

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_

Certiorari to Lee County

R. Ferrell Cothran, Jr., Circuit Court Judge  
\_\_\_\_\_

RECEIVED

SEP 19 2013

S.C. Supreme Court

TERRENCE BLACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000298  
\_\_\_\_\_

JOHNSON 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

# INDEX

INDEX.....	1
ISSUE PRESENTED.....	2
STATEMENT.....	3
ARGUMENT.....	4
CONCLUSION.....	8
PETITION TO BE RELIEVED AS COUNSEL.....	9

### ISSUE PRESENTED

Trial counsel erred in dissuading petitioner from testifying in his defense at trial by advising that his testimony would implicate his cellmate and classify him as a snitch, which would jeopardize his safety, as this advice constituted deficient representation because counsel's concern for a cellmate and the assumption that SCDC was unsafe denied petitioner of the right to testify and assert his claim of innocence, especially since all of petitioner's defense witnesses testified that they knew nothing and saw nothing regarding the case.

## STATEMENT

Petitioner Terrence Black was convicted of assaulting a Correctional Officer per a jury trial held during the August 2008 term of the Lee County General Sessions Court before Judge Howard P. King. App. 1-213. S. Bryon Doby represented petitioner at trial. Judge King sentenced petitioner to imprisonment for a period of five years to run consecutively to the sentence petitioner serves presently.

Petitioner appealed his conviction and sentence. Lanelle C. Durant represented petitioner on direct appeal. App. 215-229. Thereafter, petitioner's appeal was dismissed by the South Carolina Court of Appeals. See State v. Black, Unpublished Opinion No. 2010-UP-12 (S.C. Ct. App. filed January 21, 2010). See App. 230-231.

On February 4, 2010, petitioner filed a PCR application with the Lee County Office of the Clerk of Court. App. 232-239. The respondent filed a return dated January 20, 2011, requesting that a hearing be held in response to petitioner's PCR action. App. 240-243.

A PCR hearing was convened on December 12, 2012, at the Sumter County Courthouse before Judge Ferrell Cothran. App. 245-279. Petitioner was present at the hearing and represented by Mark E. Schnee. On January 24, 2013, Judge Cothran issued an Order of Dismissal that denied petitioner's allegations of ineffective assistance of trial counsel in the case. App. 281-289.

Petitioner appealed Judge Cothran's Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in dissuading petitioner from testifying in his defense by advising that his testimony would implicate his cellmate and classify him as a snitch, which would jeopardize his safety, as this advice constituted deficient representation because counsel's concern for a cellmate and the assumption that SCDC was unsafe denied petitioner of the right to testify at trial and assert his claim of his innocence, especially since all of petitioner's defense witnesses testified that they knew nothing and saw nothing regarding the case.

At trial, SCDC Corrections Officer Derrick Anderson testified that on April 11, 2008, he was in the process of placing a food tray in the food flap of petitioner's cell when petitioner pushed his arms through the flap and tied his (petitioner's) jumpsuit around the flap in order to prevent the closing of the flap. Anderson explained that when he asked petitioner to "get off the flap," petitioner refused to do so. Then, Anderson added that as he attempted to shut the flap, petitioner "came out with a sharp metal object [i.e., a shank] and stabbed [him] in the palm of [his] hand." App. 72, l. 7-p. 84, l. 21.

Police Officer Lloyd Greer interviewed petitioner and obtained a statement from him also. According to Officer Greer, petitioner told him that "it wasn't supposed to go down like that" and that Anderson "got in the way" and/or "got too close." App. 135, l. 6-p. 142, l. 20.

Also during the trial, four inmates testified on petitioner's behalf. Three inmates<sup>1</sup> testified that they saw nothing, and another inmate<sup>2</sup> invoked his Fifth Amendment right not to testify. App. 160, l. 1-p. 161, l. 25; App. 163, l. 1-17; App. 165, l. 2-p. 166, l. 11; App. 162, l. 12-p. 163, l. 17.

During the PCR hearing, petitioner stated that he wanted to testify in his defense at trial, but that trial counsel dissuaded him from testifying by advising him that it was not in his best interest to

---

<sup>1</sup> Bernard Brown, Jeffrey Youngrin, Jerry Bynum

<sup>2</sup> Carlos Sumter

testify because if he did so, then he would look like a snitch. In other words, this case was such that either petitioner or his roommate committed the crime; therefore, if petitioner testified that he was not guilty of the charge, then by process of elimination this meant that his cellmate committed the crime. Hence, petitioner's testimony would have revealed the identity of the perpetrator and then he (petitioner) would be have been classified as a snitch, which is a prison label that presumably carries dangerous consequences. App. 252, l. 15-p. 253, l. 14. Petitioner stated that he did not commit the crime, but that he did not want the reputation of being a snitch. App. 257, l. 21-p. 258, l. 2; App. 254, l. 22-p. 255, l. 2; App. 256, l. 9-23. Petitioner testified as follows:

MS. HARRIGAN: Okay. And your testimony today is you decided not to testify because you were afraid of you own safety, correct?

MR. BLACK: Yes.

MS. HARRIGAN: So you weighed ---

MR. BLACK: ---on those terms.

MS. HARRIGAN: You weighed the options, and you voluntarily chose not to testify at trial because of safety concerns, correct?

MR. BLACK: I mean --

MS. HARRIGAN: Yes or no.

MR. BLACK: You got to talk to my lawyer about that. I mean, I did that on -- I did that on the strength of my well being. But at the time it was his advice. App. 261, lines 2-20.

Trial counsel testified that his theory of the case was that petitioner's cellmate committed the stabbing offense, and that this was in effect his trial strategy. App. 268, l. 3-25; App 273, l. 4-13. Counsel admitted that it was his job to explain "the ramifications of testifying" to petitioner, but that it was petitioner's decision not to testify at trial. App 274, l. 24 -- p. 275, l. 1. App. 275, l. 11-17.

The PCR judge ruled that trial counsel “reviewed [petitioner’s] right to testify with him several times and that [petitioner] made a voluntary decision not to take the stand in his defense” and that “based on [this], petitioner ha[d] not shown that trial counsel’s performance fell below professional norms.” App. 286-287.

A defendant has a right to testify in his defense at trial under the Due Process clause of the Fourteenth Amendment, the Compulsory Process clause of the Sixth Amendment, and the Fifth Amendment’s privilege against self-incrimination. Rock v. Arkansas, 483 U.S. 44 (1987). See also State v. Rivera, 402 S.C. 225, 74 S.E. 2<sup>nd</sup> 694 (2013), where the Court cited to Rock v. Arkansas, supra, and explained that the right to testify at trial is fundamental to a personal defense in that every criminal defendant has a right to present his own version of the events in his own words. In Rivera, this Court reversed where defense counsel actively thwarted the defendant’s desire to testify (despite the fact that not testifying appeared advantageous) because “there was no basis in the law to prevent him from testifying.” Likewise, in the case at bar, trial counsel erred in dissuading petitioner from testifying, which is a right that is paramount, in order to protect his cellmate and him (petitioner) from the label of snitch and the safety hazards that would follow.

Furthermore, trial counsel’s act of dissuading petitioner from testifying at trial cannot be considered a valid trial strategy. For example, trial counsel stated that his theory of the case was that petitioner’s cellmate committed the crime. Therefore, what better way to prove that the cellmate committed the crime than to allow petitioner to testify that he did not commit the crime, which would present the strongest case possible that “the cell-mate did it.” In short, trial counsel’s strategy was not an appropriate trial strategy.

This Court has reversed in cases where strategy decisions made by counsels were invalid and/or inappropriate. For example, in Bailey v. State, 392 S.C. 422, 709 S.E. 2d 671 (2011), the

Court held that trial counsel's strategy in failing to object to a supplemental jury charge that enlarged the defendant's homicide by child abuse charge did not constitute a valid strategy, and that counsel's error in this regard was ineffective assistance. Also, in Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997), the Court held that trial counsel's failure to challenge the burglary indictment (1<sup>st</sup> degree) on the distinction of a barn and a dwelling was not a valid strategy. Moreover, compare the criminal sexual conduct case of Smith v. State, 386 S.C. 562, 689 S.E. 2d 629 (2010), where counsel's failure to object to the forensic interviewer's testimony that she believed the prosecutrix's testimony and to the four witnesses who corroborated the prosecutrix's testimony was held to have constituted ineffective assistance in violation of the rules governing hearsay and improper bolstering. Additionally, in McKnight v. State, 378 S.C. 33, 661 S.E. 2d 354 (2008), the Court found counsel's representation deficient because counsel's strategy in failing to move for a continuance in order to secure an expert medical witness who would have ruled out cocaine use as the cause of the homicide by child abuse constituted an invalid strategy because the state's theory and the state's expert medical witness' testimony was that cocaine caused the death of the fetus. Moreover, see Holman v. State, 381 S.C. 491, 674 S.E. 2d 171 (2009), where the Court held that trial counsel's strategy in not objecting to a pistol that was unrelated to and located a week after the shooting could not be justified and found that counsel's assistance at trial was ineffective.

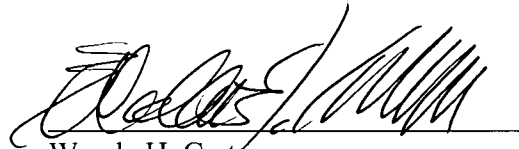
In the case at bar, petitioner was denied the right to testify based on counsel's deficient representation in the case, which in turn violated petitioner's Sixth Amendment right to the effective assistance of counsel at trial. See Strickland v. Washington, 466 U.S. 668 (1989). Also, counsel's trial strategy did not cure this right to testify in this case. The strong assumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making decisions in a case cannot stand if counsel's strategy cannot be deemed valid. Watson v. State, 370 S.C. 68,

634 S.E. 2d 642 (2006). Therefore, but for counsel's deficient representation in dissuading petitioner from testifying in his defense at trial, a reasonable probability exists that the outcome of his trial would have been different.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of September, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO LEE COUNTY  
R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

---

TERRENCE BLACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT  
APPELLATE CASE NO. 2013-000298

---

PETITION TO BE RELIEVED AS COUNSEL

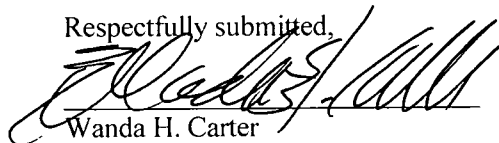
---

Counsel for Terrence Black states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 11, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Terrence Black.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 19th day of September, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Lee County  
R. Ferrell Cothran, Jr., Circuit Court Judge

---

TERRENCE BLACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

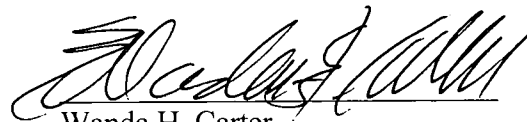
APPELLATE CASE NO. 2013-000298

---

CERTIFICATE OF SERVICE

---

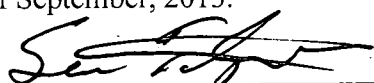
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Megan Harrigan, Esquire and Terrence Black, #265323, at Lieber Correctional Institution this 19th day of September, 2013.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day  
of September, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.