

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ORIGINAL

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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DEVIN JAMAHL SIMS,

V.

STATE OF SOUTH CAROLINA,

RECEIVED  
NOV 28 2018  
PETITIONER  
S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2018-000648

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Taylor D Gilliam  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where plea counsel was ineffective for failing to wait for a ruling on a suppression motion before suggesting that Petitioner plead guilty, where the State's plea offer was not set to expire and where it was reasonably probable that the suppression motion would be granted?

## STATEMENT

Petitioner was indicted for trafficking more than twenty-eight grams of cocaine by a Spartanburg County grand jury on May 29, 2015. App. 201 – 202. On December 16, 2015, following a suppression hearing, Petitioner pleaded guilty to trafficking, second offense, before the Honorable Roger Couch. App. 1; App. 118 ll. 16 – 25. Eddie Hunter served as the assistant solicitor, and Joshua Schultz represented Petitioner.

The facts alleged by the State were as follows: On December 9, 2014, law enforcement officers supposedly smelled marijuana inside a truck with Petitioner as the passenger at an intersection in Spartanburg. App. 125 l. 18 – App. 126 l. 7. According to the assistant solicitor, Petitioner admitted to smoking marijuana earlier that day and consented to a pat down. Id. Law enforcement felt a bulge in Petitioner's pants and located forty grams of cocaine in three different bags. Id.

Judge Couch accepted the plea as freely and voluntarily given and sentenced Petitioner to eighteen years under a negotiated plea deal. App. 115 ll. 11 – 25; App. 127 ll. 1 – 6; App. 133 l. 14 – App. 134 l. 12. Two other drug charges were dismissed as a condition of the plea. App. 131 ll. 2 – 25. Probation was revoked in full and the remainder of Petitioner's sentence was structured to run concurrently with the eighteen years. App. 133 l. 14 – App. 134 l. 12.

On July 25, 2016, Petitioner filed an application for post-conviction relief. App. 136. It contained allegations of ineffective assistance of counsel, including that “counsel failed as an advisor, negotiator, and failed to investigate and prepare for trial.” App. 138. The State filed its Return and Motion for More Definite Statement on May 4, 2017. App. 143 – 146. Counsel for Petitioner filed thirty-one “Amendments to Post Conviction Relief Applications” on May 12, 2017. App. 147 – 151.

An evidentiary hearing before the Honorable G. Thomas Cooper, Jr. took place on November 13, 2017. App. 159. Rodney Richey represented Petitioner, and Valerie Giovanoli appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

At the conclusion of the hearing, Judge Cooper took the matter under advisement. He issued an Order of Dismissal on or about March 26, 2018. App. 190 – 200. He found that Petitioner failed to prove counsel was deficient. App. 194.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where plea counsel was ineffective for failing to wait for a ruling on a suppression motion before suggesting that Petitioner plead guilty, where the State's plea offer was not set to expire and where it was reasonably probable that the suppression motion would be granted.**

### *Relevant facts*

Judge Couch never issued a ruling on Petitioner's motion to suppress; Petitioner pled guilty before a ruling was issued. App. 165 ll. 8 – 12. The only allegation Petitioner proceeded with at the evidentiary hearing was that counsel "should have waited and got a ruling before [Petitioner] pled." App. 166 ll. 5 – 9. Following brief direct examination, Petitioner stated on cross-examination that counsel "scared [him] from continuing" which resulted in the decision to plead guilty. App. 168 l. 12 – App. 169 l. 8. Petitioner indicated he was unaware that he could have waited for a ruling on the suppression hearing. App. 169 l. 23 – App. 170 l. 6.

Counsel testified that he advised Petitioner to plead guilty based on the potential sentencing range of twenty-five to thirty years. App. 173 ll. 10 – 19. Counsel credibly testified that the plea offer of eighteen years was going to be withdrawn had counsel waited for a ruling from the trial judge first. App. 176 ll. 11 – 19. Counsel noted that his "advice was that if we did not accept the 18, then we will proceed to trial; and if the outcome was a guilty verdict of the jury, then he would have potentially received a sentence of anywhere from 25 to 30 years." App. 178 ll. 9 – 21. According to the cocaine trafficking statute, Petitioner was facing between twenty-five and thirty years if the charge was a third offense as the assistant solicitor stated. App. 118 ll. 16 – 25; S.C. Code Ann. § 44-53-370(e)(2)(b). Had the charge been a second

offense, the sentencing range would have been between seven and thirty. Id. However, if the suppression motion was granted, Petitioner would likely have been found not guilty. App. 181 ll. 13 – 20.

Counsel admitted that he was not “running up on an offer deadline” at the time Petitioner pleaded guilty. App. 181 l. 25 – App. 182 l. 22. Counsel conceded that he “could have asked that the offer be extended until the ruling was made.” Id.

In response to questions by the PCR court, Counsel remarked that there was no indication that the state would withdraw the plea offer if Judge Couch denied the motion to suppress. App. 186 l. 14 – App. 187 l. 7. When asked why he did not wait to see how Judge Couch ruled, Counsel did not have any explanation. Id.

Following advice that did not reflect “reasonable professional judgment” in the context of the Fourth Amendment and a search of a hotel room, this Court found counsel to be deficient in Goins v. State, 397 S.C. 568, 726 S.E.2d 1, 2012). In Goins, counsel told the applicant in the suppression hearing “that the law favored the landlord or basically that the proprietor of the motel being able to ... unlock the door and let someone in.” Id. at 574, 726 S.E.2d at 4. This Court found that unqualified statement to be clearly inaccurate considering the search jurisprudence which specifically recognizes a landlord or motel owner “does not enjoy an unfettered right to grant entry into the rented guest rooms of his establishment.” Id. at 574-5, 726 S.E.2d at 4.

Similarly, Counsel in the matter *sub judice* provided ineffective representation by advising Petitioner to plead guilty without awaiting a ruling on the suppression motion. Petitioner, who had not been on trial before, was wholly unfamiliar with the proceedings and

therefore understandable unaware that he could have waited for a ruling. App. 168 l. 15 – App. 170 l. 6.

### *Discussion*

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must first demonstrate that counsel was deficient and then must also show this deficiency resulted in prejudice. Id. To satisfy the first prong, a defendant must show counsel's performance “fell below an objective standard of reasonableness.” Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001).

To satisfy the second prong of the analysis in the context of an allegation that a guilty plea was improvidently accepted, the “ ‘defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.’ ” Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

“The Fourth Amendment to the United States Constitution protects the people’s right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; *cf.* S.C. Const. art. I, § 10.” State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment’s prohibition against unreasonable searches and seizures. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981).

A jury was selected but not yet sworn in Petitioner’s case at the time Counsel moved to invalidate the search and suppress the drug evidence. App. 38 l. 15 – App. 40 l. 1. Four witnesses testified during the *in camera* hearing. Reginald Spurgeon, an officer with the City of

Spartanburg, observed Petitioner get in a truck being driven by Melvin Mitchell. App. 47 l. 21 – App. 49 l. 24. Spurgeon pulled alongside the truck and allegedly smelled marijuana. App. 51 ll. 5 – 24. Spurgeon admitted that there was no criminal activity that he noticed prior to the smell. App. 68 l. 21 – App. 69 l. 1. According to Spurgeon, Petitioner consented to a search. App. 70 l. 24 – App. 71 l. 1. Law enforcement felt a bulge in Petitioner’s groin area which did not “appear to be normal or natural.” App. 82 ll. 2 – 20. Marijuana and cocaine was recovered from bags located on Petitioner. App. 82 l. 21 – App. 83 l. 4.

Following the pre-trial testimony of three law enforcement witnesses, Counsel for Petitioner called Melvin Mitchell to the stand. App. 97. He testified that Petitioner never sold him narcotics. App. 100 l. 25 – App. 101 l. 11.

At the conclusion of the pre-trial hearing, Counsel argued for suppression. App. 109 l. 7 – App. 112 l. 18. The State responded, and Judge Couch stated that he would watch the dash cam video while at lunch. App. 112 l. 20 – App. 114 l. 23. Upon returning from lunch, the court was “informed by counsel that [Petitioner] wishe[d] to change his plea.” App. 114 ll. 20 – 21.

Because “the overwhelming smell of marijuana could not have been in the car ... and thus the officers could not have smelled it that much emanating from the car,” the suppression motion likely was going to be granted. App. 109 ll. 14 – 17. Because no burned marijuana or recently smoked marijuana was located in the truck, the officers’ stop was invalid. There was a strong likelihood that the suppression motion was going to be granted, and Counsel should have awaited a ruling from the judge before suggesting that Petitioner plead guilty.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.



Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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DEVIN JAMAHL SIMS,

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PETITION TO BE RELIEVED AS COUNSEL

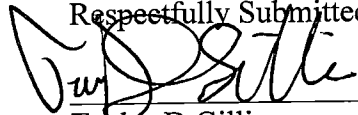
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Counsel for Devin Jamahl Sims states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge G. Thomas Cooper, Jr., which was held on November 13, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Devin Jamahl Sims.

Respectfully Submitted,



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Taylor D Gilliam

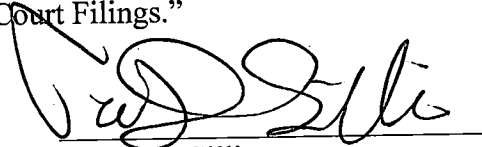
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent  
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ATTORNEY FOR PETITIONER

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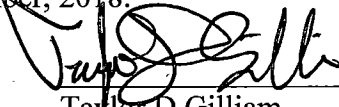
RESPONDENT

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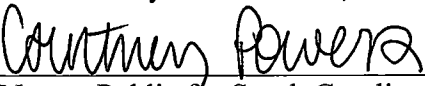
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jordan Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Devin Jamahl Sims, #366510, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of November, 2018.

  
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Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 26th day of November, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027.