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SC SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

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RAHIEM KIRKMAN

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002372

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PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred by finding trial counsel provided effective representation where counsel failed to move for a continuance prior to Petitioner's trial in *absentia*, where counsel was unable to notify Petitioner that his case was up for trial since Petitioner did not want a trial, Petitioner wanted counsel to negotiate a plea deal, and Petitioner was sentenced to twenty-five years' imprisonment and a \$200,000.00 fine?

## STATEMENT OF FACTS

According to Officer Jamie Crawford, on August 22, 2006, he was patrolling I-85 in Anderson County, when he observed a gray Volkswagen Passat following too closely behind a tractor trailer truck. App. 98, l. 15 – App. 101, l. 4. The vehicle was traveling northbound and had a North Carolina license plate. App. 101, ll. 19 – 22. Crawford initiated a traffic stop on the Passat near mile marker nineteen. App. 101, ll. 5 – 7. Petitioner was the driver and sole occupant of the vehicle. App. 102, ll. 12 – 15.

Crawford claimed that when he approached the car and asked for Petitioner's driver's license, Petitioner's hands were shaking and "his bottom lip was quivering, uncontrollably." App. 103, l. 24 – App. 104, l. 3. Crawford then asked Petitioner to sit in the front seat of the patrol car while he checked Petitioner's driver's license. App. 104, l. 25 – App. 105, l. 9.

When Crawford began writing the warning citation to give to Petitioner, he asked Petitioner where he had been. App. 105, ll. 22 – 25. Petitioner told Crawford that he had driven to Atlanta, Georgia, to drop his girlfriend off at school. App. 107, ll. 1 – 8. However, Petitioner could not remember which school. App. 107, ll. 1 – 8. Crawford claimed Petitioner then changed his story, telling Crawford that he had dropped the girlfriend off at her home in Stone Mountain, Georgia. App. 107, ll. 1 – 8.

After questioning Petitioner while sitting in the patrol car, Crawford took his drug dog out of the car and walked it around Petitioner's car to conduct a "free air sniff." App. 108, ll. 2 – 11. The drug dog detected the presence of drugs in Petitioner's car. App. 108, ll. 2 – 11. At that point, dispatch had determined that Petitioner's driver's license "was clear." App. 111, l. 23 – App. 112, l. 7.

Crawford claimed that when he asked Petitioner whether there was a reason why the drug dog detected the presence of drugs in Petitioner's car, Petitioner said the drug dog did not detect anything. App. 111, l. 23 – App. 112, l. 10. Petitioner allegedly told Crawford that he had \$18,000.00 lying on the back seat if Crawford wanted it. App. 112, ll. 16 – 22. Crawford's partner, Deputy Mize, pulled up as Crawford was questioning Petitioner about the drug dog. App. 114, l. 24 – App. 115, l. 5. Crawford asserted that he had the warning citation in his hands to give to Petitioner. App. 114, l. 24 – App. 115, l. 5.

According to Crawford, he informed Petitioner that he and Mize were going to search Petitioner's car and Petitioner "became really agitated." App. 115, ll. 8 – 16. At that point, Petitioner opened the door and "ran straight down 85 towards the exit ramp," where he jumped the fence and ran into the woods. App. 116, ll. 1 – 8. Both officers chased after Petitioner but were unable to catch him. App. 116, ll. 1 – 8.

Officers searched Petitioner's vehicle and discovered over ten thousand grams of cocaine in the trunk. App. 257, ll. 12 – 23. Petitioner was arrested the next day in Anderson County, pursuant to an anonymous tip, and charged with trafficking in more than 400 grams of cocaine. App. 190, l. 15 – App. 193, l. 10.

On September 19, 2006, the Anderson County Grand Jury indicted Petitioner for trafficking in more than 400 grams of cocaine. App. 403. Petitioner's case proceeded to a jury trial before the Honorable Alexander S. Macaulay. App. 1. Dorothy Manigault represented Petitioner. Rame Campbell represented the State. App. 1. Petitioner was not present at trial. App. 3, ll. 16 – 18.

Prior to trial, defense counsel moved to be relieved as counsel. App. 3, l. 19 – App. 4, l. 17. Counsel explained to the court that she had never met Petitioner in person and was retained

over the telephone and by mail. App. 3, l. 22 – App. 4, l. 6. Counsel stated that she had not heard from Petitioner in six months. App. 3, l. 22 – App. 4, l. 6. Counsel also asserted that she contacted Petitioner’s bondsman to inform him of Petitioner’s trial. App. 4, ll. 3 – 6. The bondsman spoke with Petitioner’s mother, who also tried to notify Petitioner of his trial. App. 4, ll. 3 – 6. The trial court denied counsel’s motion to be relieved.

Defense counsel then requested that the court not try Petitioner in his absence. App. 8, ll. 10 – 20. Counsel asked the court to issue a bench warrant instead. App. 8, ll. 10 – 20. Counsel, however, never informed the court that Petitioner did not want a jury trial and wanted to accept responsibility by pleading guilty. App. 8, ll. 10 – 20; App. 377, ll. 21 – 25. Counsel also failed to move for a continuance. App. 8, ll. 10 – 20.

The trial court found that Petitioner “freely, voluntarily, knowingly, and intelligently waived his right to be present at trial” based on Petitioner’s signature on his bond form. App. 9, l. 1 – App. 10, l. 4. The court noted counsel’s objection to the trial in *absentia*. App. 10, ll. 1 – 4.

Petitioner was found guilty and sentenced to twenty-five years’ imprisonment and a fine of \$200,000.00. App. 401. Petitioner appealed his conviction and sentence.

J. Falkner Wilkes represented Petitioner on appeal. On November 9, 2011, the South Carolina Court of Appeals affirmed Petitioner’s sentence in an unpublished opinion. State v. Kirkman, Op. No. 2011-UP-500 (S.C. Ct. App. filed November 9, 2011).

### **PCR Hearing**

On October 12, 2012, Petitioner filed a PCR application. App. 299. The State filed its return on August 1, 2013 requesting an evidentiary hearing. App. 336. On February 20, 2014, a

PCR hearing was held before the Honorable Cordell Maddox, Jr. App. 342. Hugh W. Welborn represented Petitioner. Walt Whitmire represented the State. App. 342.

At the PCR hearing, Petitioner asserted that defense counsel should have moved to have his case continued. App. 359, ll. 23 – 25. Petitioner stated that if counsel had made the motion, they would have had more time to work on his case. App. 360, ll. 1 – 11. Further, counsel could have done more to get in touch with Petitioner about trial, since Petitioner wanted to appear in court. App. 358, l. 24 – App. 359, l. 22.

Defense counsel Manigault admitted that Petitioner never wanted to go to trial. App. 377, ll. 21 – 25. Instead, Petitioner wanted counsel to negotiate a plea offer. App. 377, ll. 21 – 25. Counsel stated that she sent letters to Petitioner’s address to notify him of his trial, but the letters were returned. App. 383, l. 21 – App. 384, l. 4. The telephone number she had on file for Petitioner was also disconnected. App. 383, l. 21 – App. 384, l. 4. Counsel also contacted Petitioner’s bondsman to notify him of Petitioner’s trial. App. 384, ll. 3 – 4.

### **Order of Dismissal**

The PCR court issued an order of dismissal on November 5, 2015. App. 390. The court found that Petitioner “failed to present any evidence that counsel was deficient in failing to request a continuance.” App. 393. The court also found that Petitioner also “failed to show that he was prejudiced by the fact that Counsel did not request a continuance.” App. 394. The court opined that there was “no indication that the trial court would have abused its discretion by denying such a request.” App. 394.

Petitioner appealed the order of dismissal. This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred by finding trial counsel provided effective representation where counsel failed to move for a continuance prior to Petitioner's trial in *absentia*, where counsel was unable to notify Petitioner that his case was up for trial since Petitioner did not want a trial, Petitioner wanted counsel to negotiate a plea deal, and Petitioner was sentenced to twenty-five years' imprisonment and a \$200,000.00 fine.

This Court has held that trial counsel is ineffective for failing to request a continuance when the trial court's denial of the request would prejudice the defendant. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006). Here, trial counsel was aware that Petitioner did not want to go to trial and should have moved for a continuance. Because of counsel's deficient performance, Petitioner is serving a twenty-five year sentence and will pay a \$200,000.00 fine.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing

professional norms.”” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

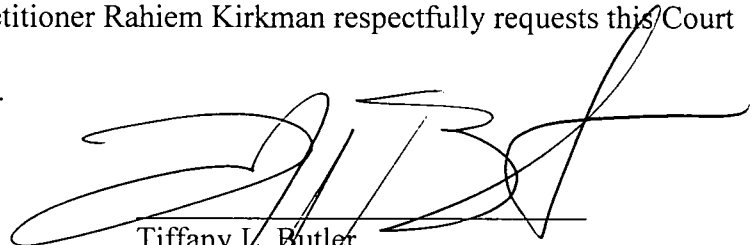
Here, defense counsel was ineffective for failing to move for a continuance of Petitioner’s case. Counsel also abandoned Petitioner by moving to be relieved as counsel.

Although the defendant in Morris, supra, signed the guilty plea sheet prior to leaving the courthouse, defense counsel here was aware that Petitioner did not want a trial. Petitioner wanted counsel to negotiate a plea offer so that Petitioner could plead guilty. Further, Petitioner was facing a maximum sentence of thirty years’ imprisonment and a \$200,000.00 fine as charged. See S.C. Code Ann. §44-53-375 (E)(1)(e). Counsel failed to explain to the trial court that Petitioner wanted to accept responsibility by pleading guilty instead of proceeding to trial.

Defense counsel, at a minimum, should have moved for a continuance and explained to the trial court that Petitioner never wanted a trial. Because counsel failed to move for a continuance, the issue of whether a continuance was warranted was not preserved for appeal. Counsel’s ineffective assistance deprived Petitioner of his day in court and the opportunity to receive a lesser sentence. Instead, Petitioner is serving a twenty-five year sentence and facing a \$200,000.00 fine.

**CONCLUSION**

For the reasons argued above, Petitioner Rahiem Kirkman respectfully requests this Court to grant his petition for writ of certiorari.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

RAHIEM KIRKMAN

PETITIONER,

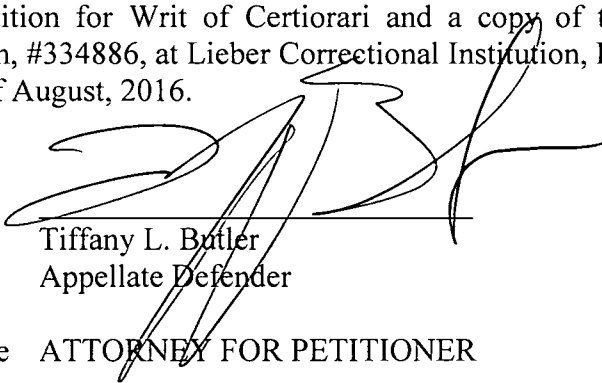
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Rahiem Kirkman, #334886, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of August, 2016.



Tiffany L. Butler  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 17th day of August, 2016.

Christian Ford (L.S)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026