

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ORIGINAL

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

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JONTA GREEN,

RECEIVED  
PETITIONER

JUL 26 2019

V.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000329

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective for failing to determine that a character witness called by the defense had a burglary conviction from 1996 and for failing to object when the State improperly questioned the witness about the conviction?

## STATEMENT

In January of 2009, the Charleston County Grand jury indicted Petitioner, Jonta Green, with murder and possession of a weapon during the commission of a violent crime, indictments #2009-GS-10-113, 116. On April 19, 2010, Petitioner proceeded to jury trial before the Honorable Deadra L. Jefferson. Demal Mattson represented Petitioner at trial. Rutledge Durant and Peter McCoy prosecuted the case. The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and the weapon charge. Judge Jefferson initially sentenced Petitioner to twenty-three (23) years for the voluntary manslaughter charge but that sentence was later amended to twenty (20) years. (App. p. 920). Judge Jefferson sentenced Petitioner to five years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 30, 2013, the South Carolina Court of Appeals dismissed the appeal. State v. Green, Op. No. 2013-UP-46 (S.C. Ct.App. filed January 30, 2013).

On October 28, 2013, Petitioner filed an application for post-conviction relief [PCR], 2013-CP-10-6337. The State filed a return on December 22, 2014. On February 18, 2015, an evidentiary hearing was held before the Honorable Eugene Griffith. James K. Falk represented Petitioner at the PCR hearing. Ashleigh R. Wilson represented the State. In a written order signed July 1, 2015, Judge Griffith denied relief and dismissed the application. On July 23, 2015, Petitioner filed a timely motion to reconsider pursuant to Rule 59(e), SCRPC. On July 29, 2015, Judge Griffith denied the motion. A notice of intent to appeal was not filed.

On December 9, 2015, Petitioner filed a second PCR application, 2015-CP-10-6633. The State filed a return on August 11, 2016. On December 4, 2017, the parties entered into a consent agreement to seek a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. pp. 1015-1019). Christopher L. Murphy represented Petitioner. Megan Harrigan

Jameson represented the State. The Honorable Deadra L. Jefferson signed the order. A timely notice of intent to appeal was served on December 19, 2017. An Austin petition and a petition for writ of certiorari were filed on July 10, 2018. On November 26, 2018, the Respondent State filed a motion for remand. (App. p. 1038). On February 1, 2019, this Court granted both petitions for writs of certiorari from the orders of both Judge Jefferson and Judge Griffith and remanded the case to allow the PCR judge, Judge Griffith, to make specific findings on each of the allegations raised but not included in the original order of dismissal. (App. pp. 1042-1043). Judge Griffith signed an amended order of dismissal on February 18, 2019. A timely notice of intent to appeal was served on February 28, 2019. This second petition for writ of certiorari pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) follows. In the order dated February 1, 2019, this Court granted the original petition for writ of certiorari as to Judge Jefferson's grant of the belated appeal pursuant to Austin. As a result, a second petition addressing the belated appeal is not being filed with the second Austin petition.

## ARGUMENT

**The PCR judge erred in refusing to find trial counsel ineffective for failing to determine that a character witness called by the defense had a burglary conviction from 1996 and for failing to object when the State improperly questioned the witness about the conviction.**

At trial counsel called several character witnesses including George Thomas Jr. (App. p. 487, lines 21-22). Petitioner worked with Mr. Thomas in his used car business, attended church with Mr. Thomas and dated his daughter. (App. p. 488, line 16 – p. 489, lines 1-20). During cross-examination of Mr. Thomas by the State the following took place:

Q. And you yourself were – you have a record as well; isn't that right?

A. I had a little problem at one time.

Q. What was that?

A. I think kind of a domestic problem with my wife at one point.

Q. What about weren't you convicted of burglary back in 1996?

A. Yeah. But that was changed because that was – it was, yeah, I was with the wrong person at the wrong time. Somebody with me committed something that I didn't know he was doing at the time.

Q. Okay. Thank you, sir.

(App. p. 491, line 21 – p. 492, lines 1-8). Trial counsel failed to object. After the improper cross-examination the following bench conference took place:

THE COURT: Be very, very careful with that ten-year time limit. Just anybody else's record you need to make sure, although he did not object.

MR. MATTSON [Trial counsel]: He had a four year sentence on it dated from April.

THE COURT: He had a four year sentenced or he had four years of probation?

MR. MATTSON: Four years suspended to 18 months probation.

THE COURT: That still would be beyond the ten years, 19—2006. Calculated from the day of release from confinement, that 2008, it's 2010.

MR. DURANT [Prosecutor]: My bad.

THE COURT: Yeah. Make sure you calculate it. Thank you.

(App. p. 492, line 19 – p. 493, lines 1-8).

At the start of the PCR hearing PCR counsel advised the PCR judge that Petitioner wished to go forward with, among other allegations, an allegation that counsel was ineffective for allowing a defense character witness “to be impeached by conviction that was outside of 609.” (App. p. 938, lines 10-12). The following took place during the PCR hearing between trial counsel and PCR counsel:

Q. So you are calling a character witness, and you didn't ask him whether or not he had a prior criminal record?

A. I probably did not ask him that.

Q. So were you caught by surprise that he had a 14-year-old burglary conviction?

A. If I didn't ask him, know it, then, yes, I would have been.

Q. Would that have been something you would have objected to?

A. The cat was out of the bag by the time the question was out. There wasn't any use to object to something that the jury heard.

(App. p. 968, line 25 – p. 969, lines 1-11). PCR counsel referenced the ten-year time limit provided by Rule 609, SCRE. (App. p. 959, lines 19-21). PCR counsel then asked trial counsel, “Had you known ahead of time, would you have handled your direct examination differently?” (App. p. 970, lines 3-4). Trial counsel answered, “Probably, yes. I might not have even called him.” (App. p. 970, line 5). Trial counsel then opined that the improper questioning about a fourteen-year-old burglary conviction was not damaging. (App. p. 970, lines 7-14).

In the amended order of dismissal the PCR judge wrote:

Applicant alleged in his application that Counsel was ineffective in not investigating witnesses. Regarding his strategy of calling several character witnesses as to the Applicant's peaceful demeanor, Applicant testified that he did not know that the father of his fiancée had a fourteen year old conviction for burglary. Applicant testified that he believed this impacted the character testimony which was sought to be elicited from this witness. Counsel testified at the hearing that he did not ask the witness about any prior convictions but may have handled the witness differently if he had known of this conviction. Counsel further stated that he did not think that it made a big impact considering all of the character witnesses that were presented. Therefore, this Court finds Applicant [sic] to meet his burden of proof as to this argument. Thus, the allegation is denied.

(App. pp. 1053-1054). Trial counsel was ineffective in failing to determine that the witness had a fourteen-year-old burglary conviction. If trial counsel had properly investigated the witness, he would have learned of the conviction and moved to exclude it pursuant to Rule 609(b). Additionally, trial counsel was ineffective for failing to object when the State improperly questioned the witness about the conviction. Trial counsel should have immediately objected to the improper question and requested that the judge provide the jury with a curative instruction.

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.

Rule 609(a), SCRE provides:

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
- (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(b), however, places restrictions for remote convictions. In State v. Robinson, 828 S.E.2d 203, 210 (S.C. 2019), the South Carolina Supreme Court wrote:

Rule 609(b) invokes one impeachment scenario. Evidence of a conviction of any kind is not admissible if more than ten years has elapsed from the date of conviction or the release of the witness from confinement for that conviction, whichever is the later date, unless the proponent of the evidence establishes that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. Rule 609(b) includes notice requirements and establishes a presumption against the admissibility of these "remote" convictions, and the State bears the burden of substantially overcoming the presumption.

Trial counsel's failure to determine that a character witness had a remote prior conviction constitutes deficient performance. Additionally, the failure to immediately object and request a curative instruction when the State improperly asked about the remote conviction constitutes deficient performance. Prejudice resulted from the deficient performance.

In Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) the South Carolina

Supreme Court wrote:

In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...,” and “we must consider the totality of the evidence before the jury.”). In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. See Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 (stating “a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”).

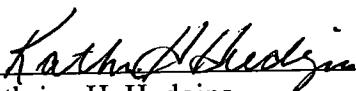
This was a self-defense case. On September 19, 2009, Petitioner and his brother, Quantas Green, who was recovering from being shot five times during an attempted carjacking (App. p. 528, line 8- p. 529, lines 1-24), drove to West Ashley in Charleston to sell some shoes. (App. p 520 lines 12-19; p. 521 lines 9-21). While selling shoes to Stephanie Jackson, Petitioner received several phone calls from Sam Crawford. (App. p. 521 line 22 – p. 522 lines 1-11). After completing the sale, Petitioner drove around the corner to Sam's house. (App. p. 634, line 1 – p. 637 lines 1- 4). Several men, including Brandon Parker, were gathered outside Sam's house. (App. pp. 141 – 142). When Petitioner arrived, he spoke to Carlos Chisholm, one of the men gathered on the lawn. (App. p. 636, line 11 – p. 637, lines 1-11). While Petitioner and Chisholm walked toward Petitioner's car, Brandon Parker struck Petitioner from behind. (App. p. 79, line 20 – p. 80, 81, lines 1-18; p. 637, lines 12 – 24). Petitioner and Parker then began to fight. (App. p. 638, line 16 – p. 639, lines 1-13). The fight broke up when Sam's mother, Mildred Crawford, yelled for everyone to stop fighting and to leave. (App. p. 639, lines 14-19. Petitioner and his brother left the Crawford residence. (App. p. 639, line 25 – p. 640, 641, lines 1-12).

After traveling approximately one block, Petitioner realized he lost his mobile phone and prescription glasses during the fight and his brother realized he lost his cane, which he needed for walking. (App. p. 642, lines 1-20). The two drove back to the Crawford residence. (App. p. 642 lines 22-23). Petitioner apologized to Ms. Crawford for fighting and asked for permission to look for his belongings. (App. p. 643, lines 8-15). Ms. Crawford agreed. (App. p. 535 lines 10-11). Petitioner removed his gun from the glove compartment, placed the gun in his waistband, and began looking for his belongings. (App. p. 643, lines 16-17). Parker again attacked Petitioner and the two struggled for the gun. (App. p. 646, line 14 – p. 647, lines 1-25). At some point during the fight, the gun went off and Parker was fatally shot. (App. p. 648, lines 13 – 25). Petitioner immediately rushed to Parker and rendered aid. (App. p. 649, lines 3-5).

Petitioner's credibility and character were critical issues for the jury to determine if Petitioner acted in self-defense. While other witnesses from Petitioner's church testified about his character as an honest person, Mr. Thomas, the witness improperly questioned by the State, is the only witness who testified about working with Petitioner in a business, his auto sales business. (App. p. 488, line 11 -15; p. 489, line 25 – p. 490, lines 1-3). Trial counsel's failure to object to the improper questioning had a specific impact on the jury's determination of credibility on the issue of self-defense. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari pursuant to Austin v. State to allow further briefing on the issue.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26<sup>th</sup> day of July, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge  
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JONTA GREEN,

PETITIONER

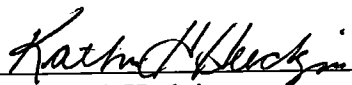
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

—————  
CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix have been served on Jonta Green, #340485, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 26<sup>th</sup> day of July, 2019.

  
Kathrine H. Hudgins  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 26<sup>th</sup> day of July, 2019.

  
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Notary Public for South Carolina  
My Commission Expires: October 26, 2019