

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

**S.C. Supreme Court**

Doyet A. Early, Special Circuit Court Judge  
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JORGE A. RODRIGUEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR judge erred in ruling that no error occurred when the circuit court judge tried petitioner in his absence because petitioner's complaints that he was neither warned nor noticed of his trial date and that he did not waive his right to be present at trial were supported by the record in the case.

## STATEMENT

Petitioner Jorge Rodriguez was tried by jury in his absence during the December 2003 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole, and found guilty of trafficking in cocaine, possession of a firearm or knife during the commission of a violent crime and pointing or presenting a firearm. App. 1-446. Petitioner was sentenced on April 2, 2004, by Judge Cole to an aggregate twenty-five year prison term. App. 447-455. John Gutierrez represented petitioner at the trial and sentencing proceeding. Petitioner did not enjoy the benefit of a direct appeal in the case.

On February 17, 2005, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 456-462. The respondent filed a return dated August 15, 2005, requesting that a hearing be held in response to petitioner's application. App. 463-466.

A PCR hearing was convened on September 18, 2006, at the Spartanburg County Courthouse before Judge Doyet A. Early. Petitioner was represented at the PCR hearing by David C. Alford. App. 468-504. On August 6, 2008, Judge Couch filed an order of dismissal in the case. App. 506-510. Petitioner did not enjoy the benefit of a PCR appeal of the denial of PCR relief.

On January 25, 2010, petitioner filed a second PCR application with the Spartanburg County Clerk's Office requesting a belated PCR appeal of his first PCR action per Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 512-518. The respondent filed a return dated June 23, 2010, requesting that a hearing be held on the Austin issue in the case. App. 519-524. A hearing regarding the Austin issue was held on September 14, 2010, at the Spartanburg County Courthouse before Judge Roger L. Couch. App. 524-532. M. Terry Haselden represented Petitioner at the

Austin hearing. On November 16, 2010, Judge Couch issued an order granting petitioner's request for an Austin appeal. App. 534-537. Petitioner appealed Judge Couch's order. Thereafter, due to a scrivener's error, the respondent requested a remand to remove Judge Couch's name from the first PCR order and have the appropriate judge (Judge Early), who heard the first PCR hearing sign the first PCR order. App. 538 – 539. In the end, the appellate court vacated the Austin action and Judge Couch's Austin order, and granted an appeal on petitioner's PCR action heard by Judge Early. App. 541 – 564. This petition follows.

#### ARGUMENT

The PCR judge erred in ruling that no error occurred when the circuit court judge tried petitioner in his absence because petitioner's complaints that he was neither warned nor noticed of his trial date and that he did not waive his right to be present at trial were supported by the record in the case.

Sergeant David Taylor testified that he used confidential informant Cecil Gilliam to conduct an undercover controlled cocaine buy on November 28, 2001. Taylor stated that the deal ultimately took place at a church on the Old Spartanburg Highway where a vehicle driven by Robert Leatherwood, which contained passengers Jorge Rodriguez and Juan Rodriguez, arrived on that night pursuant to Gilliam's agreement. Sergeant Taylor stated that the apprehension of Leatherwood, Jorge Rodriguez and Juan Rodriguez, did not come to fruition until after the end of the vehicle chase in the case. App. 160, l. 18 – p. 182, l. 2.

Confidential informant Cecil Gilliam testified that he set up a cocaine buy with Robert Leatherwood, and met Leatherwood, who showed up with Jorge Rodriguez and Juan Rodriguez, at

a church parking lot on the night of November 28, 2001. Gilliam stated that as the transaction commenced to materialize, undercover police officers appeared to arrest them, but Leatherwood drove the vehicle away from the scene. App. 190, l. 11 – p. 205, l. 18.

Robert Leatherwood testified at trial and stated that Juan Rodriguez produced the cocaine for Gilliam and that he, Juan Rodriguez, Jorge Rodriguez, and Gilliam attempted to conduct the transaction, but that he had to drive off when police cars appeared on the scene, and that a chase ensued. App. 224, l. 1 – p. 247, l. 15.

According to Officer Bryanna Rogers' testimony, ultimately Sergeant Andrews, who gave chase on that night, blocked the car Leatherwood drove and arrested all three men in the car. Rogers testified that it appeared that guns were pointed at the police during the chase. App. 273, l. 15 – p. 278, l. 17.

Subsequently, Officers Floyd Turley and Matt McDaniel followed up with a roadside search and recovered cocaine and a weapon, both of which had been thrown out of the car in connection with the case. App. 326, l. 18 – p. 332, l. 23; App. 337, l. 1 - p. 342, l. 4. Petitioner was tried along with his cousin Juan Rodriguez, both of whom were convicted of trafficking in cocaine, possession of a weapon during the commission of a violent crime, and pointing and presenting a firearm.

During the PCR hearing held in the case, petitioner's trial counsel testified in effect that he sent a letter dated November 26, 2003, to petitioner's residence informing him of a December 8, 2003 trial date, but explained that the letter was returned to him (counsel) on November 30, 2003. App. 475, l. 1 – p. 480, l. 2. App. 510-B. The Attorney General produced petitioner's bond papers which reflected a December 8, 2003 trial court date. App. 480, l. 9- p. App. 482, l. 8.

Petitioner testified during the PCR hearing and explained that he never received a letter from counsel in the mail or a telephone call from counsel regarding a trial date or a warning that he needed to be present at trial. App. 487, l. 4 – p. 494, l. 1.

The PCR court ruled that petitioner did not establish that ineffective assistance of counsel occurred with respect to the issue of whether petitioner received notice of his trial date and the consequences of not appearing for trial. App 508 – 510.

A criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to present at trial. Illinois v. Allen, 397 U.S. 337 (1970). However, the right to be present at trial can be waived. In order for a defendant to be tried in absentia, a trial judge must determine whether a defendant voluntarily waived his right to be present at trial by making findings as to whether the defendant received notice of his right to be present at trial and whether the defendant was warned that the trial would proceed in his absence if he did not attend the trial. State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986).

In the case at bar, petitioner's declarations that he never received notice via the mail and that he never received counsel's letter advising him of the trial date are apparently true because counsel admitted prior to trial that that the notice letter was returned to sender (counsel). App. 12, l. 15 – p. 13, l. 8. Note that prior to trial, the following dialogue occurred regarding petitioner's absence at trial.

THE COURT: All right. And have you received any subsequent information or word from Jorge Rodriguez regarding why he is not here today?

MR. GUTIERREZ: The only thing I have is a returned letter. The post office returned a letter "addressee unknown," notifying him of the date and time of the trial, being yesterday, December 8<sup>th</sup> App. 13, lines 12 -17.

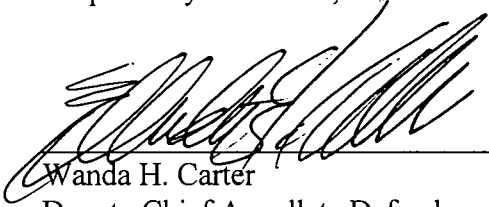
In addition, counsel erred because he acknowledged at the hearing that there was a second address (in North Carolina) for petitioner (App. 478, ll. 22-23), but admitted that he failed to try to send another letter to this second or additional address for petitioner. Also, according to counsel's letter (see supplemental appendix), there was nothing therein advising petitioner that the trial would commence in his absence if he failed to appear in court. Finally, counsel erred in failing to request that the trial judge place on the record the requisite findings in order to ascertain whether petitioner waived his right to be present at trial. The record is devoid of such findings. App. 10, l. 1 – p.14, l. 16.

Clearly, the PCR judge erred in ruling that no error occurred when the circuit court judge tried petitioner in his absence and that petitioner had adequate notice and warning of his trial date and therefore waived his right to be present at his trial. Counsel's error in failing to properly notice and warn petitioner regarding his trial date and in failing to request that the trial judge make the appropriate findings regarding petitioner's absence at trial constituted deficient representation such that but for the error, it would have been clear that petitioner did not voluntarily waive his right to be present at trial and he would not have been tried in absentia. Counsel's error violated the Sixth Amendment guarantee that attorneys provide competent legal representation to defendants in criminal cases. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). But for the error, a reasonable likelihood exists that petitioner would not have been tried in his absence and that the trial might have ended differently.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2012.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Doyet A. Early, Special Circuit Court Judge

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JORGE A. RODRIGUEZ,

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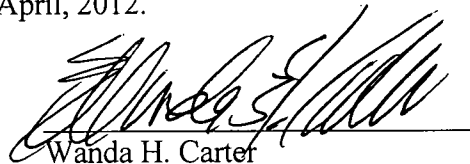
RESPONDENT

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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 appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of April, 2012.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day  
of April, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.