

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Dorchester County  
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2013-002488

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LOUIS SHEPPARD,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**S.C. Supreme Court**

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### **ISSUE PRESENTED**

Whether there is evidence of probative value to support the post-conviction relief court's finding that Counsel was not ineffective for advising Petitioner not to testify where Counsel advised him of the risks and benefits of testifying, and it was Petitioner who elected to forgo testifying in his defense.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Petitioner was indicted during the April 2006 term of the Dorchester County Grand Jury for Assault and Battery with Intent to Kill (2006-GS-18-0767). (App. p. 275). Petitioner was represented by Marva Hardee-Thomas, Esquire. The State was represented by Donald N. Sorenson, Esquire, and Russell D. Hilton, Esquire. Petitioner proceeded to a jury trial before the Honorable Diane S. Goodstein, where he was convicted as indicted. On July 26, 2007, Judge Goodstein sentenced Petitioner to life imprisonment without parole.

A Notice of Appeal was filed and an appeal was perfected on Petitioner's behalf by Joseph L. Savitz, III. The South Carolina Court of Appeals dismissed Petitioner's appeal following submissions of an Anders<sup>1</sup> brief. State v. Sheppard, No. 2010-UP-118 (S.C. Ct. App. filed February 11, 2010). The Remittitur was issued on April 8, 2010.

Petitioner filed an application for post-conviction relief on July 26, 2010. (App. p. 211). Respondent made its Return on February 4, 2011, requesting an evidentiary hearing be held. (App. p. 217). Petitioner submitted an amended application for post-conviction relief on March 8, 2011. (App. p. 216). An evidentiary hearing was convened on August 30, 2011, at the Orangeburg County Courthouse before the Honorable Edgar W. Dickson. Petitioner was present and represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney of the South Carolina Attorney General's Office. By Order filed November 14, 2013, Judge Dickson denied and dismissed Petitioner's application for post-conviction relief. (App. p. 267). Petitioner filed a Petition for Writ of Certiorari on May 8, 2014.

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘*any evidence*’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

## ARGUMENT

**There is evidence of probative value to support the PCR Court's finding that Counsel advised (rather than ordered) Petitioner not to testify, and that such advice did not constitute ineffective assistance of counsel.**

Petitioner asserts that trial counsel was ineffective in ordering Petitioner not to testify in his defense, thus violating his Due Process Rights and Fifth and Sixth Amendment Rights to testify in his own defense. Petitioner also argues that under State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), such a deprivation constituted structural error, requiring automatic reversal. Respondent submits Counsel properly advised Petitioner of his rights to testify and that he knowingly and voluntarily waived those rights after a detailed colloquy with the court.

Where ineffective assistance of counsel is alleged 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 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 688. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have

prejudiced the Petitioner such that “there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “An on-the record waiver of constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right . . . Review of this issue is better left to a post conviction relief proceeding where the facts surrounding the trial can be fully explored.” Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994).

Respondent submits Counsel was not ineffective in *advising* Petitioner not to testify. The PCR Court found that nothing in Counsel’s representation fell below any reasonable professional standard. Counsel had valid strategic reasons for advising Petitioner not to testify. Counsel testified that she presented a simple assault theory of the case in hopes of persuading the jury to find Petitioner guilty of the lesser included offense. (App. p. 260, lines 8-9). Counsel also testified that simple assault was more consistent with the facts of the case than a self-defense theory. Id. Petitioner’s testimony would have been contrary to that theory as he testified at the PCR hearing that he was not the aggressor and was acting in self-defense. (App. p. 270). The facts simply did not support a self-defense theory. The State had presented consistent testimony of the victim and two correctional officers that Petitioner was the aggressor. In her closing argument at trial, Counsel argued that Petitioner had simply gotten in a fight with the victim, which supported her theory that the crime did not rise to the level of assault and battery with intent to kill. (App. p. 175, lines 16-17). At trial, Counsel pointed out that there was no weapon and that Petitioner did not have the requisite intent to kill as the injuries to the victim were not life threatening and did not cause serious bodily injury. (App. p. 176, lines 21-23 – p. 177, lines

14-23). Counsel also argued in closing statements that the pen used in the incident was not a deadly weapon. (App. p. 175 – 176).

At the PCR hearing, Counsel testified that she thought it would also not be in Petitioner's best interest to testify because the State, through cross-examination, could have impeached him with his prior convictions of assault and battery with intent to kill, armed robbery, and strong armed robbery. (App. p. 260, lines 21-23). Counsel also testified that the State presented the testimony of the victim and other witnesses, and that Petitioner's testimony would have lacked credibility compared to those witnesses. (App. p. 256, lines 6-14). Counsel argued for a conviction on the lesser included offense of simple assault and did not present a self-defense theory because there was no evidence Petitioner acted in self-defense. The State presented eyewitness testimony from three witnesses who all consistently stated that it was Petitioner who was the aggressor. Counsel advised Petitioner not to testify because his testimony would not have been consistent with the theory presented and because he would be impeached on cross examination with his previous conviction of assault and battery with intent to kill, among others. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 110, 525S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)).

Petitioner asserts that his case is subject to a structural error analysis rather than a harmless error analysis.

[D]espite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are 'so basic to a fair trial that their infraction can never be treated as harmless error. "There are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error standards' and which 'affect the framework within which the trial proceeds, rather than simply an error in the trial process itself."

State v. Rivera, 402 S.C. 225, 246-47, 741 S.E.2d 694, 705 (2013) (internal citations omitted). Because Petitioner is unable to show that Counsel violated his right to testify, his claim is not subject to a “structural error” analysis. As a result, even if Petitioner is able to satisfy the first prong of the Strickland test and show that Counsel’s performance was deficient, he still must show prejudice in order to be entitled to relief. Petitioner alleges that he was prejudiced because but for Counsel’s error, he “could have asserted his self-defense claim and his trial might have ended differently and an LWOP sentence might have been avoided.” (PWC, p. 6). This allegation is insufficient to obtain relief under Strickland. The standard is not whether the outcome of the proceeding *might* have been different—there must be a *reasonable probability* that it would have been different. Strickland at 694.

Additionally, even if Petitioner was entitled to a jury charge on self-defense, Petitioner has failed to meet his burden of proving the allegation that a self-defense charge “might” have been successful. At the PCR hearing Petitioner offered no evidence other than his own non-credible testimony to support a theory of self-defense.<sup>2</sup> The first two corrections officers to respond to the incident identified Petitioner as the aggressor, and the victim’s stab wounds were consistent with Petitioner walking up behind him and stabbing him in the back. (App. p. 94, line 24 – p. 95, line 2; p. 108 lines 4-5.)

Further, Respondent submits Petitioner’s reliance on Rivera is misplaced. Rivera stands for the general rule in South Carolina that a defendant’s right to testify in his own defense is so fundamental that its deprivation cannot be harmless error. Id. at 249. That being said, there is nothing to indicate that Petitioner was actually deprived of his right to testify. In Rivera, the

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<sup>2</sup> Respondent notes the PCR Court found Petitioner’s testimony not credible after having the opportunity to directly weigh its import. (App. p. 271).

defendant wanted to testify, told his counsel he wanted to testify and, crucially, told the trial judge he wanted to testify. Id. at 231. Rivera's trial counsel told the judge that testifying would not be in the defendant's best interest, and declined to call him as a witness. Id. at 232. The judge held a conference outside the presence of the jury to determine whether or not it would call the defendant as a witness and found, erroneously, that his testimony would violate the South Carolina Rules of Evidence. Id. at 235-36. In Rivera, the South Carolina Supreme Court found the deprivation of the defendant's rights came from the trial judge's decision not to allow defendant to testify.

Rivera does not apply to the present case. Unlike the scenario in Rivera, the trial court here did not rule that Petitioner he could not testify. Instead, the trial court explained to him during an *elaborate* colloquy that he could talk with his attorney, "his family, friends, or anyone else," but that the "final decision" was to be left entirely up to him. (App. p. 141, line 5 – p. 143, line 7). Petitioner, while under oath, told the trial court that he understood. (App. p. 143, line 8). After consulting with his attorney, Petitioner told the trial court: "I don't want to testify." (App. p. 144, line 20). He then acknowledged again that he understood his right to testify. (App. p. 144, line 24 – p. 145, line 5).

There is also nothing in Rivera to support Petitioner's argument that Counsel has the constitutional capacity to violate Petitioner's right to testify by "ordering" him not to testify, even when, as here, the trial judge cures any alleged error. However, even if Rivera applies to trial counsel as well as the court, the facts in the record do not support Petitioner's allegation. When asked at the PCR hearing about the decision to testify, Petitioner responded that he "took [Counsel's] *advice*" because he "didn't know nothing [sic] about the law [himself]." (App. p. 246, lines 16-17 (emphasis added)). Further, Counsel testified that he did not threaten or coerce

Petitioner in any way to get him to make that decision, (App. p. 261, lines 1-3). Counsel also testified that he advised Petitioner of his rights to testify, and discussed with him “his background, the charges and his being incarcerated and the weapon.” (App. p. 260, lines 19-21). Petitioner knowingly and voluntarily waived his rights to testify at his trial and he should not be able to now second guess that decision after he was convicted.

For the reasons stated above, there is ample probative evidence to support the PCR Court’s ruling on this issue.

### CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issue herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

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SC Bar No. 101443  
Assistant Attorney General

By: \_\_\_\_\_  
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September 24, 2014

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2013-002488

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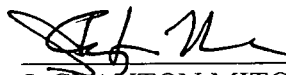
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**Wanda H. Carter, Esquire  
SC Commission of Indigent Defense  
1330 Lady Street; Suite 401  
Columbia SC 29201**

This 24<sup>th</sup> day of September, 2014.



\_\_\_\_\_  
J. CLAYTON MITCHELL, SC Bar #101443  
ATTORNEY FOR RESPONDENT

**SWORN to before me this 24<sup>th</sup> day of September, 2014.**

\_\_\_\_\_  
**Notary Public for South Carolina.**  
**My Commission Expires: May 14, 2024**



ALAN WILSON  
ATTORNEY GENERAL

September 24, 2014

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S.C. Supreme Court

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Louis Sheppard v. The State of South Carolina  
Appellate Case No. 2013-002488

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

J. Clayton Mitchell  
Assistant Attorney General  
S.C. Bar No. 101443

JCM/sbm  
Enclosures

cc: Wanda H. Carter, Esquire, Appellate Defense  
Trisha Allen, Victim's Services