

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

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**RECEIVED**

DEC 19 2014

**S.C. Supreme Court**

RODNEY THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001171

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did defense counsel provide ineffective assistance of counsel, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, by failing to advise petitioner he had a viable self-defense case, since petitioner would not have pled guilty and he would have gone to trial if he had been properly advised?

## STATEMENT

Petitioner was indicted at the June 24, 2010 term of the Lancaster County Grand Jury for the offense of murder. App. 86-87. He appeared on March 28, 2011 before the Honorable Brooks P. Goldsmith. Michael Lifsey represented petitioner. Douglas Barfield was the solicitor. App. 1.

Solicitor Barfield told the judge that petitioner was pleading guilty to the offense of voluntary manslaughter, and “the negotiated sentencing agreement is 20 to 30 years.” App. 3, ll. 1-8.

Petitioner told the judge he was forty-two years old, and that he had been treated for his addiction “to crack cocaine and all kind of drugs. I went to it was like a mental institution in Columbia and, then they sent me to a drug rehab place after I left the place and I just completed my time down there, did everything they told me to do.” App. 4, l. 23 – 5, l. 8.

In his factual assertions justifying the guilty plea the solicitor said petitioner had been involved in a dispute with the decedent. The solicitor maintained that petitioner entered the decedent’s home -- “we don’t allege that Thompson busted the door open...” and he shot the decedent with a .22 caliber pistol. The solicitor maintained that there was more than a five or ten minute interval between the altercation with the decedent, and petitioner returning to shoot the decedent. App. 6, l. 7 – 9, l. 23. As will be seen infra, petitioner said the decedent threatened to hit him with a pipe simultaneously with the decedent’s threat to kill him.

The solicitor also said that the police officer who procured petitioner’s confession to shooting the decedent “grew up together” with petitioner, and he was able to get petitioner to tell him what actually happened. Gunshot residue was also found on petitioner’s clothes after the police obtained a search warrant for his home. App. 9. l. 22 – 10, l. 13.

Defense counsel Lifsey said his main concerns before trial were the admissibility of petitioner's statement, "and then whether this [the facts of the case] constituted self-defense." App. 14, l. 22 – 15, l. 13. Defense counsel offered his belief that petitioner would have had to testify to make the self-defense case viable but he believed other available witnesses would not have supported petitioner's self-defense case. App. 15, l. 21 – 16, l. 7.

Defense counsel further opined: "it was my legal opinion that the odds of any success on a self-defense argument was very, very slim in this case so that's why he entered the guilty plea." App. 16, ll. 1-22. Judge Goldsmith sentenced petitioner to twenty-four years imprisonment. App. 26, ll. 3-6.

Petitioner filed an application for post-conviction relief (PCR) on January 3, 2012. App. 28-33. Petitioner alleged he was ineffectively represented. App. 30.

To this application for post-conviction relief the state filed a return dated June 25, 2012. App. 35-39. An evidentiary hearing was convened on February 4, 2013 before the Honorable J. Ernest Kinard, Jr. Tristan Shaffer represented petitioner. Assistant Attorney General Suzanne H. White represented the state. App. 40.

Petitioner testified that he was threatened by the decedent who had a "big pipe" in his hand and he threatened to kill petitioner. Petitioner said he asked the decedent to "put your weapons down" and to engage in a fist-fight without weapons. App. 45, ll. 1-23. Petitioner attempted to explain to the PCR judge that the decedent was yelling at him: "I'm going to kill you" at the same time the decedent had a weapon in his hand. The judge interjected "what's all this about?" App. 46, l. 1, - 47, l. 3.

The judge told petitioner and his PCR counsel that "I'm not retrying the case. . . he had an absolute opportunity to have a jury trial if he wanted one, and none of that is in the facts that were

relayed by the Solicitor to Judge Goldsmith . . . You can tailor your things to him about he had a self-defense maybe and he didn't pursue it, but I'm not interested in all of that stuff. That doesn't have anything to do with his post-conviction." App. 47, ll. 13-23.

Petitioner testified that defense counsel told him he was facing a life sentence if convicted and he advised petitioner to plead to voluntary manslaughter given the twenty to thirty year recommendation. App. 52, ll. 6-20; App. 57, ll. 2-5.

Defense counsel Lifsey testified that he would have presented a self-defense case if petitioner went to trial but he claimed: "The problem is the facts just didn't amount to self-defense." App. 65, ll. 14-19. Defense counsel seemed to maintain that there was a sufficient "cooling period" between the time of the petitioner's dispute with the decedent and the time when he shot him as *a matter of law*. App. 65, l. 14 – 66, l. 6.

Near the conclusion of the post-conviction hearing the judge told PCR counsel and petitioner: "It's not a self-defense case under anything that I have read or what he said, so he's looking at 30 to life in a new trial which you might want to get for him, and he might want to have..." App. 72, l. 22-25.

An order of dismissal dated October 22, 2013 was issued. App. 78-85. This order noted that petitioner testified the decedent threatened to kill him with a wrench and that petitioner shot the decedent. App. 80. "Counsel testified that he would have certainly tried the case, but he did not think that the facts of the case amounted to self-defense or even voluntary manslaughter." App. 81. The order also stated that the testimony of defense counsel was credible. App. 82.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

## ARGUMENT

Defense counsel provided ineffective assistance of counsel, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, by failing to advise petitioner he had a viable self-defense case, since petitioner would not have pled guilty and he would have gone to trial if he had been properly advised.

In Davenport v. State, 301 S.C. 39, 389 S.E.2d 649 (1990), the Supreme Court held that trial counsel was ineffective for advising Davenport to plead "guilty but mentally ill" to a murder charge where trial counsel knew the state's own psychiatrist had diagnosed Davenport as legally insane. A verdict of not guilty by reason of insanity would have prevented Davenport from being incarcerated at all.

In Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991), this Court held defense counsel was ineffective for failing to advise Cobbs that he had the defense of double jeopardy available to him. This Court noted, at the time of that case, that the evidence showed Cobbs had been convicted in magistrate's court for the same offense for which he later pled guilty in General Sessions Court. This Court also found that further investigation would have revealed that the victim no longer sought to prosecute Cobbs for forgery. This Court found there was a reasonable probability that Cobbs would not have pled guilty, and he would have insisted on going to trial had he been properly advised. See Hill v. Lockhart, 474 U.S. 52 (1985).

Here, defense counsel's PCR testimony shows he thought any intervening time between the altercation with the decedent and when petitioner shot him rendered a self-defense case hopeless. That was legally incorrect advice. Cf. Dandy v. State, 301 S.C. 303, 391 S.E.2d 581 (1990); Stone v. State, 294 S.C. 286, 363 S.E.2d 903 (1988).

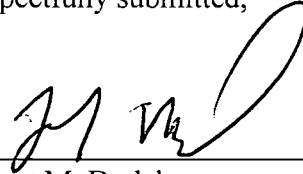
Although the PCR Court respectfully refused to allow petitioner to elaborate fully on the facts that he thought entitled him to make a viable self-defense case if he had gone to trial, it is nonetheless clear from what is in the record that petitioner had a viable self-defense case. Petitioner testified the decedent threatened to kill him while armed with a deadly weapon, a pipe. Petitioner's PCR testimony clearly conveys that he shot the decedent in self-defense.

Consequently, defense counsel was ineffective for failing to advise petitioner he had a viable self-defense action, and that any attempt to assert self-defense at trial would be hopeless. See Hill v. Lockhart, 474 U.S. 52 (1985). Petitioner's guilty plea should be vacated, and he should be granted a trial where he can assert his self-defense case.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of December, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO LANCASTER COUNTY  
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

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RODNEY THOMPSON,

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APPELLATE CASE NO. 2014-001171

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PETITION TO BE RELIEVED AS COUNSEL

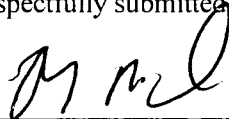
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Counsel for Rodney Thompson states:

1. He is the Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 4, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Rodney Thompson.

Respectfully submitted,



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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 19th day of December, 2014

STATE OF SOUTH CAROLINA,

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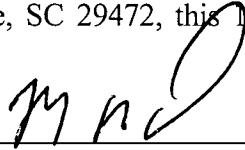
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CERTIFICATE OF SERVICE

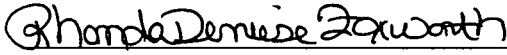
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Rodney Thompson, #345452, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of December, 2014.

  
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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day  
of December, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021.