

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

PERRY KEITH STRICKLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001692

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when defense counsel failed to properly advise Petitioner on what prior convictions the state would be allowed to impeach Petitioner with if he were to testify since defense counsel announced Petitioner would not be testifying before the trial court made a ruling regarding whether Petitioner's prior convictions that were more than ten years old would be admissible since Petitioner relied on the erroneous belief that these prior convictions would be admissible when he decided not to testify?

STATEMENT

A Spartanburg County Grand Jury indicted Petitioner at the May 2007 term of General Sessions for murder and assault and battery with intent to kill (ABIK). App. 460-463. Petitioner's case was called to trial on July 9, 2007 before the Honorable J. Derham Cole, and a jury. App. 1. Assistant Solicitors Robert Coler and Dan Cude appeared on behalf of the prosecution, and John Reckenbeil represented Petitioner. Id. On July 11, 2007, the jury found Petitioner guilty of the lesser included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature (ABHAN). App. 366, ll. 12-21. He was sentenced by Judge Cole to twelve years for voluntary manslaughter and ten years concurrent for ABHAN. App. 375, ll. 5-17.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Strickland, Op. No. 4714 (Filed July 21, 2010). The subsequent Petition for Rehearing was denied by the court on August 27, 2010. A Petition for Writ of Certiorari was filed with the South Carolina Supreme Court on December 3, 2010. By order dated April 7, 2011, the South Carolina Supreme Court denied certiorari.

On September 6, 2011, Petitioner filed an application for post-conviction relief (PCR) and an accompanying Memorandum in Support of PCR Issues to be Heard. App. 377-398. The state filed a Return to this application dated July 17, 2012. App. 399-405. The matter proceeded to an evidentiary hearing on April 4, 2013 before the Honorable J. Mark Hayes, II. App. 406. Assistant Attorney General Suzanne White represented the state, and Kenneth P. Shabel represented Petitioner. App. 406. By order dated July 24, 2013, Judge Hayes denied Petitioner relief. App. 451-459.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when defense counsel failed to properly advise Petitioner on what prior convictions the state would be allowed to impeach Petitioner with if he were to testify since defense counsel announced Petitioner would not be testifying before the trial court made a ruling regarding whether Petitioner's prior convictions that were more than ten years old would be admissible since Petitioner relied on the erroneous belief that these prior convictions would be admissible when he decided not to testify.

Relevant Facts

Deputy Bill Kish of the Spartanburg County Sheriff's Office testified that he was dispatched to Petitioner's mobile home at 2:04 a.m. on November 13, 2005. App. 62, l. 19 – 63, l. 20. Kish found Petitioner "lying on his stomach and moving back and forth, stomach to the side, with Ms. Jennifer Weathers over the top of him and he appeared to be bleeding heavily." Kish added, "He seemed to be in pretty bad condition, looked like [he was] losing a lot of blood." App. 63, ll. 9-16.

When EMS arrived to attend to Petitioner, Kish walked over to the adjacent trailer that Jennifer Weathers had identified as the place where Petitioner had been stabbed. The other mobile home was only twenty yards from Petitioner's home. App. 63, l. 21 – 64, l. 22. Kish saw blood coming out from underneath the trailer door so he opened the door based upon that exigent circumstance. App. 66, ll. 15-19.

Kish found William Phillip Huckabee¹ bleeding from multiple chest wounds. "He was over the top of his son, Christopher, who appeared to be deceased." There was a "large" quantity of blood in the mobile home. Kish testified, "It, the blood, covered the walls, the floor." App. 66, l. 20 – 67, l. 7.

EMS Paramedic Jeffrey Straub testified Petitioner had a significant laceration to his left arm causing “an arterial bleed.” Straub stated Petitioner’s injuries were life threatening and that he could have bled to death if he had not received medical treatment. Straub also stated that Huckabee had three puncture wounds to the left upper chest that were also considered life threatening due to the significant amount of blood loss. Both men were in critical condition. App. 98, l. 3 – 102, l. 25.

Heather West testified she was the decedent’s good friend, and that they had dated in the past. App. 103, l. 22 – 104, l. 21. West said she had an argument with the decedent in the car about where they would sleep the night of the fatal incident. West said she did not want to stay at Huckabee’s mobile home because a month before they had found a snake in the bedroom where they slept. West said she told the decedent, “I wanted nothing else to do with him,” and she drove away, leaving the decedent at his father’s mobile home. App. 108, l. 15 – 109, l. 10.

When West later returned to bring the decedent all of his stuff she said the decedent’s father, Tony, came out and “was yelling my name, ‘Heather, Heather, Chris is dead.’” West said she found the decedent lying on the mobile home floor, and she called 911. App. 109, l. 11 – 111, l. 1. Heather did not witness the fatal encounter.

There were three eyewitnesses to the stabbing. They were the decedent’s father, William Huckabee, Petitioner’s common law wife, Jennifer Weathers, and an acquaintance of both Huckabee and Petitioner, Barry Lee Smith.

Huckabee testified first that Jennifer Weathers came to his apartment on the morning of Saturday, November 12, 2005 about 7:00 or 8:00 a.m. Huckabee said Jennifer wanted a place to sleep because she had been up all night. There would later be evidence Petitioner “kicked her out” of his mobile home. Huckabee said he reluctantly allowed Weathers to sleep on the couch given that his ex-wife was coming over “and [he] told her it, it wouldn’t look good.” While Jennifer slept,

¹ Mr. Huckabee is often referred to in the record by his nickname, “Tony.”

Huckabee testified that he went to the store and bought beer and cigarettes. When he returned, he woke Jennifer up and told her she had to leave. App. 145, l. 21 – 149, l. 15.

Huckabee said he began drinking early that morning out of boredom. He would later admit that he drank an entire twelve pack of beer that day and took three Xanax while he drank. App. 165, l. 20 – 167, l. 22.

Huckabee remembered that Jennifer came back to his trailer later. Huckabee's adult son, Chris, and his girlfriend, Heather West, and Barry Smith also arrived to socialize at the trailer that day. App. 151, l. 5 – 152, l. 12. The elder Huckabee admitted he only "vaguely" remembered the events that led to the stabbing, and the stabbing itself. App. 153, ll. 4 – 13.

Huckabee said he recalled that Petitioner came back to his trailer for the third or fourth time that day, and Petitioner was sitting on the couch with Barry Smith and Jennifer. Huckabee said Petitioner demanded his house key back from Jennifer. App. 153, ll. 10-24. Huckabee claimed Petitioner was getting angry with Jennifer for not giving him the key back, and that "Chris had said I'm not going to have this in my daddy's house." Huckabee maintained Petitioner responded: "Shut your fucking mouth up." App. 154, l. 12 – 155, l. 1. Huckabee said his son "shoved his chair back" -- clearly signaling to his father that he was going to fight. Huckabee testified: "I went after Keith [Petitioner] . . . I didn't want my son to get hurt. He's not a very big fellow. . ." App. 155, ll. 2-9.

Huckabee said he had a hard time remembering what happened after he went after Petitioner, but he added, "I remember hitting Keith to the couch. I remember. The sequence is hard to remember, but I remember being off the top of him and in the floor. And my son was laying on me and said 'Are you alright, Daddy?' and I said, 'I'm fine, son' and then I went out." Huckabee maintained that he passed out or fainted at this point, and when he woke up he found his son lying dead on the floor. App. 156, l. 5 – 157, l. 3.

As stated, Huckabee admitted he was taking Xanax while drinking that day. App. 166, l. 7 – 167, l. 23. Huckabee also confirmed his son had a “red handled knife that had an emblem on it.” App. 170, l. 7-9. This knife had Petitioner’s blood on it. App. 214, l. 2 – 215, l. 23.

Later in his testimony Huckabee said that when his son said, “I’m not going to have this in my dad’s house,” Petitioner responded, “Punk, shut your fucking mouth, punk.” App. 180, ll. 5 -18. Huckabee again confirmed that his son “shoved his chair back and got up at that point” and then Huckabee attacked Petitioner. App. 180, l. 19 – 181, l. 24. Huckabee said he did not remember talking to the police or saying anything inconsistent to them about what had happened. App. 182, l. 21 – 183, l. 14.

Jennifer Weathers testified that Petitioner asked her to leave their mobile home that morning so she went to her grandmother’s house. She denied that she went to Huckabee’s house to sleep as Huckabee claimed. App. 220, l. 13 – 222, l. 25. Jennifer testified that she returned to the trailer park later and she and Petitioner “stayed at Jimmy’s all day cleaning up brush for Jimmy.” App. 223, l. 6 – 224, l. 9.

Jennifer said at some point late that night she went to Tony Huckabee’s trailer by herself and drank beer. App. 225, ll. 8-25. Jennifer testified that Petitioner arrived fifteen to twenty minutes later and “they all, they jumped on him.” Jennifer said Tony and Chris Huckabee jumped on Petitioner when all Petitioner did was ask her for the key to his trailer. App. 226, l. 20 – 227, l. 23. Jennifer denied that Petitioner yelled at her when he asked for the key. Instead, she testified he asked in a “polite and quiet manner.” App. 227, l. 15 – 228, l. 228, l. 1; App. 238, l. 18 – 239, l. 16; App. 248, l. 16 – 249, l. 1.

Jennifer explained that she did not have time to respond to Petitioner’s request “because that’s when they jumped on him.” Jennifer testified that the decedent started walking towards Petitioner, and then “Tony jumped in, and that’s what happened.” She explained, “They was just

rolling on the floor fighting, and I was trying to get [Huckabee and the decedent] off of [Petitioner].” App. 228, l. 2 – 229, l. 24.

Jennifer said both Tony and the decedent had knives, but that Petitioner did not.² App. 230, ll. 1-6. She testified that the three men struggled for about five minutes, but that [i]t seemed like forever.” App. 232, ll. 16- 20. Jennifer eventually “got [Petitioner] by the arm and the two “ran out the door.” App. 233, ll. 8-10. She called an ambulance because Petitioner was stabbed during the attack. App. 235, ll. 12-17. When they left, Jennifer testified that the decedent was lying face down on the floor and was not moving. However, she had “no idea” of Tony Huckabee’s condition. App. 324, l. 11 – 235, l. 11.

On cross-examination, Jennifer repeated that Petitioner knocked on the door and that the decedent let him in. Petitioner asked about his key and Jennifer said the decedent jumped on Petitioner first, and “a second” later the decedent’s father, Tony, also jumped on top of Petitioner. Jennifer said she remembered seeing the decedent pull a knife out once this started. App. 247, l. 8 – 251, l. 9. Jennifer recalled Barry Smith ran out the door once the physical attack began, and Smith later confirmed that fact. App. 251, ll. 8 – 15.

The state called Detective Allen Wood as a witness. Wood testified that Jennifer Weathers told him that Petitioner stepped inside the Huckabee mobile home, and hollered at her about his door key. Wood said Jennifer specifically told him that Petitioner asked, “Where the fuck is my door key?” App. 255, l. 18 – App. 256, l. 14. Wood remembered Jennifer informing him that “Chris gets up and said some challenging words to the effect of get the fuck out of my house” and then the decedent “hit Keith [Petitioner] in the face.” Wood said Jennifer told him that “Keith hit

² Weathers admitted she told the detective that “Tony had a knife and it was a straight knife, not a pocket knife.” App. 241, ll. 7-11.

[the decedent] right back” and then the decedent ““staggered back and that’s when Tony jumped on Keith and they all ended up on the couch to the left of the front door.”” App. 256, l. 15 – 257, l. 8.

The defense called Barry Smith as a witness. Smith testified that when he went to Tony Huckabee’s trailer on November 13, 2005, it was only the second time he had ever been there. App. 268, ll. 4-19. Smith remembered that the decedent had showed him his knife earlier, and Smith told the decedent “that’s a nice looking knife, that’s a collector’s knife. I said it might be worth a little something.” App. 269, ll. 19-24. Smith said it was “a little red knife.” App. 270, l. 7-8.

Smith testified he was talking to Tony Huckabee “waiting on Chris” to arrive when Jennifer Weathers came to the trailer. Chris, the decedent, eventually arrived as well. App. 271, l. 2 – 272, l. 8. Smith remembered that Petitioner knocked on the door “so Chris got up and opened the door.” Smith recalled that Petitioner asked Jennifer for his house key and Jennifer told him she did not have the key. However, Smith maintained Jennifer showed him she had the key earlier that night. App. 272, l. 19 – 273, l. 12.

Smith testified Petitioner was standing outside the door and the decedent was standing inside. Petitioner said they were “just staring at each other like two wrestlers.” Smith remembered “then later on Chris just, Chris just I mean, he just [made] a little move, and then they were fighting.” App. 273, 14 – 274, l. 3. Smith told the jurors “and then Chris and Keith fall down on the couch fighting. And Tony jumped up. He fell down there with him.” App. 274, ll. 4-7. Smith said he told them “y’all need to stop that fighting, you know, like that. Then Chris fell back from the fighting. *That’s when [Chris] pulled that knife out. I said, Chris, don’t cut that boy, just like that. And then Chris ran and kicked him in his side. And I hit the door then.*” App. 274, ll. 4-16 (emphasis added). Smith said he ran because he “didn’t want no part of this” and he told the jurors that if he knew what was going to happen he would have taken his chances on breaking it up “but it just didn’t look too good.” App. 274, ll. 12-23.

On cross-examination Smith admitted he told the police that “Keith got hot and then Tony’s son got an attitude.” App. 277, ll. 18-25. Smith then claimed he thought Jennifer and the decedent had had sex inside the trailer before Petitioner arrived. App. 277, l. 11 – 278, l. 7. Smith said Petitioner had a “pissed-off look on his face” when he arrived at the door that night. He added “he [Petitioner] didn’t step into the door though. Keith never did walk, Keith never did step in the door until they started fighting.” App. 290, ll. 10-23.

During Petitioner’s case in chief, the trial court reviewed with Petitioner his right to testify during a routine colloquy. The solicitor also reviewed with the court Petitioner’s prior record that he sought to use as impeachment if Petitioner were to testify. Those convictions included two grand larceny and two burglary convictions from 1993 and two false information convictions from 2002. The solicitor explained that Petitioner received a sentence of ten years imprisonment suspended upon the service of five years probation for the 1993 convictions and thus argued that Petitioner’s probationary sentence “extended into the ten year window.” However, the solicitor had no evidence that Petitioner actually served the entire five years of probation and the court noted that the state may have “let him out early.” The solicitor told the judge that he would find out whether Petitioner actually served the entire five years of probation that evening and inform the court in the morning before the judge issued a ruling.

The solicitor also explained that he served Petitioner with notice that he intended to offer convictions outside the ten year period “because he has a significant criminal history dating back all the way to 1979.” The solicitor explained, “The reason the state’s served notice is that I think that gives the jury a more complete picture of Mr. Strickland’s criminal convictions.” These older convictions included armed robbery from 1979 and multiple convictions from 1984, including storebreaking, housebreaking, and grand larceny. For the 1979 conviction, Petitioner was sentenced to “one to six year Y.O.A. sentence” and for the 1984 convictions, the longest sentence was seven

years imprisonment. The court never made a ruling as to which convictions the state could use as impeachment. App. 288, l. 22 – 295, l. 22.

Defense counsel ultimately informed the court that Petitioner would not testify. App. 297, l. 24 – 298, l. 23.

Direct Appeal

Petitioner argued on direct appeal that the trial court erred in denying his motion for a directed verdict because he established self-defense as a matter of law. State v. Strickland, 389 S.C. 210, 214, 697 S.E.2d 681, 683 (Ct. App. 2010). After analyzing the facts and the law, the Court of Appeals held, “As to the first element [of self-defense], [Petitioner] was not without fault in bringing on the difficulty.” In support of its holding, the court cited State v. Woodham, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931) (“The true rule is that the plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on.”). Id. at 215, 697 S.E.2d at 684. The court also noted that “the question of whether the language used was opprobrious enough as to have reasonably been expected to bring on a difficulty is ordinarily a question of fact for the jury.” Id. (citing State v. Ferguson, 91 S.C. 235, 242-243, 74 S.E. 502, 505 (1912)). The court thus affirmed Petitioner’s convictions.

PCR Hearing

Petitioner testified at the PCR hearing that he has “never been able just to tell [his] side [of] the story period.” App. 416, l. 14 – 417, l. 7. Petitioner explained that Jennifer Weathers and Chris Huckabee, the decedent, came to his house around eleven o’clock that night and asked him to come over for a “friendly visit.” Petitioner told Jennifer that it was going to take him a few minutes to get ready. Petitioner said that Jennifer asked him if he was going to lock her out and he told her no and put the keys down on the table. Jennifer and the decedent then left together

and Petitioner eventually went over to Tony Huckabee's trailer about fifteen minutes later. App. 417, l. 13 – 419, l. 9.

Petitioner said that when he got to the trailer he knocked on the door and Tony Huckabee told him to “come in,” but the door got stuck on the bottom. Tony Huckabee then said “hold on a minute” and the decedent then came running towards the door from the back of the trailer and opened the door. Petitioner walked inside and moved toward the couch where Jennifer was sitting. Petitioner admitted that he asked Jennifer “what, uh, where the ‘F’ did you do with [the keys?]” Despite using the “‘F’ word,” Petitioner testified that he was not “screamin’, hollerin’, nuttin’ like that.” He asked Jennifer in a “normal conversation tone.” App. 419, l. 10 – 421, l. 2.

Petitioner explained that the decedent then came “around my right side and pulled my left arm out and cut it.” Petitioner said the decedent pulled him so that his back was towards Huckabee and then Huckabee hit Petitioner from behind, which knocked all three of them onto the floor. The decedent still had a knife in his hand. Petitioner testified that he was dazed from the hit to the head and when he came to, the decedent was lying on Petitioner's legs at the bottom holding his neck and Huckabee was leaning over Petitioner's right shoulder with his head towards Petitioner's feet. Jennifer was screaming at Petitioner to get up and get “outta there before you bleed to death.” When Petitioner tried to get up, he saw blood squirting out of his arm and “went into shock and freaked out.” He explained, “Tony Huckabee when I looked down he had the knife in his hand, I don't know whose . . . knife it was or nuttin' like that, I just seen one in his hand.” Petitioner and Huckabee then struggled over the knife. Petitioner assumed that this is when Huckabee got injured. As soon as he could, Petitioner ran from the trailer and tried to get to the hospital. App. 421, l. 4 – 424, l. 3.

Petitioner said that he did not testify at trial and was not able to tell his side of the story to the jury. Petitioner stated that trial counsel advised him not to testify because he did not think

that the state had proved murder and that “they was gonna go back and use my criminal record against me.” Petitioner now thinks that he should have testified and that the fact that he did not testify cost him his freedom. App. 424, l. 7 – 426, l. 15. Importantly, Petitioner stated that he did not testify because he thought “his prior record over ten years old would be admitted if [he] testified.” App. 435, ll. 11-16.

Trial counsel, John Reckenbeil, testified, “I thought the jury would acquit him on somewhat of their own logical self-defense, uh, even without [Petitioner’s] testimony so I thought if obviously Judge Cole would allow those things [convictions] to come in and then him not testify well, uh, I thought that it would probably increase the chances of a conviction of murder.” App. 438, l. 5 – 439, l. 2. Trial counsel stated that, in his opinion, if Petitioner testified, it “woulda made it worse.” Trial counsel explained that he knew the solicitor well and that he thought that the solicitor “would have elicited a lot more evidence to show to a jury that manslaughter woulda been proper.” App. 441, l. 4 – 442, l. 7. Trial counsel conceded that whether the trial judge was going to keep out Petitioner’s convictions that were older than ten years was a “big factor in determining whether or not” Petitioner should testify, but that the judge never made a ruling before defense counsel announced Petitioner would not testify. App. 445, l. 3 – 446, l. 8.

Order of Dismissal

The PCR court found that Petitioner “had a difficult time explaining how the altercation occurred” and that, based on his testimony, Petitioner would have “difficulty overcoming the ‘heat of passion’ element of voluntary manslaughter.” Therefore, the court stated that it could not “find that a different outcome would have occurred had [Petitioner] not been advised not to testify.” App. 456. The court also stated that trial counsel articulated a valid strategy for

advising Petitioner not to testify such as “he believed that [Petitioner’s] testimony would have supported a charge for manslaughter even more.” Id. The court thus dismissed the claim.

Discussion

In Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991), our Supreme Court held that Horton received ineffective assistance of counsel when his trial counsel erroneously informed him that he could be cross-examined on a prior conviction that was more than ten years old resulting in Horton not testifying when there was no ruling on the admissibility of the conviction by the trial judge. Horton’s case was remanded for a new trial after this Court determined that Horton suffered prejudiced due to this erroneous advice. Id. at 255, 411 S.E.2d at 225.

The facts in this case are similar to the facts in Horton. Petitioner explained that he did not testify because he thought “his prior record over ten years old would be admitted if [he] testified” when the trial court had yet to make a ruling on the admissibility of these prior convictions. See App. 435, ll. 11-16. Defense counsel improperly led Petitioner to believe that his convictions that were older than ten years would be admissible and used by the state to impeach him if he testified. This advice was erroneous since the trial court had not yet issued a ruling on the admissibility of those remote convictions.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable

professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel was ineffective because he failed to wait until the trial court issued a ruling on the admissibility of Petitioner's prior convictions that exceeded the ten year window before advising Petitioner not to testify because his prior convictions would be used by the state to impeach him. See Horton, 306 S.C. at 254-255, 411 S.E.2d at 224-225. There is *no* logical reason why trial counsel did not wait for the judge to issue a ruling before advising Petitioner not to testify. Trial counsel even *conceded* that whether the trial judge was going to keep out Petitioner's convictions that were older than ten years was a *"big factor in determining whether or not" Petitioner should testify*, but that the judge never made a ruling before defense counsel announced Petitioner would not testify. See App. 445, l. 3 – 446, l. 8. (emphasis added).

Petitioner relied on the belief that all of his prior convictions, including the convictions that were older than ten years, would be admissible as impeachment in deciding not to testify. Petitioner testified at PCR that he would have testified at trial if it were not for this erroneous advice. App. 424, l. 7 – 426, l. 15; App. 435, ll. 11-16.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to wait for a ruling from the trial court on the admissibility of Petitioner's remote convictions before advising Petitioner not to

testify forced Petitioner to make a decision based on an erroneous belief that the judge had made a ruling on the issue.

It is extremely likely that the trial court would have ruled that Petitioner's prior convictions from 1979 and 1984 were inadmissible as impeachment against Petitioner. See Rule 609(b), SCRE (Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction."). The conviction from 1979 was twenty eight years old at the time of Petitioner's trial in 2007. The convictions from 1984 were twenty three years old. The longest sentence Petitioner received on the 1984 convictions was seven years, which would mean that his sentence ended at the latest in 1991. It is also possible that the trial judge would have ruled that Petitioner's 1993 convictions were inadmissible as well depending on what information the solicitor learned regarding when Petitioner's probationary sentence actually ended. If Petitioner's probation ended in 1996 or earlier, the judge very likely would have excluded those convictions as well.

These prior convictions were unduly prejudicial to Petitioner because the state sought to use them to paint Petitioner as a career criminal and show that he was capable of committing the crimes for which he was on trial. See App. 292, ll. 14-16. They are also, as discussed, very remote in time to Petitioner's 2007 trial. Therefore, the trial court would have very likely held that the probative value of these remote convictions substantially outweighed their prejudicial effect and excluded them.

Additionally, there were very few witnesses to the altercation. The state's main evidence against Petitioner consisted of the testimony of Tony Huckabee and Jennifer Weathers. Both of these witnesses had conflicting testimony. Specifically, Huckabee testified that Petitioner entered his mobile home that night and angrily demanded the key to their trailer from Jennifer. According to Huckabee, after the decedent said, "I'm not going to have this in my daddy's house," Petitioner

responded, “Shut your fucking mouth up.” See App. 153, l. 15 – 155, l. 1. Jennifer, on the other hand, testified that Petitioner came in and politely asked for the key to their trailer and that before she could respond, the decedent and Huckabee attacked Petitioner. See App. 226, l. 20 – 228, l. 5.

This conflicting testimony is significant because it relates to the factual issue of whether Petitioner acted in self-defense as a matter of law. Specifically, it’s important to the first element of self-defense that “the defendant must be without fault in bringing on the difficulty.” See State v. Strickland, 389 S.C. 210, 214, 697 S.E.2d 681, 683 (citing State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978).

Petitioner’s testimony, as demonstrated at the PCR hearing, likely would have convinced the jury that Petitioner was “without fault in bringing on the difficulty” and that it should acquit Petitioner based on self-defense. It likely would have tipped the scales in Petitioner’s favor. Petitioner testified that he walked inside Huckabee’s trailer and asked Jennifer, in a “normal conversation tone,” “where the ‘F’ did you do with [the keys?]” Despite using the “‘F’ word,” Petitioner said that he was not “screamin’, hollerin’, nuttin’ like that.” App. 419, l. 10 – 421, l. 2. Petitioner did not raise his voice. He was simply using language that was likely commonly used between him and his wife.

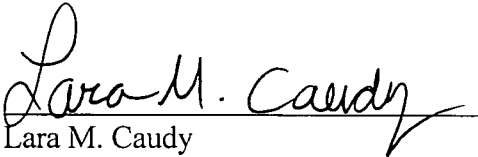
Petitioner was prejudiced by trial counsel’s actions because it led to Petitioner not testifying and thus the jury did not hear his testimony about the altercation and whether he acted in self-defense, specifically whether he was at fault on bringing on the difficulty.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

PERRY KEITH STRICKLAND,

PETITIONER,

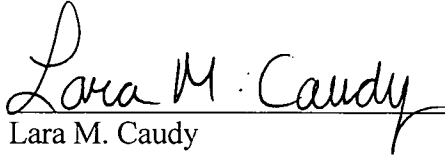
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of January, 2014.


Lara M. Caudy

Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of January, 2014.


(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.