

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

J C Buddy Nicholson, Jr , Circuit Court Judge

THE STATE,

RESPONDENT,

V

RAYMONDEZE L RIVERA ,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L SAVITZ, III
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge violated Rivera's Sixth Amendment right to counsel by summarily relieving defense counsel from representing Rivera simply because Rivera rejected counsel's advice and elected to testify

STATEMENT OF THE CASE

On February 11 through 13, 2008, Raymondeze L. Rivera stood trial in Anderson County, before Judge J. C. Nicholson, Jr., and a jury, on an indictment charging him with the murder of Asha Wiley, who was strangled to death in her home the night of December 10, 2006. Against the advice of defense counsel, Rivera took the stand and related a bizarre story implicating himself not only in Wiley's murder but in the murder of another woman, Kwana Burns, three days later. At defense counsel's request, the judge summarily ordered Rivera to proceed *pro se*. Neither defense counsel nor Rivera made a closing argument. The jury found Rivera guilty as charged, and the judge sentenced him to life imprisonment. Observing that the court reporter and "TV cameras are here," the judge then asked Rivera "to take the witness stand and tell who else you have killed." ROA p. 325 line 6- ROA p. 236 line 1. To the judge's palpable disappointment, Rivera responded, "I do not wish to." ROA p. 236 lines 2-8.

ARGUMENT

The trial judge violated Rivera's Sixth Amendment right to counsel by summarily relieving defense counsel from representing Rivera simply because Rivera rejected counsel's advice and elected to testify

Although defense counsel advised Rivera "there is no profit for him taking the stand, no advantage in it," he rejected their advice and chose to testify ROA p 264 lines 16-24 Rivera then informed the jury that he was a professional assassin who had killed, among others, Asha Wiley and Kwana Burns ROA p 271 line 10- ROA p 304 line 15

At this point, defense counsel informed the judge, "[I]f he wants a closing statement, since he's gone loose on the witness stand, I think its up to him to act in his own behalf to do it Because we ethically can not do it " ROA p 305 lines 3-18 The judge agreed and informed Rivera, "[I]f you want to make a closing statement to the jury, at the appropriate time I will give you that opportunity " ROA p 305 lines 19-23 "[I]f there was any such animal as a directed verdict of guilty in a murder trial, I should be able to give one in this case, but I can't do that," the judge added ROA p 306 lines 15-18 Rivera declined the opportunity to make his own closing argument ROA p 307 line 25-ROA p 308 line 10

The Sixth Amendment to the United States Constitution requires that, in all criminal prosecutions, the accused shall have the right to the assistance of counsel "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert his ability to assert any other rights he may have " *United States v Cronin*, 466 U S 648 (1984) A defendant may, however, relinquish his right to counsel (1) by an affirmative, verbal request (2) by conduct and (3) by forfeiture *State v Roberson*, 382 S C 185, 675 S E 2d 732 (2009), *State v Boykin*, 324 S C 552, 478

S E 2d 689 (Ct App 1996) Since Rivera did not waive counsel through an affirmative, verbal request, if he relinquished his right to counsel, it could only have been through waiver by conduct or forfeiture

“Deliberate and dilatory conduct on behalf of a defendant can suffice to waive the right to counsel” *State v Fahey*, 374 S C 92, 646 S E 2d 445, 450 (Ct App 2007), certiorari denied June 26, 2008 “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so” *Harris v New York*, 401 U S 222, 225 (1971) “[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to testify in his or her own behalf” *Jones v Barnes*, 463 U S 745, 751 (1983) A defendant’s decision to testify, even though foolhardy and contrary to defense counsel’s best advice, does not act as a waiver of his right to counsel

Contrary to defense counsel’s assertion, Rivera’s decision to testify, while undoubtedly unwise, did not place counsel in an ethically untenable position See Rule 407, Subsection 1 16, SCACR In fact, Subsection 3 1 of Rule 407 specifically provides

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law or fact in doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law *A lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in an incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established* [Emphasis added]

Counsel for Rivera abandoned his obligation to do just that

A violation of the right to counsel at trial can never be harmless error See *Chapman v California*, 386 U S 18 (1967) Nevertheless, it is both instructive and troubling to observe how quickly and completely Rivera’s trial degenerated into an inquisition once

Rivera was without the assistance of counsel. Immediately after the judge had sentenced Rivera to life imprisonment, he embarked upon what can only be described as an unconstitutional custodial interrogation.

The Court: Mr. Rivera, what I would like to say to you, I believe this Court has an obligation to possibly look into this information. During cross examination by the Solicitor when you were on the witness stand, she asked you the question was Mrs. Wiley the first person you had killed. You said, "No." Now, she was going into that further. I stopped her because at that time I felt like it was not appropriate before the jury. Now, if you would like to take the witness stand and continue that testimony, tell us who else you have killed, we'll be glad to receive it.

Rivera: No.

The Court: Have a witness seat on the witness stand.

Solicitor: He said no.

The Court: He said no?

Rivera: Yeah.

The Court: The TV cameras are here. If you want to sit down and give a statement, we'll be glad to receive it. We have a court reporter here.

Rivera: No, Your Honor.

The Court: Pardon?

Rivera: I do not wish to.

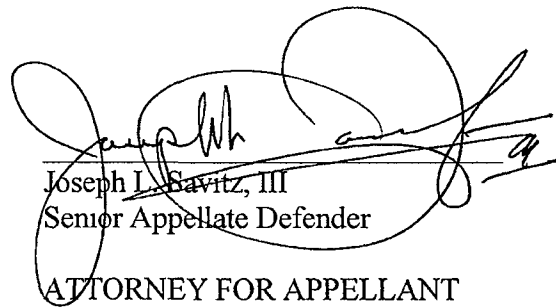
The Court: You do not want to. Okay. I'm going to ask the law enforcement officers to further investigate that. Do you understand?

Rivera: [Nods head up and down.]

ROA p 325 line 6- ROA p 326 line 8 Above all else, a trial judge must be impartial He compromises his duties when he assumes the role of inquisitor Compare, for example, *State v Owens*, 362 S C 175, 607 S E 2d 78 (2004)

The Court should reverse Raymondeze Rivera's conviction for murder and remand for a new trial

Respectfully submitted,



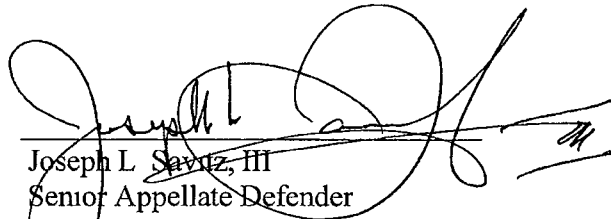
Joseph I. Savitz, III
Senior Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of January, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings"

January 29, 2010



Joseph L. Savitz, III
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Appeal from Anderson County

J C Buddy Nicholson, Jr , Judge

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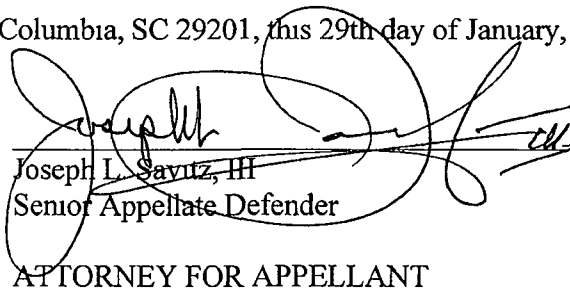
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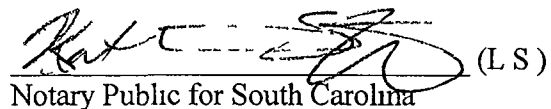
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of January, 2009


Joseph L. Savitz, III
Senior Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of January, 2009

 (L S)
Notary Public for South Carolina

My Commission Expires July 1, 2019



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January 29, 2010

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Re The State v Raymondeze L Rivera

Dear Don

Enclosed please find two copies of the Final Brief of Appellant in the above entitled case, which I have filed today with the South Carolina Court of Appeals

Should you have any questions concerning this matter, please do not hesitate to contact me

Sincerely,

Joseph L Savitz, III
Senior Appellate Defender

JLS,III/kms

Enclosure



SCCID

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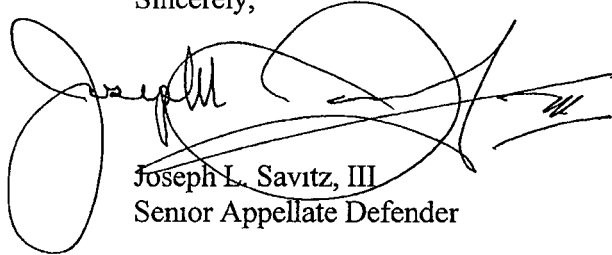
Re Your appeal

Dear Mr Rivera

Enclosed please find a copy of the Final Brief of Appellant in your case, which I have filed with the South Carolina Court of Appeals

Should you have any questions concerning this matter, please do not hesitate to contact me

Sincerely,



Joseph L. Savitz, III
Senior Appellate Defender

JLS,III/kms

Enclosure