

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable Roger E. Henderson, Circuit Court Judge

TYRESS ANTONIO LITTLEJOHN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001895

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel erred in advising petitioner not to testify at trial because petitioner had a right to testify in his defense at trial.

STATEMENT

Petitioner Tyress Antonio Littlejohn was convicted of trafficking in crack cocaine (first offense) per jury trial held during the October 2014 term of the York County General Sessions Court before Judge John C. Hayes, III, and sentenced to imprisonment for a period of fifteen years. App. 1-269. Attorney Geoff Dunn represented petitioner at trial and Assistant Solicitor Leslie Robinson appeared on behalf of the state.

Petitioner appealed, but the South Carolina Court of Appeals dismissed the appeal on April 6, 2016. See State v. Littlejohn, Op. No. 2016-UP-161 (S.C. Ct. App. filed April 6, 2016). David Alexander, Esquire, of the South Carolina Office of Appellate Defense represented petitioner on direct appeal.

On February 23, 2017, petitioner filed a PCR action with the York County Office of the Clerk of Court. App. 270-278. The respondent filed a Return dated June 8, 2017, requesting that a PCR hearing be held in response to petitioner's PCR action. App. 279-287.

On April 18, 2018, a PCR hearing was convened at the York County Courthouse before Judge Roger E. Henderson. App. 288-354. Petitioner was present at the hearing and represented by Lir P. Derieg, and Assistant Attorney General Justin Hunter appeared on behalf of the state. On August 7, 2018, Judge Henderson issued an Order of Dismissal in the case. App. 356-374.

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

ARGUMENT

Trial counsel erred in advising petitioner not to testify at trial because petitioner had a right to testify in his defense at trial.

At trial, the solicitor argued in effect that informant Tezo Ervin came to petitioner's mother's house on August 16, 2012, and purchased crack cocaine from petitioner. However, Ervin's testimony was not credible because he admitted that he made the purchase to work off pending drug charges for himself, and he was obviously confused in that he testified that he sold crack cocaine to two people at the scene on that date, one of whom (Jywaun Williams) the drug charge against was dismissed by the state. App. 116, I, 12 – p. 161, l. 20. Note that the audio evidence was not conclusive because Officer Rainer admitted at trial that the audio was “gargled” and there was no talk of drugs on the audio of the incident. App. 77, l.17 – p. 96, l. 11; App. 105, l. 22-25; App. 110, lines 18-25.

During the PCR hearing held in the case, petitioner testified that he never put any drugs in the informant's hands, and that he just happened to be at his mother's house while the informant was meeting a person there on that date, and that this is why he wanted to testify and explain these circumstances to the jury; but that trial counsel told him not to testify so that they could get the last argument and explained also that it was the state that had the burden of proof. App. 294, l.5-13; App. 300, l.17-p. 301, l.17. Clearly, petitioner's testimony would have proved not only that he was innocent and made no drug sale, but also that the informant lied about the entire transaction to free himself of pending charges, which worked out favorably for him (informant). App. 304, l.12-p. 305, l. 11.

Jywaun Williams testified at the PCR hearing and stated that he was charged with trafficking also and that the police alleged that he (Williams) gave petitioner drugs, but that his

(Williams') drug charge was dropped because the informant lied about his (Williams') drug involvement in the case. App. 307, 1.4-p. 312, 1.12. Petitioner's testimony could have been used to show that the informant lied on him in the same manner that he lied on Williams.

Trial counsel testified at the PCR hearing and explained that he did not recall a conversation with petitioner about whether he should or should not testify, but that he would never oppose a client's desire to testify as a matter of practice. App. 322, 1.15-p.323, 1.14.

Counsel's testimony follows:

Q : You said y and discussed with [petitioner] his right to testify...

A: Yes

Q: Did you explain to him about the giving up last argument if he were to decide to testify?

A: I don't remember if I did that. I mean sometimes I have that conversation, sometimes I don't...

App. 327, 1.8-14.

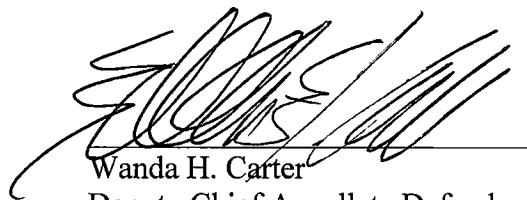
The PCR judge ruled that petitioner did not meet his burden of proof on his claim that he received ineffective assistance of counsel in the case. App. 364-374.

Petitioner's right to testify at trial should not have been stifled by counsel. A defendant in a criminal case has the right to take the witness stand and testify in his or her behalf under the due process clause of the Fourteenth Amendment, which guarantees that no one shall be deprived of liberty without due process of law, and under the compulsory process clause of the Sixth Amendment that grants the defendant the right to call witnesses, and under the Fifth

Amendment's privilege against self-incrimination. State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), citing to Rock v. Arkansas, 483 U.S. 44 (1987), and Faretta v. California, 422 U.S. 806 (1975). In Rivera, the Court reversed because the defendant's was denied his right to testify in his defense at trial (despite the position that **“preventing [the defendant] from testifying may have been an advantageous strategic decision ...[because this position]..had no basis in the law]”** and the denial of the right to testify at trial could not have been harmless as it was considered structural error. In addition, a defendant has a right to present his defense. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (2001). Trial counsel's error in dissuading petitioner from testifying at trial constituted deficient representation at trial in violation of the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984), such that but for the error, a reasonable probability existed that petitioner's testimony would have led to a different outcome in the case.

CONCLUSION

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



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of August, 2019.

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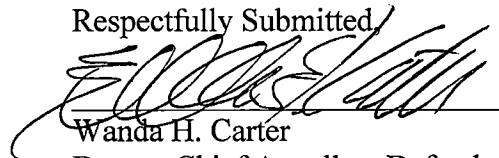
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyress Antonio Littlejohn states that:

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 record of petitioner's post-conviction relief hearing before Judge Roger E. Henderson, which was held on April 18, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Tyress Antonio Littlejohn.

Respectfully Submitted,

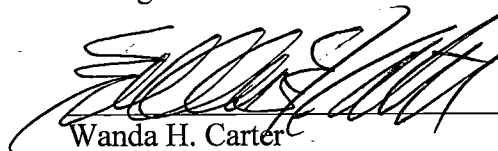


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of August, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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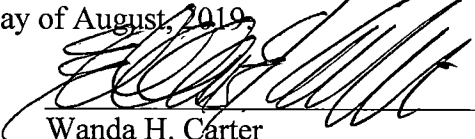
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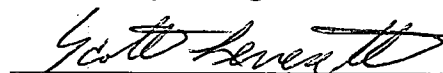
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Tyress Antonio Littlejohn, #263016, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 2nd day of August, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.