

The Supreme Court of South Carolina

Jorge Rodriguez,

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER

This matter was originally before the Court by way of a notice of appeal from an order of dismissal issued by Judge Couch finding, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), that petitioner was entitled to a belated review of the denial of his first application for post-conviction relief (PCR). The order indicated petitioner's first PCR application was denied by written order of Judge Couch filed August 8, 2008. Petitioner provided the Court with a copy of the August 2008 order, which was signed by Judge Couch.

However, the State filed a motion with the Court in which it reported that Judge Early, not Judge Couch, presided over petitioner's first PCR hearing. The State moved the Court to remand the matter to the circuit court so that the order signed by Judge Couch could be vacated and Judge Early could sign the correct order. The State asked that the pending appeal be held in abeyance until this "scrivener's error" could be corrected.

By order dated May 27, 2011, we vacated the order of Judge Couch granting petitioner an *Austin* review of the order issued in the first PCR matter and dismissed the appeal. We also vacated the order of dismissal issued by Judge Couch in the first PCR matter and remanded the matter to Judge Early to take whatever steps were necessary for the issuance of a proper final order, including obtaining a transcript of the original hearing in the matter if he was unable to recollect what occurred at the hearing. Judge Early was given sixty days to issue the order.


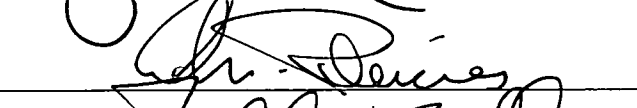
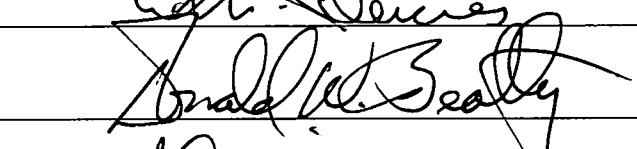
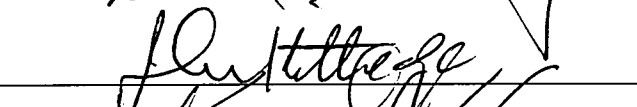
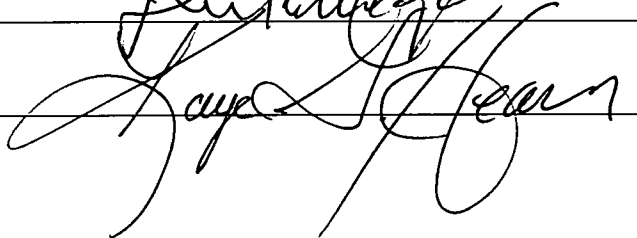
Judge Early issued an order of dismissal dated June 9, 2011, denying and dismissing petitioner's first PCR application. Petitioner filed a notice of appeal, and the Commission on Indigent Defense, Division of Appellate Defense, assumed representation of him in this matter. Wanda Carter has filed a Petition for a Writ of Certiorari and a Petition for a Writ of Certiorari Pursuant to *Austin v. State*. The appendix and supplemental appendix she filed list Judge Couch as the PCR judge and contain the records from the Austin proceeding.

The State has filed a motion to strike Ms. Carter's petition in order to "clarify the matter on appeal and properly reflect that the appeal results from the Order of Dismissal of Judge Early, denying the Petitioner's first post-conviction relief application." The State also submits the cover pages on the appendices should be corrected to properly represent the fact that the appeal is now proceeding from the order of dismissal of Judge Early rather than Judge Couch. Finally, the State moves to supplement the appendix with a copy of the State's motion to remand, a copy of this Court's order remanding the matter to Judge Early, and the order of dismissal issued by Judge Early.

Ms. Carter has filed a return in which she asserts that since the order issued by Judge Early "was not captioned as a final order as required, but was captioned as an order of dismissal," she filed a petition and an *Austin* petition "out of an abundance of caution to preserve the *Austin* issue, which was whether petitioner waived his right to appear at trial, because although Judge Couch's *Austin* order was vacated, there was a second PCR hearing held where the PCR judge ruled orally from the bench granting petitioner an *Austin* review." Ms. Carter submits that "inasmuch as the waiver of the right to appear at trial was addressed in the order in question (although it was not designated as a final order), this issue is . . . still preserved for appellate review." Accordingly, she states she has no objection to the motion to supplement the appendix and to amend the appendix cover page or to the motion to strike the petition and file the *Austin* petition as a petition for a writ of certiorari containing the question of the "non-waiver of petitioner's presence at trial."

We hereby strike the petitions and appendices filed by Ms. Carter. Within ten (10) days of the date of this order, Ms. Carter shall serve and file a

petition and appendix that are relevant to, and accurately reflect the procedural posture of, this case.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

April 18, 2012

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Doyet A. Early III, Circuit Court Judge
2005-CP-42-0449

RECEIVED
MAR 19 2012
S.C. Supreme Court

JORGE A. RODRIGUEZ,
PETITIONER,

v.

STATE OF SOUTH CAROLINA,
RESPONDENT.

**MOTION TO AMEND APPENDIX AND
HOLD TIME LIMITS IN ABEYANCE**

The Respondent hereby respectfully moves this Court to hold Respondent's time to respond to the Petition for Writ of Certiorari in abeyance and moves this Court for the following:

Motion to Supplement Appendix

- 1) Respondent's Motion to Remand, dated April 18, 2011.
- 2) Order of South Carolina Supreme Court, dated May 27, 2011.
- 3) Order of Dismissal signed by Judge Early, dated June 9, 2011.

These are part of the lower court record and are necessary for purposes of clarification. This Court requires that a Petition for a Writ of Certiorari include the *entire* lower court record. Rule

227(f)(1), SCACR (*emphasis added*). The Respondent submits that the above items are relevant to the instant proceeding and were presented to the lower court and filed with the clerk of court. These documents are material to this Court's review as to whether the lower court's decision is supported by probative evidence, as well as for clarification of the procedural history of this matter.

Motion to Amend Appendix Cover Pages

- 1) Correct title block from "Roger L. Couch, Special Circuit Court Judge," to "Doyet A. Early, III, Circuit Court Judge," on front page of Appendix Volumes I & II and Supplemental Appendix.

Respondent submits that the cover pages of the Appendices should be corrected to properly represent the fact that the appeal is now proceeding from the signed Order of Dismissal of Judge Early, rather than Judge Couch, as indicated from the May 27, 2011, Order from this Court.

Motion to Clarify and Motion to Strike Petitioner's Brief

Furthermore, Respondent moves that in order to clarify the matter on appeal and properly reflect that the appeal results from the Order of Dismissal of Judge Early, denying the Petitioner's first post-conviction relief application, Respondent submits that Petitioner's Petition for Writ of Certiorari addressing the granting of the belated appeal by Judge Couch should be stricken, and the language "Pursuant to Austin v. State," should be stricken from the second Petition.

The movant also requests that the time limits for response to the Petition for Writ of Certiorari be held in abeyance until this Court's ruling on the Motion to Supplement Appendix and Motion to Clarify and Strike. The movant further requests that this Court direct the Office of Appellate Defense to supplement the Appendix to include the entire lower court record with the materials listed above or in the alternative requests that the undersigned create and file the Second Supplemental Appendix and correct the Appendices cover pages.

Respectfully submitted,

ALAN WILSON
Attorney General

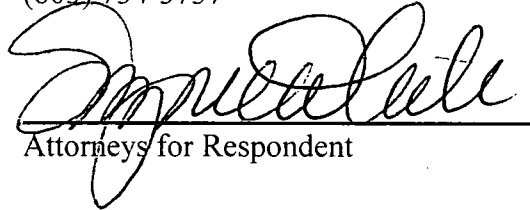
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By:



Attorneys for Respondent

March 19, 2012.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
In The Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 2005-CP-42-0449

JORGE A. RODRIGUEZ,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Motion to Amend Appendix and Hold Time Limits in Abeyance was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Wanda H. Carter, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211.



Anne A. Mueller
Legal Assistant for Petitioner

SWORN to before me this
19th day of March, 2012.



(L.S.)

Notary Public for South Carolina

My Commission Expires: My Commission Expires

January 30, 2013

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Appeal from Spartanburg County

MAR 22 2012

Doyet A. Early, III, Special Circuit Court Judge

S.C. Supreme Court

JORGE A. RODRIGUEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO MOTION TO AMEND APPENDIX
AND HOLD TIME LIMITS IN ABEYANCE

Pursuant to Rule 224(e) of the South Carolina Appellate Court Rules, petitioner's counsel submits the following return to the respondent's motion to amend appendix and hold time limits in abeyance. In support of this return, counsel submits the following:

1.) Petitioner was tried in his absence during the December 2003 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole. Petitioner did not appeal.

2.) Petitioner filed a PCR application on February 17, 2005, and a PCR hearing was held on September 18, 2006, before Judge Doyet A. Early.

3.) On April 6, 2009, an order of dismissal was issued in the case, but the order was signed by Judge Roger L. Couch. No PCR appeal was taken from this action.

4.) On January 25, 2010, petitioner filed a PCR action requesting an Austin¹ appeal.

5.) An Austin hearing was convened on September 14, 2010, before Judge Couch whereinafter Judge Couch verbally granted petitioner's request for an Austin review.

6.) On November 16, 2010, Judge Couch issued a written order granting petitioner an Austin review.

7.) On April 18, 2011, the respondent filed a motion to remand stating that Judge Couch was not the presiding PCR judge, but rather it was Judge Early who was the presiding PCR judge. The respondent's motion follows.

- 1.) Petitioner's Application for Post-Conviction Relief (2010-CP-42-0407) was voluntarily withdrawn after the State consented to allow the Petitioner to have a belated appeal of his previous Application for Post-Conviction Relief (2005-CP-42-0449), signed by the Honorable Roger L. Couch by Order dated November 16, 2010.
- 2.) The judgment was entered on November 17, 2010, and a copy was mailed to the attorneys of record on November 18, 2010. A timely notice of appeal was filed.
- 3.) Subsequent to service of the Notice of Appeal, it came to the parties' attention that the Original Order of Dismissal (2005-CP-42-0449) contained a scrivener's error, listing the presiding judge as Roger L. Couch. This led to Judge Couch being sent the Order of Dismissal and signing the Order of Dismissal. However, it appears The Honorable Doyet A. Early III was the presiding judge in this matter.
- 4.) Rule 60(a), SCRCP provides that, during the pendency of an appeal, leave to correct a clerical mistake in an order must be obtained from the appellate court.

¹ 305 S.C. 453, 409 S.E.2d 395 (1991)

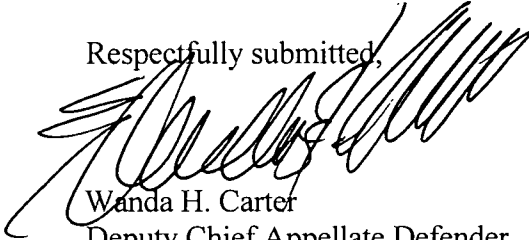
8.) Subsequently, this court issued an order vacating Judge Couch's order that granted an Austin review, and dismissed the Austin appeal, and remanded for Judge Early to issue a final order.

9.) However, since the last order issued was not captioned as a final order as required, but was rather captioned as an order of dismissal, then counsel for petitioner filed a petition and an Austin petition out of an abundance of caution to preserve the Austin issue, which was whether petitioner waived his right to appear at trial, because although Judge Couch's Austin order was vacated, there was a second PCR hearing held where the PCR judge ruled orally from the bench granting petitioner an Austin review.

10.) Therefore, inasmuch as the waiver of the right to appear at trial was addressed in the order in question (although it was not designated as a final order), this issue is nonetheless still preserved for appellate review. Therefore, petitioner has no objections to the motion to supplement appendix and amend appendix cover page or to the motion to strike the petition and file the Austin petition as a petition for writ of certiorari containing the question of the non-waiver of petitioner's presence at trial issue.

WHEREFORE, the undersigned counsel has no objections to the respondent's motion to amend appendix and hold time limits in abeyance.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

March 22, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Doyet A. Early, III, Special Circuit Court Judge

JORGE A. RODRIGUEZ,

PETITIONER,

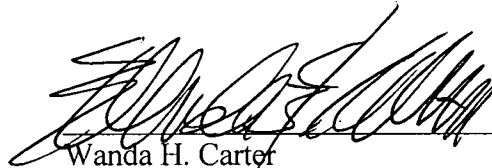
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies the return to motion to amend appendix and hold time limits in abeyance in the above referenced case has been served upon Suzanne H. White, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 22nd day of March, 2012.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of March, 2012.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 2, 2013.



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

March 19, 2012

RECEIVED

MAR 19 2012

S.C. Supreme Court

Via Hand Delivery

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

**RE: Jorge A. Rodriguez v. State of South Carolina
2005-CP-42-0449**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Respondent's Motion to Amend Appendix and Hold Time Limits in Abeyance in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this petition today.

Very truly yours,

Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc: Wanda H. Carter, Esquire (w/enclosures)

The Supreme Court of South Carolina

Jorge Rodriguez,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Doyet A. Early, III
Spartanburg County
Trial Court Case No. 2005-CP-42-00449

ORDER

The request for an extension until March 19, 2012 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 *Wanda J. Shealy*
Clerk

Columbia, South Carolina *Chief Deputy*

February 17, 2012

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Suzanne H. White



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

February 16, 2012

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

RECEIVED

FEB 16 2012

S.C. Supreme Court

RE: **Jorge Rodriguez v. State of South Carolina**
2005-CP-42-0449

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari and Return to the Petition for Writ of Certiorari Pursuant to Austin v. State in the above appeal are due to be served and filed on February 17, 2012. However, this is to respectfully request a 30-day extension in which to serve and file these returns.

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: Wanda H. Carter, Esquire

The Supreme Court of South Carolina

Jorge Rodriguez,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Doyet A. Early, III
Spartanburg County
Trial Court Case No. 2005-CP-42-00449

ORDER

For good cause shown, the request for an extension until January 3, 2012 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 *Srenda J. Shealy*

Chief Deputy Clerk

Columbia, South Carolina

December 5, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

RECEIVED

DEC - 2 2011

JORGE A. RODRIGUEZ,

S.C. Supreme Court

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

3

The undersigned counsel would respectfully request a **final** thirty-day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by two prior orders of this Court.

2. Counsel is filing the brief of petitioner in the case of Tommy Novack Lloyd v. State in the Supreme Court today. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Leonard G. Stanfield v. State in the Supreme Court on November 22, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of William Avinger v. State in the Supreme Court on November 21, 2011. Counsel filed the petitions for writ of certiorari and

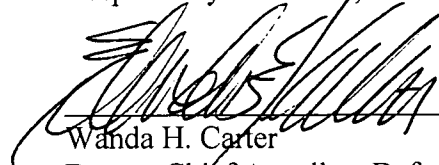
accompanying appendices in the cases of Mark Bolte v. State and Stanley DeHart v. State in the Supreme Court on November 7, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Randy Edward Anderson in the Court of Appeals on November 4, 2013. In October, 2011, Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Curtis Jerome Mitchell v. State, Ismael Cruz v. State, Vincent J. Beaton v. State, Gary Louis Cunningham v. State, Derek K. Behlke v. State and Timothy Dinkins v. State. Counsel also filed the petition for rehearing in the case of State v. Vashaun Ravenel in October, 2011. Additionally in October, 2011, Counsel had oral arguments in the cases of Michael Jermaine Goins v. State and Marcus Martin v. State in the Court of Appeals.

3. This request is made in good faith, and not for purposes of delay.

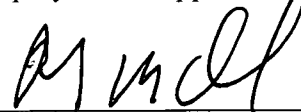
4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final** thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,

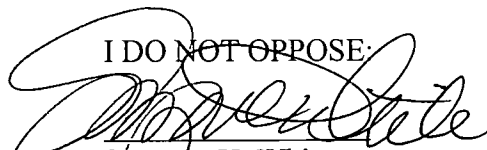


Wanda H. Carter
Deputy Chief Appellate Defender



Robert M. Dudek
Chief Appellate Defender

December 2, 2011

I DO NOT OPPOSE:


Suzanne H. White

The Supreme Court of South Carolina

Jorge Rodriguez,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Doyet A. Early, III
Spartanburg County
Trial Court Case No. 2005-CP-42-00449

ORDER

For good cause shown, the request for an extension until December 2, 2011 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

November 3, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

RECEIVED

NOV 2 2011

S.C. Supreme Court

JORGE A. RODRIGUEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

(2)

The undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

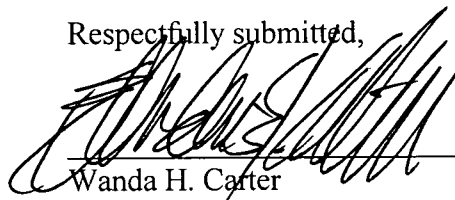
1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by one prior order of this Court.
2. Counsel will be filing the initial brief of appellant and designation of matter in the case of State v. Randy Edward Anderson in the Court of Appeals on Friday, November 4, 2013. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Curtis Jerome Mitchell v. State in the Supreme Court on October 28, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Ismael Cruz v. State in the Supreme Court on October 24, 2011. Counsel had

an oral argument in the case of Michael Jermaine Goins v. State on October 20, 2011, as well as an oral argument in the case of Marcus Martin v. State on October 19, 2011, both in the Court of Appeals. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Vincent J. Beaton v. State on October 17, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Gary Louis Cunningham v. State on October. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Derek K. Behlke v. State on October 12, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Timothy Dinkins v. State on October 7, 2011. Counsel filed the petition for rehearing in the case of State v. Vashaun Ravenel in the Court of Appeals on October 5, 2011. Counsel attended the annual South Carolina Public Defender's Conference in Myrtle Beach September 26-28, 2011. In September, 2011, Counsel had oral arguments in the cases of State v. Jennifer Rayanne Dykes and State v. Vashaun Ravenel. Additionally in September, Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of State v. Anthony A. Williams, State v. Brian Keith Nesbitt, Mickey Terrell Dover v. State, Curtis Scott v. State, Jamel Alexandrette v. State and Tommy Novack Lloyd v. State. Counsel also filed the brief of petitioner in the case of Johnnie Smith, Jr. v. State and the return to petition for rehearing in the case of Jonathan K. Hill v. State in September.

3. This request is made in good faith, and not for purposes of delay.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

November 2, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

JORGE A. RODRIGUEZ,

PETITIONER,

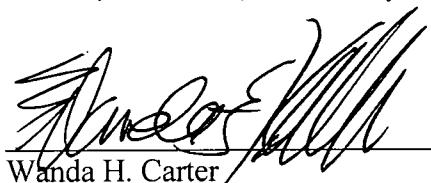
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

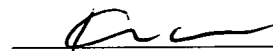
The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Suzanne H. White, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 2nd day of November, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of November, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

The Supreme Court of South Carolina

Jorge Rodriguez,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Doyet A. Early, III
Spartanburg County
Trial Court Case No. 2005-CP-42-00449


ORDER

The request for an extension until November 2, 2011 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

October 3, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Suzanne H. White

ORIGINAL



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

October 3, 2011

RECEIVED

OCT - 3 2011

S.C. Supreme Court

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

Re: Jorge A. Rodriguez v. State of South Carolina

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Suzanne H. White, Esquire, of the Office of the Attorney General, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/kam

cc: Suzanne H. White



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

August 3, 2011

RECEIVED

AUG - 3 2011

S.C. Supreme Court

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

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.

Jorge A. Rodriguez v. State of South Carolina

8/2/2011

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

July 26, 2011

RECEIVED

JUL 26 2011

S.C. Supreme Court

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

Dear Ms. Green:

Please provide us with the following transcript:

Jorge Rodriguez v. State of South Carolina Case #: 05-CP-42-00449

County: Spartanburg Date of Trial: September 18, 2006

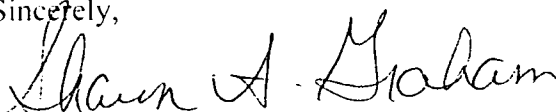
Presiding Judge: Doyet A. Early, III

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include 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.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,


Sharon A. Graham
Administrative Coordinator

cc: S.C. Court of Appeals
Attorney General's Office

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Doyet A. Early III

Case No. 2005-CP-42-449

Jorge RodriquezAppellant

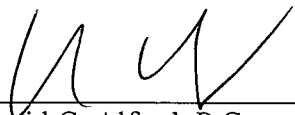
State of South CarolinaRespondent

Motion to be Relieved as Counsel

David C. Alford was appointed to represent the Petitioner in this PCR matter. Upon receipt of the trial court's Order, counsel now moves to be relieved from further representation.

Being appointed, Counsel moves for waiver of any filing fee in this Motion.

June 16, 2011



David C. Alford, P.C.
Attorney for the Appellant-Petitioner
P.O. Box 6326
Spartanburg, South Carolina 29304

Other Counsel of Record:

Paula Magargle
P.O. Box 11549
Columbia, S.C. 29211
Attorney for the Respondent

SEE IF AND
IS WORTH
T. REPRESENT.
IF SO, WOULD
TO BE RELIEVED
CAN BE DENIED
AS MOT.

LAW OFFICES
DAVID C. ALFORD, P.C.

160 HIDDEN HILL ROAD
POST OFFICE BOX 6326
SPARTANBURG, SOUTH CAROLINA 29304

June 16, 2011

South Carolina Court of Appeals
Clerk of Court
P.O. Box 11330
Columbia, South Carolina 29211

Ref: Notice of Appeal
Jorge Rodriquez, Appellant-Petitioner v. State of South Carolina,
Respondent
Case No. 2005-CP-42-449

Enclosed for filing is a Notice of Appeal, Motion to be removed as
Counsel, and Certificate of Service upon the Respondent.

I respectfully request the filing and motion fees be waived in this appeal
from a PCR matter.

I have included a SASE for return of a clocked copy.

Respectfully,



David C. Alford

Cc: Jorge Rodriquez
Paula Magargle

RECEIVED

JUN 20 2011

S.C. SUPREME COURT

LAW OFFICES
DAVID C. ALFORD, P.C.

160 HIDDEN HILL ROAD
POST OFFICE BOX 6326
SPARTANBURG, SOUTH CAROLINA 29304

June 16, 2011

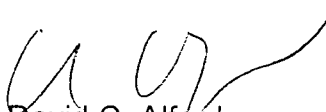
The Honorable Hope Blackley
Clerk of Court for Spartanburg County
180 Magnolia Street
Spartanburg, SC 29306

Ref: Jorge Rodriquez, Petitioner, v. State of South Carolina, Respondent
Case No. 2005-CP-42-449

Dear Ms. Blackley,

Enclosed for filing is a Notice of Appeal in the above referenced case that
has been filed with the Supreme Court of South Carolina.

Respectfully submitted,



David C. Alford
Attorney for Appellant

cc: Jorge Rodriquez
Paula Magargle

RECEIVED

JUN 20 2011

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Doyet A. Early III

Case No. 2005-CP-42-449

Jorge RodriguezAppellant

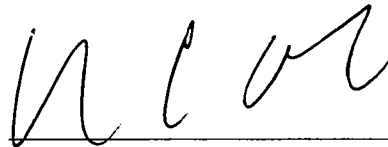
State of South CarolinaRespondent

NOTICE OF APPEAL

The Appellant appeals the Order of Dismissal dated June 9, 2011 and recorded in the Clerk of Court Office June 14, 2011, and received June 16, 2011, denying Appellant's post-conviction relief.

Appellant requests waiver of any filing fee for this appeal.

June 16, 2011



David C. Alford, P.C.
Attorney for the Appellant-Petitioner
P.O. Box 6326
Spartanburg, South Carolina 29304

Other Counsel of Record:

Paula Margargle
P.O. Box 11549
Columbia, S.C. 29211

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Doyet A. Early III

Case No. 2005-CP-42-449

Jorge RodriquezAppellant

State of South CarolinaRespondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal and Appellant Counsel's Motion to be Relieved upon the Respondent by depositing a copy of same in the United States Mail, postage prepaid, on June 17, 2011, addressed to its attorney of record, Paula Magargle, P.O. Box 11549, Columbia, S.C. 29211, and upon the Appellant Jorge Rodriquez, # 300992, Edisto B-30 Lieber Correctional Institute PO Box 205 Ridgeville, SC 29472

June 17, 2011



David C. Alford, P.C.
Attorney for the Appellant-Petitioner
P.O. Box 6326
Spartanburg, South Carolina 29304

Other Counsel of Record:

Paula Magargle
P.O. Box 11549
Columbia, S.C. 29211

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)	
Jorge Rodriquez, #300992,)	2005-CP-42-449
)	
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 17, 2005. An evidentiary hearing into the matter was convened on September 18, 2006, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by David C. Alford, Esquire. The Respondent was represented by Paula Magargle of the South Carolina Attorney General's Office.

The Applicant is currently in the custody of the South Carolina Department of Corrections pursuant to orders by the Spartanburg Clerk of Court. The Applicant was indicted at the February 2002 term of the Court of General Sessions for Spartanburg County for Trafficking in Cocaine (+200 g) (02-GS-42-0715), Possession of a Weapon During the Commission of a Violent Crime (02-GS-42-0715), and Pointing and Presenting (02-GS-42-0715). He was represented by John C. Gutierrez, Esquire. On December 9-11, 2005, Applicant was tried in his absence and found guilty of the indicted offenses. The Honorable J. Derham Cole, sentenced him to twenty-five (25) years for Trafficking and five (5) years for Possession of a Weapon and Pointing and Presenting. These sentences were run consecutively. The Applicant did not appeal his conviction or sentence.

DEPARTMENT OF CORRECTIONS
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 MARY ELLEN LITTLE

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II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Applicant's Testimony

The Applicant testified that counsel was ineffective for failing to give him notice of his trial date and failing to inform him he would be tried in his absence if he was not present. The Applicant testified that he was living on Cooper Bridge Road in Woodruff at the time of the trial. He received no mail at this house.

Trial Counsel's Testimony

Counsel testified that he sent a letter to the Applicant's last known address in Woodruff, informing him of the date of trial, but this letter was returned. Counsel also testified that he informed him of the trial date and that he would be tried in his absence if he failed to appear.

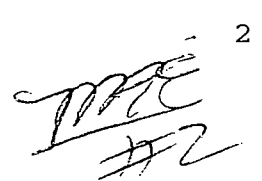
Maria Leatherwood's Testimony

Ms. Leatherwood testified that she attended the trial because of her connections with the co-defendants

Solicitor's Testimony

Jessica Thill testified the Applicant was instructed at his bond hearing that he would be tried in his absence if he failed to appear. Ms. Thill also testified that the Applicant would have been required to inform the State of any change of address as a condition of his bond. Ms. Thill testified that the Applicant and his co-defendant were spotted at the courthouse on the day of the trial. The Applicant's co-defendant was on the phone with his attorney on the day of the plea. Ms. Thill testified that many of the Applicant's family members were present in the courtroom throughout the trial.

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III. APPLICABLE LAW

Ineffective Assistance of 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.

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.

Trial in Absence

Before a defendant's trial *in absentia* can begin, the trial judge must make a finding of fact



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SUMNER COUNTY
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regarding (1) whether the appellant had received notice of his right to be present, and (2) whether the appellant had been warned that ~~the~~ trial would proceed in his absence upon a failure to attend court. State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986).

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 trial counsel's testimony and solicitor's testimony to be credible. This Court finds the Applicant's testimony to be not credible.

This Court finds that counsel was not ineffective for failing to give the Applicant notice of his trial date. Counsel testified that he sent a letter informing the Applicant of the trial date to his last known address, but this letter was returned. (PCR transcript, page 10, line 15). Counsel also testified that he informed the Applicant of his trial date. (PCR transcript, page 15). Furthermore, this Court notes that counsel informed the trial judge that he told the Applicant over the phone of the trial date. He also told him as late as the week before trial that he would be tried in his absence if he failed to appear. (Trial transcript, page 12, lines 1-25).

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.

YME
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CLERK OF COURT
STATE OF SOUTH CAROLINA
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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

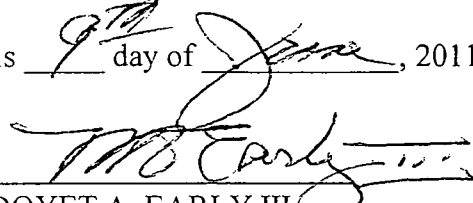
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.


This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

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 9th day of June, 2011.


DOYET A. EARLY III
Presiding Judge
Seventh Judicial Circuit

, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY



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LAW OFFICES

DAVID C. ALFORD, P.C.

P.O. BOX 6326
SPARTANBURG, SOUTH CAROLINA 29304

first class

Jose Rodriguez

South Carolina Court of Appeals
Clerk of Court
P.O. Box 11330
Columbia, South Carolina 29211

CONSUMER
LAW