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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge  
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DEMARCUS KENTRAIL BUSSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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Columbia, SC 29211-1589  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Probation counsel erred in failing to appeal petitioner's probation revocation sentences handed down in his case.

## STATEMENT

Petitioner was convicted of carjacking and two counts of robbery during the July 2006 term of the Greenville County General Sessions Court and sentenced to imprisonment for a period of ten years, suspended on the service of five years and four years probation on one robbery conviction, five years suspended during probation on his second robbery conviction, and ten years suspended during probation on his carjacking conviction. Petitioner did not enjoy the benefit of a direct appeal in the case.

On March 19, 2010, petitioner's probation sentences were revoked pursuant to a hearing held before Judge Simmons at the Greenville County General Sessions Court. Petitioner was sentenced to imprisonment for a period of four years and eighty-three days for each of his robbery convictions, and nine years and eighty-three days for his carjacking conviction. Michael Cullinan represented petitioner at the probation revocation hearing.

On June 30, 2010, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court alleging that his probation revocation attorney was ineffective in his representation at his probation revocation hearing. On May 11, 2011, a PCR hearing was held at the Greenville County Courthouse before Judge Edward Welmaker. Rodney Richey represented petitioner at the PCR hearing. During that hearing, petitioner testified that his probation attorney was ineffective because he failed to appeal the probation revocation,<sup>1</sup> and that the charges presented in support of the revocation were pending charges only for which he had not been convicted.<sup>2</sup>

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<sup>1</sup> App. 32, ll. 2-3; App. 36, ll. 9-22.

<sup>2</sup> App. 21, l. 6 – p. 24, l. 6; App. 40, ll. 7-23; App. 43, ll. 2-5.

On July 1, 2011, Judge Welmaker issued an order of dismissal denying petitioner's allegations of ineffective assistance of probation counsel. Petitioner appealed Judge Welmaker's order.

On January 27, 2012, the undersigned appellate counsel filed a petition for an order to reconstruct the probation revocation proceeding, which is unavailable, but the petition was denied. Supp App. 20-24.

This petition for writ of certiorari follows.

### ARGUMENT

Probation counsel erred in failing to appeal petitioner's probation revocation sentences handed down in his case.

During the PCR hearing, petitioner stated that he asked probation counsel to file an appeal after his probation sentences were revoked, but that counsel did not do so. Petitioner added that he attempted to appeal the probation revocations himself, but was unsuccessful in doing so. See Applicant's #6 (Motion for Reconsideration of Probation Violation). App. 32, ll. 2-3; App. 34, l. 1 – p. 36, l. 4; Supp App. 11-19. Petitioner stated his grounds for an appeal during the PCR hearing. For example, petitioner testified that there were many arguments in his defense that would have proved that he did not commit the crimes which his probation warrant citation listed as violating his conditions of probation, including the fact that no gun was found, and the fact that he did not admit to committing the pending offenses (robbery and possession of a firearm) charged and published during the probation revocation hearing. App. 21, l. 14 – p. 26, l. 20; Supp App. 1-5. Also, petitioner added that he should not have had his probation revoked for not having a job, because he

had not yet finished his job training program in order to gain employment. App. 31, ll. 11-25; App.

34, ll. 18-25. Petitioner explained his desire for an appeal further as follows:

Q. I only have one question. Explain to me what you wanted to appeal from your probation revocation hearing. What error did the Judge make that you wanted to appeal?

A. That the Judge made?

Q. Yeah.

A. The Judge denied my right for allocution. He did not let me speak and put up a defense on my behalf. And also he waived my right to have my hearing on record which had me at a clear disadvantage today. Because had my hearing been on record, I could have showed the prejudice statement that Ms. Amanda Ware, my probation agent made, I could have showed that [probation counsel] failed to object to it.

App. 36, ll. 9-22.

At the PCR hearing, probation counsel testified regarding the issue of an appeal and stated that he had “no indication in [his] file that [petitioner] requested ...[an] appeal...” but that he “may very well have, but [that he] don’t (sic) remember.” App. 38, l. 14 – p. 39, l. 11.

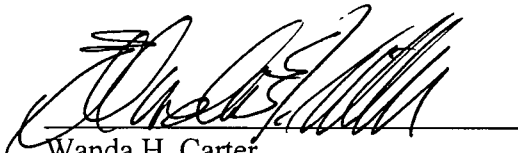
Although persons charged with probation violations in South Carolina have a right to counsel at a probation revocation hearing via Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986); nonetheless, a probation revocation is a loss of a conditional liberty interest, which means that a probationer is only entitled to minimal due process. Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008); Gagnon v. Scarpelli, 411 U.S. 778 (1973). Therefore, probation counsel does not have a duty to inform a probationer of his right to appeal absent extraordinary circumstances. See Bullis v. State, 382 S.C. 192, 675 S.E.2d 734 (2009), However, in the case at bar, extraordinary circumstances were in existence to the extent that the probation revocation judge erred under S.C. Code Ann. 24-21-460 in revoking petitioner’s probation sentences in light of certain defenses that

would have proved that he did not violate the conditions of his probation. Hence, the PCR court erred in denying petitioner's allegation that counsel erred in failing to appeal his probation revocation in the case.

CONCLUSION

Based on the foregoing argument, petitioner requests that the 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 7th day of May, 2012.

STATEMENT OF ISSUE ON DIRECT APPEAL

- 1.) The probation revocation judge erred in revoking appellant's probation sentences per S.C. Code Ann. 24-21-460 (1985) because there was no proof that appellant violated his conditions of probation in the case.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

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DEMARCUS KENTRAIL BUSSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

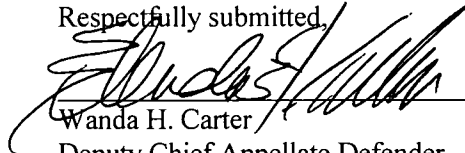
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Counsel for Demarcus Kentrail Bussey states:

1. She is a 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 May 13, 2011. 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 Demarcus Kentrail Bussey.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 7th day of May, 2012

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
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DEMARCUS KENTRAIL BUSSEY,

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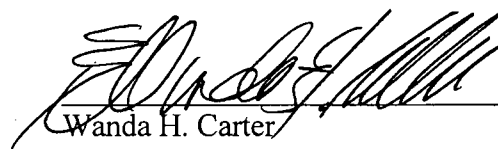
RESPONDENT

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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 and supplemental appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Demarcus Kentrail Bussey, #316432, at Allendale Correctional Institution this 7th day of May, 2012.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day  
of May, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.