

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Williamsburg County

R. Knox McMahon, Circuit Court Judge **S.C. Supreme Court**

JAVON RIVERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE # 2013-002647

PETITION FOR WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective for failing to assert that Petitioner was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §§ 16-11-410-450?

## STATEMENT

In December of 2008, the Williamsburg County Grand Jury indicted Petitioner Rivers for murder and possession of a weapon during the commission of a violent crime, indictment #2008-GS-45-275. Petitioner proceeded to jury trial before the Honorable George C. James. Legrand Carraway represented Petitioner. Ronnie Sabb and Kimberly Barr prosecuted the case. The jury returned with verdicts of guilty and on March 12, 2009, Judge James sentenced Petitioner to thirty (30) years imprisonment for murder and five (5) years consecutive for possession of a weapon during the commission of a violent crime. A timely notice of intent to appeal was filed, the direct appeal perfected and a brief filed pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). On March 21, 2012, the South Carolina Court of Appeals dismissed the appeal. State v. Rivers, 2012-UP-199 (S.C. Ct.App. filed March 21, 2012).

On March 27, 2012, Petitioner filed an application for post conviction relief. The State filed a return on September 10, 2012. On October 3, 2013, an evidentiary hearing was held before the Honorable R. Knox McMahan. Charles T. Brooks represented petitioner at the hearing. Mary Williams was present on behalf of the State. In a written order signed November 26, 2013, Judge McMahan denied relief and dismissed the application. A timely notice of intent to appeal was served on December 12, 2013. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to assert that Petitioner was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §§ 16-11-410-450.

During the evidentiary hearing, petitioner argued that counsel should have argued for immunity pursuant to the Protection of Persons and Property Act, S.C. Code §§ 16-11-410-450 [the Act] or “Stand Your Ground.” (App. p. 406, lines 3-21). The PCR judge disagreed finding that Petitioner did not establish that he should be entitled to the protection of the Act by a preponderance of the evidence. (App. pp. 415-418). The PCR judge erred.

On May 17, 2008, at approximately 2:00 AM Dyshea McBride went to her grandmother’s night club, Sadie’s, in Kingstree to pick up her boyfriend, the decedent, Derial McCrea. (App. p. 93, lines 5-15). When Dyshea arrived at the club, she met her mother, Erica McBride, who told her she needed to go and get the decedent. (App. p. 143, line 15 –p. 144, 145, lines 1-25). The decedent was dancing with another female and was not ready to leave. (App. p. 93, lines 22-25). Dyshea and the decedent argued outside of the club and Erica also became involved in the argument. (App. p. 146, lines 1-20). Dyshea testified, “He [decedent] and my mama had some words and after they had passed words I went to the car. And that’s when Javon Rivers [Petitioner], he came out of nowhere. I didn’t see where he come from and he came that’s when they [the decedent and Petitioner] start arguing.” (App. p. 93, lines 1-4).

State’s witness Ernie Wilson testified that he saw the fight between Petitioner and the decedent. (App. pp. 41-42). Wilson testified that while he did not see a knife, it appeared to him that the decedent had a knife and was swinging it at Petitioner. (App. p. 48, line 7 – p. 49, lines 1-14). Wilson testified, “The crowd was yelling knife when he was swinging.” (App. p. 49, line 3).

Wilson also testified that Petitioner went to his car, got a gun and confronted the decedent. (App. pp. 43-44).

Defense witness Christian Brand saw petitioner and the decedent arguing and testified that the decedent was trying to stab Petitioner. (App. p. 197, lines 14- 19). Brand testified:

He swung and then I see Scooter [Petitioner] take out and running I don't know where he went but in a few seconds he came back and he ain't said nothing, Ms. Erica was behind . . . been behind him. That when Dyshea say he got a gun, now everybody yell out he got a gun, he got a gun. That when Derial say I ain't scared to die. I ain't scared to die. So that when he walk up to Scooter and started swinging. When he swing . . .when he swing again is when the gun went off so I seen him fall on the ground.

(App. p. 197, line 19 – p. 198, line 1).

The judge charged the jury with the law of murder, voluntary manslaughter, self-defense, and the defense of others. (App. pp. 331 – 341). Counsel for Petitioner, however, did not argue pre-trial or at the directed verdict stage that Petitioner was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §§ 16-11-410-450 [the Act] or “Stand Your Ground.” Counsel was ineffective.

During the PCR hearing trial counsel was asked if, at the time of trial, he was aware that South Carolina had a “Stand Your Ground Law.” (App. p. 396, lines 7-9). Trial counsel responded, “I was not familiar with that at the time.” (App. p. 396, line 10). The effective date of the Act is June 9, 2006. State v. Isaac, 405 S.C. 177, 186, 747 S.E.2d 677, 681 (2013). Petitioner’s trial took place in March of 2009.

During the PCR hearing Petitioner testified that when he attempted to intervene in the argument between Erica, the wife of Petitioner’s cousin, and the decedent, the decedent threatened him. (App. p. 375, line 10 – p. 374, 375, lines 1-6). Petitioner testified he left but then turned around and came back when he heard the decedent and Erica arguing again. (App. p.

376, lines 19-24). Petitioner denied returning to the car to get a gun. (App. p. 376, lines 21-22). Petitioner testified that as he was returning the crowd knew that the decedent had a knife and someone, a home boy, handed him a gun. (App. p. 377, lines 11-19).

Petitioner testified that as he returned others were taking the decedent away when a girl yelled out that Petitioner had a gun. (App. p. 377, lines 17-23). Petitioner testified, “He [the decedent] said I ain’t scared of anybody. You ain’t going to shoot at nobody and then he swung a knife at me twice.” (App. p. 377, lines 24-25). Petitioner then shot. (App. p. 378, lines 15-23). Petitioner testified that he relayed all of this information to his trial attorney. (App. p. 378, line 24 – p. 379, line 1).

In the order of dismissal the PCR judge found that counsel was not ineffective in failing to request a pretrial hearing to determine immunity under the Act because the case was tried prior to the decision in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), providing for a pretrial determination on immunity. (App. p. 415-416). The PCR judge also found that even if counsel had requested a hearing, Petitioner failed to show that the judge would have granted immunity. The PCR judge wrote:

The intent of §16-11-440( C) is clearly not to allow an individual in a place other than his dwelling, residence occupied vehicle, or place of business to leave the area of danger, retreat to safety, then return in order to draw his retreating opponent into a second confrontation where danger to himself and the person he claimed to defend, Erica, had passed upon his retreat. If Applicant had already been armed at the time of the initial confrontation and it was believed that Victim was armed and attacking Applicant or Erica with a knife, the protection could have foreseeably applied. However, where applicant retreated and then returned with a pistol visibly in hand, an act which could have ostensibly caused his retreating opponent fear of attack, the Act’s protection does not apply.

The PCR judge erred. The evidence in the record supports a finding that, after being threatened by decedent, Petitioner armed himself and returned to the scene where the decedent

again attacked him with a knife and Petitioner “stood his ground” and fired back. Petitioner was entitled to immunity under the Act. Counsel was ineffective in failing to move for immunity.

S.C. Code §16-11-440(C ) provides:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

Petitioner was not engaged in an unlawful activity and was attacked in a place where he had a right to be. Petitioner had every right to return to the scene after being threatened by decedent. Once the decedent again attacked Petitioner with a knife, Petitioner had no duty to retreat and had the right to stand his ground and meet force with force. Petitioner reasonably believed the use of deadly force was necessary. Pursuant to the Act, petitioner was entitled to immunity. While the law at the time of trial was not clear about when the issue of immunity should be raised, counsel failed to raise the issue at all. Based on the law at the time of trial, counsel should have at least moved for immunity at the directed verdict stage. The PCR judge erred in refusing to find counsel ineffective for failing to move for immunity.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under

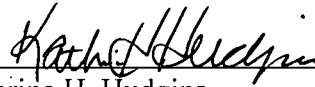
this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Counsel was deficient for not moving for immunity. There is a reasonable probability that if counsel had moved for immunity the trial judge would have granted immunity. The PCR judge erred in refusing to grant relief.

**CONCLUSION**

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of September, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JAVON RIVERS,

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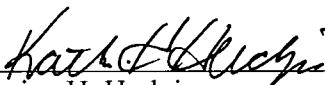
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CERTIFICATE OF SERVICE

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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 Donald J. Zelenka, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 10th day of September, 2014.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day  
of September, 2014.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.