

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge  
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**RECEIVED**

FEB - 5 2014

**S.C. Supreme Court**

CALVIN SHARPE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001160  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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WANDA H. CARTER  
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ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT .....4

CONCLUSION .....7

PETITION TO BE RELIEVED AS COUNSEL.....8

ISSUE PRESENTED

Trial counsel erred in not objecting to the trial judge's failure to recuse himself from petitioner's trial because there was sufficient evidence establishing judicial impartiality in the record.

## STATEMENT

Petitioner Calvin Sharpe pled guilty<sup>1</sup> to distribution of counterfeit goods and possession of marijuana during the February 2012 term of the Sumter County General Sessions Court before Judge W. Jeffrey Young. App. 333, l. 3 – p. 352, l. 8. Petitioner was sentenced to imprisonment for a period of one year on his drug conviction and ten years, suspended upon the service of seven years and three years probation, on his conviction of distribution of counterfeit goods. Garryl L. Deas represented petitioner at trial and Assistant Solicitor Darla Pierce appeared on behalf of the state.

On June 27, 2012, petitioner filed a PCR action with the Sumter County Office of the Clerk of Court. App. 354 – 360. The respondent filed a return dated October 9, 2012, requesting that a hearing be held in the case. App. 361 – 365.

A PCR hearing was convened on December 12, 2012, at the Sumter County Courthouse before Judge R. Ferrell Cothran. App. 367 – 413. Petitioner was present at the PCR hearing and represented by Benjamin Stitely, and Assistant Attorney General Megan Harrigan appeared on behalf of the state.

On February 14, 2013, Judge Cothran issued an Order of Dismissal in the case. App. 418-429. Petitioner appealed Judge Cothran's Order of Dismissal. This petition follows.

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<sup>1</sup> Petitioner opted for a trial by jury, which actually convened in the case, but near the end of the state's case, he (petitioner) pled guilty as charged. App. 333, l. 12 – p.352, l. 8.

## ARGUMENT

Trial counsel erred in not objecting to the judge's failure to recuse himself from petitioner's trial because there was sufficient evidence establishing judicial impartiality in the record.

At trial, Officer Jeffrey Richardson testified that he arrived at petitioner's residence in order to execute an arrest warrant on him (petitioner), and that in the process of doing so, he observed what appeared to be shoe boxes of questionable origins stacked at the back of the house. This provided the basis to secure a search warrant in the case. After the search warrant was obtained, Officer Richardson searched petitioner's house and found purses, jackets, shoes, and other clothing items, and he also discovered marijuana inside a vehicle located on petitioner's property. App. 114, l. 3 – p. 145, l. 19. Rick Hawks, who is an expert in intellectual properties and trademarks, testified that the goods found in the house were fake items. The goods included fake Louis Vuitton, Gucci, and Dolce and Gabbana bags, fake Gucci jackets, fake Ralph Lauren shirts, and fake Timberland and Nike Air Jordan shoes. App. 269, l. 3 – p. 309, l. 23. The state's theory was that these fake goods were being sold by petitioner.

Apparently, Officer Brown, who was present at the crime scene and testified as a witness at the trial in this case, was also a basketball coach at the local YMCA and actually coached the trial judge's son. The trial judge admitted that his son was on Officer/Coach Brown's team. Note that Officer Brown specifically testified at petitioner's trial that he participated in the search of petitioner's house and recovered the goods in question in the case. Prior to trial, the judge addressed the issue of whether he should recuse himself as follows:

Solicitor: Your Honor, can we put on the record so the record is clear, you mentioned Trevor Brown.

Court: Trevor Brown who I did not know until I got a call saying my son was on his (Officer Brown's) team...[as coach at the YMCA]. They actually have a pretty good team. Other than that, I don't do anything socially or business with Trevor

Brown other than my son plays on his team. I think there is an insufficient cause for me to recuse.

Trial Counsel: I agree with Your Honor that is not a sufficient basis for you to recuse yourself. App. 75, lines 10-23.

During the PCR hearing, petitioner testified that he wanted trial counsel to request that the trial judge recuse himself from the case because the trial judge's son played on Officer/Coach Brown's basketball team, but that trial counsel did not do so. App. p. 34, l. 11 – 24.

Trial counsel testified at the hearing and admitted that he did not make a motion to have the trial judge recuse himself from the case because there was no sufficient reason to do so. App. p. 385, l. 12 – p. 387, l. 5; App. 394, l. 9 – p. 395, l. 18.

The PCR judge ruled that petitioner failed to meet his burden and showing that he was prejudiced by counsel's failure to move for the trial judge to recuse himself from the trial. App. 428.

As a rule, a judge must recuse himself if there is any alleged bias that will affect his (trial judge's) impartiality in a case in order to avoid judicial prejudice. See State v. Howard, 384 S.C. 212, 682 S.E.2d 42(2009), citing to State v. Cheatham, 349 S.C. 101, 561 S.E. 2d 618 (Ct. App. 2002). Additionally, the alleged bias must reflect a personal bias. State v. Cheatham, supra. In the case at bar, the trial judge's son played basketball on a team that Officer Brown coached. Officer Brown testified at petitioner's trial and explained that Officer Richardson called him regarding petitioner's arrest and asked him to assist in obtaining a search warrant for petitioner's property. Also, Officer Brown assisted in confiscating and processing the items seized during the search and went on to endorse expert Rick Hawks, who deemed the confiscated items as fake goods. Tr. 215, l. 4 – p. 229, l. 2. More specifically, Officer Brown testified at trial that after viewing and confiscating the items inside petitioner's residence, he contacted Rick Hawks immediately

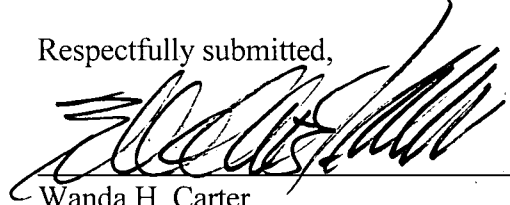
thereafter upon his suspicion that the goods were counterfeit goods because in his opinion Rick Hawks was the specialist who had the proper expertise in these matters. App. 218, l. 19 – p. 219, l.19.

Undoubtedly, Officer Brown's approval of Rick Hawks as an expert in identifying fake goods probably carried subconscious weight with the trial judge, who subsequently ruled at trial that Hawks was a qualified expert on the subject of counterfeit items and in turn allowed him to testify at trial regarding the same (whether petitioner was distributing counterfeit drugs) which was the central issue in the case. In other words, the question of whether petitioner's goods were counterfeit goods was the ultimate factual issue in petitioner's case, and this question was answered by Rick Hawks whom Officer Brown and the trial judge in effect endorsed as an expert in identifying counterfeit items. Clearly, there was enough judicial bias present in the instant case to warrant a motion by trial counsel to request that the trial judge recuse himself from presiding over petitioner's trial. Counsel's error in failing to request that the trial judge in the case recuse himself from petitioner's trial constituted ineffective assistance of counsel in violation of petitioner's right to competent counsel in a criminal trial via the Fourteenth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984). Petitioner was prejudiced by counsel's error because the trial judge's impartiality denied him (petitioner) of the right to a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant his petition and allow full briefing on the issues raised in the case.

Respectfully submitted,

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

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of February, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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CALVIN SHARPE,

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PETITION TO BE RELIEVED AS COUNSEL

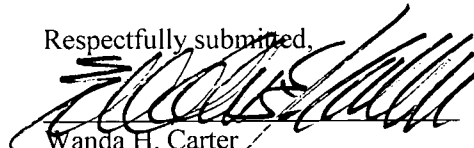
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Counsel for Calvin Sharpe states:

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 12, 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 Calvin Sharpe.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 5th day of February, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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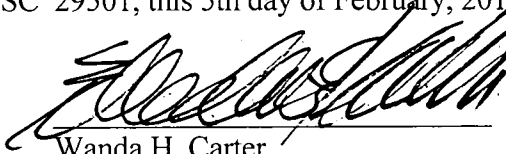
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CERTIFICATE OF SERVICE

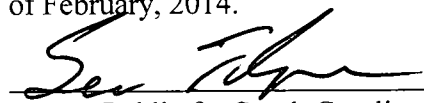
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Calvin Sharpe, #349922, at Palmer Pre-Release Center, 2012 Pisgah Road, Florence, SC 29501, this 5th day of February, 2014.



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day  
of February, 2014.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.