   
ATTORNEYS FOR THE RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

April 25, 2011.

STATE OF SOUTH CAROLINA  
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2007-CP-42-0302

**RECEIVED**

APR 25 2011

S.C. Supreme Court

GREGORY McHAM,

Petitioner,

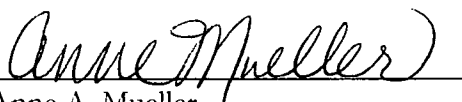
v.

STATE OF SOUTH CAROLINA,

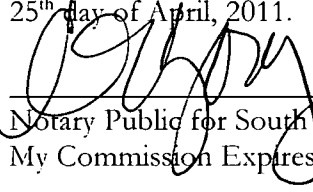
Respondent.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 25<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
Anne A. Mueller  
Legal Assistant for Respondent

SWORN to before me this  
25<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
Notary Public for South Carolina. (L.S.)  
My Commission Expires 10/28/2014



ALAN WILSON  
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737  
PCR FACSIMILE: 803.734.4113

April 25, 2011

*Via Hand Delivery*

Honorable Daniel E. Shearouse  
Clerk of the Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**RECEIVED**

APR 25 2011

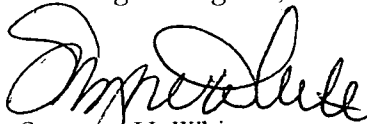
S.C. Supreme Court

**RE: Gregory McHam v. State of South Carolina  
2007-CP-42-0302**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

  
Suzanne H. White  
Assistant Attorney General

SHW/aam  
Enclosures

cc: Kathrine H. Hudgins, Esquire (w/enclosure)

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

---

## ORDER

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For good cause shown, the request for an extension until April 25, 2011 to serve and file the Return to the Petition for Writ of Certiorari in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

March 28, 2011

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White



ALAN WILSON  
ATTORNEY GENERAL

March 25, 2011

RECEIVED

MAR 25 2011

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

3

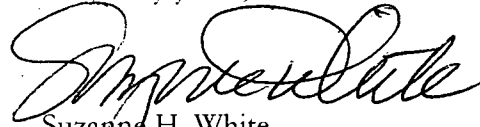
S.C. Supreme Court

RE: **Gregory McHam v. State of South Carolina**  
**2007-CP-42-0302**

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed today. However, this is to respectfully request a 30-day extension to serve and file this Return. This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and is for good cause.

Very truly yours,

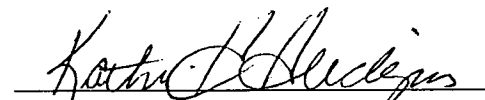
  
Suzanne H. White  
Assistant Attorney General

SHW/aam

*In compliance with:*

**In Re: Extensions in Criminal and Post-Conviction Relief Cases, (S.C. Sup. Ct. order dated March 18, 2009) (Davis Adv. Sh. No. 13 at 1).**

  
SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

  
KATHRINE H. HUDGINS  
Attorney for Petitioner

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

---

## ORDER

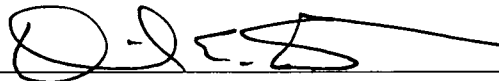
---

For good cause shown, the request for an extension until March 25, 2011 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

February 24, 2011

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White



ALAN WILSON  
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737  
PCR FACSIMILE: 803.734.4113

February 23, 2011

**RECEIVED**

FEB 23 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: Gregory McHam v. State of South Carolina  
2007-CP-42-0302**


(2)

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension in which to serve and file this Return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and made for good cause.

Yours very truly,

  
Suzanne H. White  
Assistant Attorney General

SHW/aam

cc: Kathrine H. Hudgins, Esquire

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

---

## ORDER

---

The request for an extension until February 23, 2011 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

January 25, 2011

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White



ALAN WILSON  
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737  
PCR FACSIMILE: 803.734.4113

January 24, 2011

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

RECEIVED

JAN 24 2011

S.C. Supreme Court

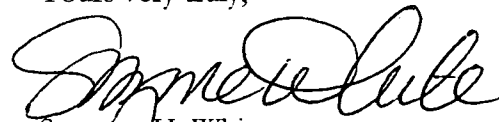
RE: **Gregory McHam v. State of South Carolina**  
**2007-CP-42-0302**

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension in which to serve and file this Return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

Yours very truly,



Suzanne H. White  
Assistant Attorney General

SHW/aam

cc: Kathrine H. Hudgins, Esquire

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

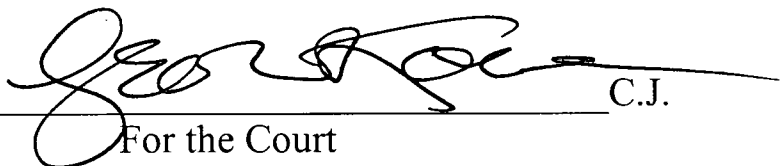
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## ORDER

---

Petitioner seeks an extension until December 8, 2010 to serve and file the Petition for Writ of Certiorari and Appendix, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extensions will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

  
\_\_\_\_\_  
C.J.  
For the Court

Columbia, South Carolina

December 3, 2010

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

 ORIGINAL

Appeal from Spartanburg County  
Roger L. Couch, Special Circuit Court Judge

---

**RECEIVED**

DEC - 1 2010

GREGORY MCHAM,

PETITIONER,

**S.C. Supreme Court**

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI  
AND ACCOMPANYING APPENDIX

---

(5)

Counsel for Gregory McHam, petitions the Court for a **final week extension, until December 8, 2010**, in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today.
2. Counsel for Mr. McHam respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the petition for writ of certiorari and accompanying appendix in Herbert Frazier v. State on November 1, 2010. Counsel filed the initial brief of appellant and designation of matter in State v. Larry Brayboy on November 3, 2010. Counsel filed the petitions for writ of certiorari and accompanying appendices in Troy Wright v. State, James Bowers v. State, Frederick Reaves v. State, and John Hammett v. State on November 8, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Davorious Mack v. State on November 10, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Tony Yarborough v. State on November 17, 2010. Counsel filed the initial brief of appellant and designation of matter

in State v. Adams on November 22, 2010. Counsel filed the brief of petitioner in Jamey Reid v. State on November 23, 2010. On November 29 counsel filed the petitions for writ of certiorari and accompanying appendices in State v. Nathan Patrick and State v. Mark Baker.


4. Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case. As a result, counsel respectfully asks this Court for a **final week extension, until December 8, 2010** in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

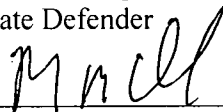
5. As indicated by signature below, Suzanne White, of the South Carolina Attorney General's Office, does not oppose this request.

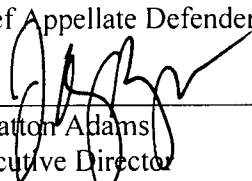
6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a **final week extension, until December 8, 2010** in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

Respectfully submitted,

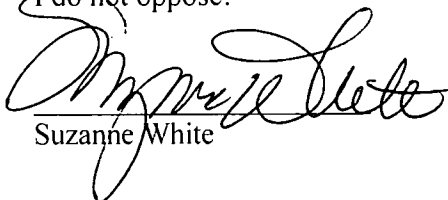
  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

  
\_\_\_\_\_  
T. Patton Adams  
Executive Director  
J. Hugh Ryan, III  
General Counsel

December 1, 2010

I do not oppose:

  
\_\_\_\_\_  
Suzanne White

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

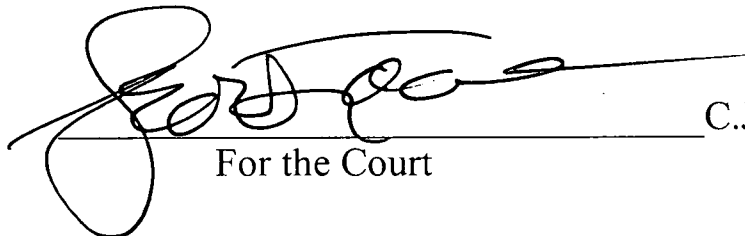
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## ORDER

---

Petitioner seeks an extension until December 1, 2010 to serve and file the Petition for Writ of Certiorari and Appendix, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extensions will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

  
\_\_\_\_\_  
C.J.  
For the Court

Columbia, South Carolina

November 3, 2010

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

 ORIGINAL

Appeal from Spartanburg County

**RECEIVED**

NOV - 1 2010

**S.C. Supreme Court**

Roger L. Couch, Special Circuit Court Judge

---

GREGORY MCHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI  
AND ACCOMPANYING APPENDIX

---

(4)

Counsel for Gregory McHam, petitions the Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today. The Court has granted counsel three previous extensions.
2. Counsel for Mr. McHam respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the petitions for writ of certiorari and accompanying appendices in William Harden v. State and Eric Rich v. State on October 1, 2010. Counsel filed the petitions for

writ of certiorari and accompanying appendices in Michael Davison v. State and Trayvon McNair v. State and the initial brief of appellant and designation of matter in State v. Wendell Williams on October 7, 2010. Counsel filed the petitions for writ of certiorari and accompanying appendices in Ronald Black v. State and Charles Richey v. State on October 13, 2010. Counsel filed the brief of petitioner in Joey Johnson v. State on October 15, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Wesley Brown v. State on October 18, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Talvin Johnson v. State and the initial brief of appellant and designation of matter in State v. Mike Salley on October 22, 2010. Counsel filed the petition for rehearing in State v. Steven Barnes on October 26, 2010. The petitions for writ of certiorari and accompanying appendices were filed in State v. Mack Green, State v. George Senior, and Heyward Johnson v. State on October 27, 2010. On October 28, 2010, counsel filed the initial brief of appellant and designation of matter in State v. Marco Clark. Counsel filed the initial brief of appellant and designation of matter in State v. Ronnie Blackmon on October 29, 2010.

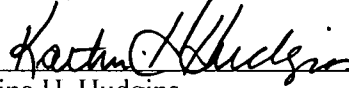
4. Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case. As a result, counsel respectfully asks this Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

5. As indicated by signature below, Matthew J. Freidman, of the South Carolina Attorney General's Office, does not oppose this request.

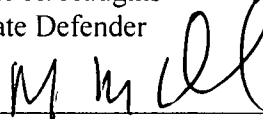
6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

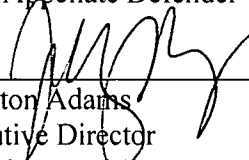
Respectfully submitted,



Kathrine H. Hudgins  
Appellate Defender

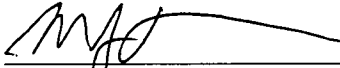


Robert M. Dudek  
Chief Appellate Defender



T. Patton Adams  
Executive Director  
J. Hugh Ryan, III  
General Counsel

November 1, 2010  
I do not oppose:



Matthew J. Freidman

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

---

## ORDER

---

For good cause shown, the request for an extension until November 1, 2010 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

October 1, 2010

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Spartanburg County  
Roger L. Couch, Special Circuit Court Judge

---

ORIGINAL

RECEIVED

OCT - 1 2010

GREGORY MCHAM,

PETITIONER, S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI  
AND ACCOMPANYING APPENDIX

---

(3)

Counsel for Gregory McHam petitions the Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today. The Court has granted counsel two previous extensions.
2. Counsel for Mr. McHam respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the initial brief of appellant and designation of matter in State v. Charles Whetstone on July 1, 2010. Counsel filed the initial briefs of appellant and designations of matter in State v. James Thompson and State v. Phillip Turner on July 14, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Joseph Selig v. State on July 19, 2010. The initial brief of appellant and designation of matter in State v. Peter McKee were filed on July 21, 2010. Counsel filed the initial brief of appellant and designation of matter in State v. Louis Gainey on July 30, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Leonard Scruggs on August 2, 2010. Counsel filed the petition for writ of certiorari and

accompanying appendix in Kevin Wiggins v. State on August 6, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Samuel Simmons v. State on August 18, 2010. The initial brief of appellant and designation of matter in State v. Christopher Hawks was filed on August 20, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in State v. Eugene Boggans on August 23, 2010. Counsel filed the initial brief of appellant and designation of matter in State v. John Campbell on August 26, 2010.

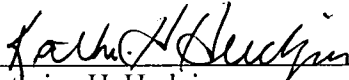
4. Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case. As a result, counsel respectfully asks this Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

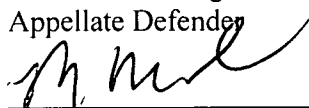
5. As indicated by signature below, Suzanne White, of the South Carolina Attorney General's Office, does not oppose this request.

6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

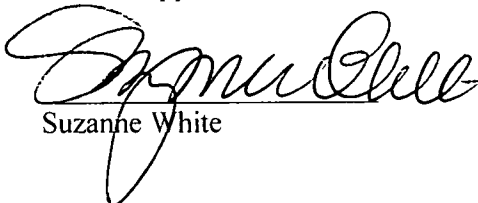
Respectfully submitted,

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

October 1, 2010

I do not oppose:

  
\_\_\_\_\_  
Suzanne White

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

---

## ORDER

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For good cause shown, the request for an extension until October 1, 2010 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

September 2, 2010

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

ORIGINAL  
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SEP - 1 2010  
S.C. SUPREME COURT

GREGORY MCHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI  
AND ACCOMPANYING APPENDIX

(2)

Counsel for Gregory McHam petitions the Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today. The Court has granted counsel one previous extension.
2. Counsel for Mr. McHam respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the petition for writ of certiorari and accompanying appendix in Leonard Scruggs on August 2, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Kevin Wiggins v. State on August 6, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in Samuel Simmons v. State on August 18, 2010. The initial brief of appellant and designation of matter in State v. Christopher Hawks was filed on August 20, 2010. Counsel filed the petition for writ of certiorari and accompanying appendix in State v.

Eugene Boggans on August 23, 2010. Counsel filed the initial brief of appellant and designation of matter in State v. John Campbell on August 26, 2010.

4. Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case. As a result, counsel respectfully asks this Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

5. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

Respectfully submitted,

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

Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

September 1, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

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GREGORY MCHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

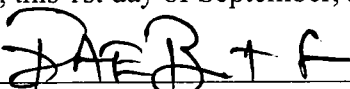
RESPONDENT

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CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon Suzanne White, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 1st day of September, 2010.

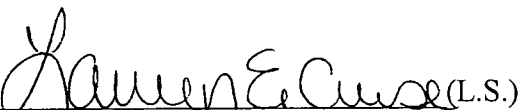


---

Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me  
this 1st day of September, 2010.



Notary Public for South Carolina

My Commission Expires: August 23, 2014 .

# The Supreme Court of South Carolina

Gregory McHam,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2007-CP-42-00302

---

## ORDER

---

The request for an extension until September 1, 2010 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

August 3, 2010

cc: Appellate Defender Kathrine H. Hudgins  
Assistant Attorney General Suzanne H. White



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

C. 1000000

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

August 2, 2010

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

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S.C. SUPREME COURT

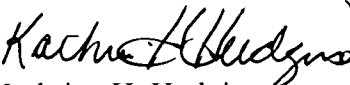
Re: Gregory McHam v. The State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Suzanne White, Esquire, of the Attorney General's Office, of my request.

Sincerely,

  
Kathrine H. Hudgins  
Appellate Defender

KHH/lec

cc: Suzanne White, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

RECEIVED

June 2, 2010

JUN - 3 2010

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

S.C. SUPREME COURT

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Gregory McHam v. State of South Carolina

6/2/2010

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham  
Administrative Coordinator



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

May 6, 2010

RECEIVED

MAY 06 2010

S.C. SUPREME COURT

Ms. Pamela E. Green  
Circuit Court Reporter  
121 Bradford Crossing Drive  
Roebuck, SC 29376

Dear Ms. Green:

Our office has been requested to perfect the appeal arising out of:

Gregory McHam v. State of South Carolina      Case #:      2007-CP-42-00302

County: Spartanburg      Date of Trial: April 8, 2009

Presiding Judge: Roger L. Couch

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

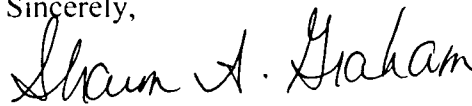
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Pamela E. Green  
May 6, 2010  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Sharon A. Graham". The signature is written in a cursive style with a large initial 'S'.

Sharon A. Graham  
Administrative Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

PCR

**THE WARD LAW FIRM, P.A.**

ATTORNEYS AT LAW  
POST OFFICE BOX 5663  
SPARTANBURG, SOUTH CAROLINA 29304

JAMES W. HUDGENS  
GENE ADAMS  
H. SPENCER KING  
ROBERT E. DAVIS\*  
JASON M. IMHOFF  
JOHN E. ROGERS, II\*

RUFUS M. WARD (1908-1988)  
L. PAUL BARNES (1931-1986)

233 SOUTH PINE STREET  
SPARTANBURG, S.C. 29302

FAX NO. (864) 585-3090  
E-mail: [jrogers@wardfirm.com](mailto:jrogers@wardfirm.com)

\*ALSO MEMBER NORTH CAROLINA BAR

Direct No. 864-591-2366

April 13, 2010

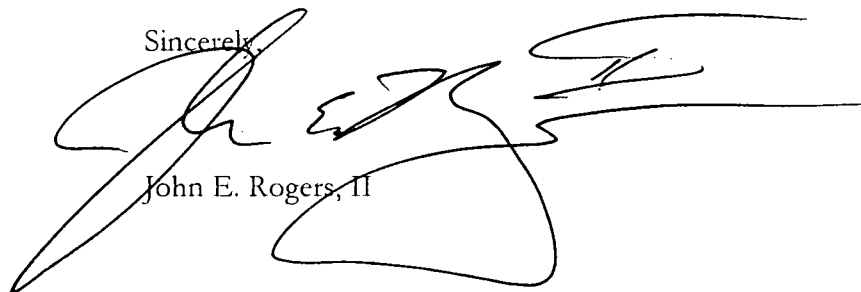
The Honorable Hope Blackley  
Spartanburg County Clerk of Court  
P.O. Box 3483  
Spartanburg, SC 29304

**RE: Gregory McHam v. State of South Carolina  
CA No.: 2007-CP-42-302**

Dear Ms. Blackley:

Enclosed for filing is one (1) original and one (1) copy of a Notice of Appeal and Proof of Service in the above-referenced case. Please return clocked copies of same to me in the enclosed envelope.

Sincerely,



John E. Rogers, II

JER,II:tw  
Enclosures

cc: Jennifer Kinzeler, Esquire  
Joseph Stravitz, Esquire  
Mr. Gregory McHam

**RECEIVED**  
APR 15 2010  
S.C. SUPREME COURT

Exhibit "1"

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No.: 2007-CP-42-302

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S.C. SUPREME COURT

Gregory McHam, 296137, ..... Appellant

v.

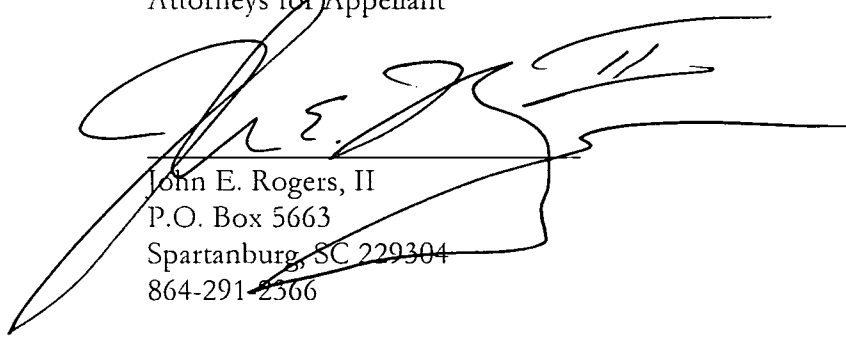
State of South Carolina ..... Respondent

NOTICE OF APPEAL

Gregory McHam appeals the Order of the Honorable Roger L. Couch dated March 24, 2010 which is attached hereto as Exhibit "1". Appellant received written notice of entry of this Order on March 29, 2010.

April ~~13th~~ 2010

THE WARD LAW FIRM, P.A.  
Attorneys for Appellant



John E. Rogers, II  
P.O. Box 5663  
Spartanburg, SC 29304  
864-291-2366

Other Counsel of Record:

Jennifer Kinzeler, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
803-734-3737  
Attorney for Respondent

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Gregory McHam, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CERTIFICATE OF SERVICE

CA NO.: 2007-CP-42-302

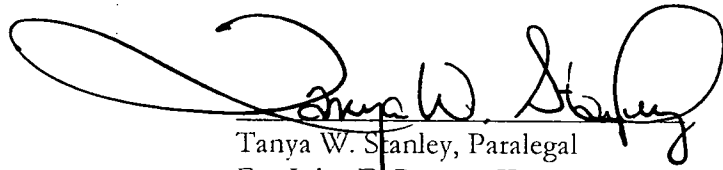
The undersigned hereby certified that Gregory McHam's Notice of Appeal of Judge Couch's Order regarding Gregory McHam's PCR Application, was served upon the following on April 13<sup>th</sup>, 2010 by depositing copies of the same via United States Postal Service, postage affixed to the following addresses:

The Honorable Daniel E. Shearouse  
Clerk of the South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

The Honorable Hope Blackley  
Spartanburg County Clerk of Court  
P.O. Box 3483  
Spartanburg, SC 29304

Joseph Stravitz, Esquire  
South Carolina Department of Indigent Defense  
P.O. Box 11589  
Columbia, SC 29211

Jennifer Kinzeler, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
Tanya W. Stanley, Paralegal  
For John E. Rogers, II

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
Gregory McHam, # 296137, )  
 )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT  
2007-CP-~~A~~2-0302

ORDER OF DISMISSAL

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 26, 2007. An evidentiary hearing into the matter was convened on April 8, 2009, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by John Rogers, Esquire. Michelle J. Parsons of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Thomas A.M. Boggs testified on behalf of the State. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Spartanburg County Clerk of Court, the Applicant's appellate records, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant was indicted at the August 2002 term of the Spartanburg County Grand Jury for possession with intent to distribute crack cocaine (2002-GS-42-4169) and trafficking cocaine (2002-GS-42-4170). Thomas A.M. Boggs, Esquire, represented the Applicant. On September 10, 2003, the Applicant proceeded to trial and was convicted of trafficking cocaine and the lesser-included offense of possession of crack cocaine. The Honorable J. Derham Cole

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*[Handwritten signature]*

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sentenced the Applicant to confinement for a period of twenty-five (25) years for trafficking in cocaine, and ten (10) years for simple possession of crack cocaine; all sentences running concurrently.

On September 17, 2003, a timely Notice of Appeal was filed on the Applicant's behalf. Eleanor Duffy Cleary, Esquire, represented the Applicant on appeal. Appellate counsel for the Applicant filed an Initial Anders<sup>1</sup> Brief and Petition to be Relieved as Counsel. The South Carolina Court of Appeals dismissed the appeal on July 26, 2005. On November 14, 2006, the South Carolina Supreme Court dismissed the Applicant's Petition for Writ of Certiorari. The Remittitur was issued on November 16, 2006.

## II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR

### EVIDENTIARY HEARING

At the PCR evidentiary hearing, the Applicant testified trial counsel was ineffective for failing to prevail on the suppression motion because the search of his vehicle was illegal. The Applicant testified this issue was briefed in an Anders appeal, but appeal was denied because the issue was not preserved. The Applicant testified he was pulled over during a traffic stop and the officer opened the passenger door, ultimately arresting him for drugs. The Applicant testified they were not his drugs. The Applicant admitted the officer found drugs, money, and scales in his car. The Applicant also alleged Counsel failed to object to the trial court characterizing the solicitor's closing as believable. (R. p. 398, l. 21). The Applicant further claimed Counsel was ineffective because he did not object to the Prosecutor's closing argument which concerned the lack of any evidence to substantiate that the case found in the car was gambling proceeds. (See

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

R. pp.394 & 395). The Applicant contended this argument constituted comments by the Prosecution on the Applicant's failure to testify at trial.

Thomas A.M. Boggs, "Counsel," also testified at the PCR evidentiary hearing. Counsel testified he was retained in the case and had known the Applicant for a while prior to his representation in this case. Counsel testified he fully investigated this case and prepared for trial. Counsel testified he research all major issues and also investigated the actual car where the traffic stop took place. Counsel testified the key issue in the case was whether there was probable cause for the officer to open the Applicant's car door. Counsel testified he joined the co-defendant's motion to suppress. Counsel testified the case was essentially won or lost at the suppression hearing. Counsel testified he had a legitimate chance of winning the suppression motion, but the State ultimately prevailed on a plain view argument. Counsel further testified he did not object to the Judge's comment on page 398, in which the trial court overruled Counsel's objection that the solicitor was arguing facts not presented in evidence during her closing. The trial court stated, "Well, she's arguing what her, what she believes the jury may draw from the evidence and tell you about what it is in this case. It's believable, but it is her opinion."

**III. APPLICABLE LAW**

*Ineffective Assistance of Trial Counsel*

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668., The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

**IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings and legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds counsel's testimony to be credible and the Applicant's to be incredible. This Court finds the Applicant's attorney was not ineffective for failing to prevail on the suppression motion. Counsel testified he researched the law, identified the suppression motion

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as a top priority, and gave it his full effort. This Court finds his representation on the suppression motion to exceed the standard of reasonableness. This Court has reviewed the opinion issued by the Court of Appeals and it appears that the Court of Appeals did review the appeal submitted by the Applicant on this issue and found no merit under the cases of Anders and Williams. The dismissal of the appeal appears to be on merits rather than for a failure to preserve as suggested by the Applicant. Anders requires a review of the appeal to determine if any issue briefed has merit. In this case, the issue was raised and found to be without merit. Therefore, attorney error, if any, was harmless. The Applicant has failed to demonstrate his attorney failed to properly argue the motion to suppress. The Applicant has also failed to demonstrate any lack of objection by his attorney led to the dismissal of his appeal. As a result, these allegations are denied and dismissed.

The Applicant also claimed his attorney was ineffective for failing to object to comment by the trial court as to the facts. During closing arguments the Prosecutor made a comment concerning the fact that the cash was in two different rolls and suggested that it might have been because part of the money was profit from a drug deal and part had to go back to a supplier. The Defense attorney objected that there was nothing about that in the record. The trial court, ruling on the objection said, "Well, she's arguing what her, what she believes the jury may draw from the evidence and tell you about what it is in this case. It's believable, but it is her opinion. Overrule the objection." (R. P. 398, ll. 12-22). Counsel did not object to the trial court's statement.

This Court finds that when taken in context, the trial court ruled that the Prosecutor had the right to comment upon what inferences might be reasonably drawn from the evidence in the

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record. The trial court immediately followed up the statement as to believability with the statement of, "but it is her opinion." As a result, when viewed in context this was not a statement by the trial court as to the facts, but rather a statement that lawyers can comment on reasonable and logical inferences that might be drawn from circumstantial evidence, which was in the record. Therefore, it was not ineffective assistance of counsel to fail to object and it is this Court's finding that this issue does not draw the results of the trial into question. This claim is denied and dismissed as well.

In addition, the Applicant claimed Counsel was ineffective because he did not object to the Prosecutor's closing argument, which concerned the lack of any evidence to substantiate that the case found in the car was gambling proceeds. (R. pp. 394 & 395). The Applicant contended this argument constituted comments by the Prosecution on the Applicant's failure to testify at trial.

This Court notes that it appears from the record of the case that the Applicant, after being give his Miranda rights, claimed at the police station that the substantial amount of cash found on his person was gambling proceeds. This was first brought up in the trial by the Defense during the cross examination of Officer Crawford. (R. p. 206 L. 13-16). It appears to this Court that the Defense intended as a trial strategy to use the "gambling proceeds" story to explain the large amount of cash on the Applicant. Later in redirect the State then further went into this claim by asking the Officer if the Applicant produced any evidence at the station to back up is claim that the money was gambling proceeds, such as receipts, ball tickets, etc., which would have shown that he was engaged in gambling. Then on re-cross the Defense went into great detail concerning the fact that gamblers do not ordinarily retain evidence of their illegal activity.

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This Court finds that the Defense employed a logical strategy to claim that the large sum of money found on the applicant was gambling proceeds, however this opened the door to an inquiry as to whether or not there was additional evidence of gambling by the applicant to back up that story. This Court further finds the Prosecutor was merely commenting on the evidence or lack thereof, which was brought into the case to substantiate the gambling story. Such evidence did not necessarily require the defendant to testify since the evidence of gambling could have come from any other source. This Court does not find Counsel ineffective for failing to object to comments as to the lack of evidence as to gambling when the Defense introduced that into the trial by way of the Defendant's own voluntary statement. As a result, this Court denies and dismisses this allegation, as well as any allegation raised at the hearing and not contained herein.

Therefore, this Court finds that the Applicant failed to carry his burden to show that trial counsel's representation fell below the standard of professional reasonableness for a criminal defense attorney in this regard. Strickland v. Washington; Cherry v. State. The Court finds that the Applicant cannot satisfy either requirement of the Strickland test.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.





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**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 24<sup>th</sup> day of March, 2010.

  
HONORABLE ROGER L. COUCH  
Presiding Judge  
Seventh Judicial Circuit

, South Carolina.

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SPARTANBURG COUNTY  
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Gregory McHam PCR

Issues raised by McHam

1. Appeal as to the suppression of drug evidence was dismissed because trial attorney was ineffective for not preserving the issue for appeal by not objecting to its admission during the trial.

**MY RULING:**

- This Court has reviewed the opinion issued by the Court of Appeals and it appears that the Court of Appeals did review the appeal submitted by the Applicant on this issue and found no merit under the cases of Anders and Williams.
- The dismissal of the appeal appears to be on merits rather than for a failure to preserve as suggested by the Applicant. Anders requires a review of the appeal to determine if any issue briefed has merit. In this case the issue was raised and found to be without merit.
- Therefore, attorney error, if any, was harmless.

2. Attorney was ineffective for failing to object to comment by the Court as to the facts. During closing arguments the Prosecutor made a comment concerning the fact that the cash was in two different rolls and suggested that it might have been because part of the money was profit from a drug deal and part had to go back to a supplier. The Defense attorney objected that there was nothing about that in the record. the Court in ruling on the objection said, "Well, she's arguing what her, what she believes the jury may draw from the evidence and tell you about what it is in this case. It's believable, but it is her opinion. Overrule the objection." TR. P. 398, LL 12-22-2014  
No objection was raised to the statement by the Court.

**MY RULING**

- When taken in context, the Court ruled that the Prosecutor had the right to comment upon what inferences might be reasonably drawn from the evidence in the record. The court immediately followed up the statement as to believability with the statement of, "but it is her opinion."
- When viewed in context this was not a statement by the Court as to the facts, but rather a statement that lawyers can comment on reasonable and logical inferences that might be drawn from circumstantial evidence which was in the record.

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COUNTY  
JAN 2 2014

- Therefore, it was not ineffective assistance of counsel to fail to object and it is this court's finding that this issue does not draw the results of the trial into question.

3. Applicant claims that Trial Counsel was ineffective because he did not object to the Prosecutor's closing argument which concerned the lack of any evidence to substantiate that the case found in the car was gambling proceeds. See TR. pp.394 & 395. Applicant contends that this argument constituted comments by the Prosecution on the Defendant's failure to testify at trial.

**MY RULING:**

- This Court notes that it appears from the record of the case that the Applicant, after being give his Miranda rights, claimed at the police station that the substantial amount of cash found on his person was gambling proceeds. This was first brought up in the trial by the Defense during the cross examination of Officer Crawford. TR. p. 206 L. 13-16.
- It appears to this Court that the Defense intended as a trial strategy to use the "gambling proceeds" story to explain the large amount of cash on McHam.
- Later in redirect the State then further went into this claim by asking the Officer if the Applicant produced any evidence at the station to back up is claim that the money was gambling proceeds, such as receipts, ball tickets, etc., which would have shown that he was engaged in gambling.
- Then on re-cross the Defense went into great detail concerning the fact that gamblers do not ordinarily retain evidence of their illegal activity.
- This Court finds that the Defense employed a logical strategy to claim that the large sum of money found on the applicant was gambling proceeds, however this opened the door to an inquiry as to whether or not there was additional evidence of gambling by the applicant to back up that story.
- The Prosecutor was merely commenting on the evidence or lack thereof, which was brought into the case to substantiate the gambling story.
- Such evidence did not necessarily require the defendant to testify since the evidence of gambling could have come from any other source.
- I do not find Defense council ineffective for failing to object to comments as to the lack of evidence as to gambling when the Defense introduced that inot the trial by way of the Defendant's own voluntary statement

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 SPARTANBURG COUNTY  
 2010 MAR 24 PM 2:54

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*Gregory  
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The Honorable Daniel E. Shearouse  
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