

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Berkeley County

Maite Murphy, Circuit Court Judge

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DAVID JUDSON PENN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000882

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PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT

I. In violation of Petitioner’s rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to prepare and call Petitioner as a witness where (1) trial counsel informed the jury in his opening statement that Petitioner would testify and (2) the only way the jury could learn that the deceased was armed with a knife was if Petitioner testified, which was imperative to the defense’s strategy that he was guilty of voluntary manslaughter, not murder ..... 8

II. In violation of Petitioner’s rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to request a ruling on the state’s ability to use Petitioner’s prior record for impeachment if Petitioner were to testify where trial counsel indicated his advice to Petitioner not to testify was based upon his fear that the state would use Petitioner’s prior convictions against him and a ruling on the matter would have assisted Petitioner in deciding whether to testify ..... 15

CONCLUSION ..... 21

## ISSUES PRESENTED

I. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, did trial counsel provide ineffective assistance by failing to prepare and call Petitioner as a witness where (1) trial counsel informed the jury in his opening statement that Petitioner would testify and (2) the only way the jury could learn that the deceased was armed with a knife was if Petitioner testified, which was imperative to the defense's strategy that he was guilty of voluntary manslaughter, not murder?

II. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, did trial counsel provide ineffective assistance by failing to request a ruling on the state's ability to use Petitioner's prior record for impeachment if Petitioner were to testify where trial counsel indicated his advice to Petitioner not to testify was based upon his fear that the state would use Petitioner's prior convictions against him and a ruling on the matter would have assisted Petitioner in deciding whether to testify?

## STATEMENT

Petitioner and Penny Blair were romantically involved and lived together for eight years. App. 306, l. 24 – App. 307, l. 2. Petitioner and Blair both suffered from drug addiction. App. 308, ll. 7-8; App. 313, ll. 21-25; App. 219, ll. 19-21. When Petitioner used crack cocaine, he acted differently – he was not the same person Blair knew and loved. App. 314, ll. 1-3. In June 2011, Blair moved out of Petitioner’s home. App. 307, l. 24 – App. 308, l. 1. Not surprisingly, Petitioner was unhappy when Blair moved out and he became upset when Blair began seeing another man shortly thereafter. App. 308, ll. 9-20.

Petitioner worked for Kathy Chrastina for several years. App. 263, ll. 21-23; App. 277, ll. 3-5; App. 307, ll. 6-11; App. 601, l. 13 – App. 602, l. 3. On October 12, 2011, Petitioner visited with Chrastina in her home. During the visit, she called him the n-word and spit in his face. App. 160, ll. 1-25. Filled with anger, Petitioner grabbed a power cord for a laptop and wrapped it around Chrastina’s neck, killing her. App. 160, ll. 1-25.

After, Petitioner felt immediate remorse. Sobbing and upset, he called Blair and confessed to her. App. 284, ll. 16-22; App. 316, ll. 4-13. Additionally, Petitioner told Darrell Hackney, a co-worker, that he had killed someone. App. 204, l. 19 – App. 205, l. 21; App. 208, l. 4 – App. 210, l. 7. He even told the manager of the hotel where he was staying that he was a killer and wanted to turn himself in to police. App. 219, ll. 5-9. When Petitioner was arrested on October 15, 2011, he confessed to police. App. 298, ll. 21-25; App. 300, ll. 3-19.

On April 11, 2012, a Berkeley County grand jury indicted Petitioner for murder (2012-GS-08-501) and grand larceny (2012-GS-08-502). App. 645-646; App. 648-649. Cody Groeber represented Petitioner and developed a trial strategy to convince the jury that Petitioner did not have malice aforethought and was adequately provoked in killing the deceased. App. 573, ll. 6-

12. To effectuate this strategy, Petitioner and Groeber discussed Petitioner testifying at his trial. App. 576, ll. 20-21. Groeber and Petitioner talked “a lot” about Petitioner testifying. App. 577, ll. 11-13; App. 604, ll. 4-13. The decision was made that Petitioner would testify. App. 604, ll. 12-13. However, Groeber never prepared Petitioner to testify as a witness. App. 605, ll. 19-22; App. 606, ll. 2-9. Groeber never posed any questions to Petitioner that the prosecutor might ask on cross-examination. App. 605, l. 23 – App. 606, l. 2.

On September 30 – October 1, 2013, the state, represented by Anne Williams and Colleen Dixon, called the case to trial before the Honorable R. Markley Dennis, Jr., and a jury. App. 1. David Schwacke and Groeber represented Petitioner at the trial. App. 1. Unsurprisingly given the defense strategy and pre-trial discussions, during his opening statement, trial counsel told the jury that Appellant would take the stand and testify. App. 160, ll. 1-25; App. 576, ll. 1-11.

You will hear from Mr. Penn, from the stand, talk about he lost control. You will hear evidence from him how he lost control and how he did not mean to do it.

He’s not saying that he didn’t mean to actually kill her. He’s saying that he didn’t intend that when he got over there, he didn’t intend it when they stated to argue.

You will hear too what provoked him into such a rage. There was a word and an act, a word and an act said out of anger, frustration and maybe even fear. A word and an act that I have no doubt Kathy Chrastina did not mean. A word and an act that I have no doubt that she would take back if she could. She called my client the N-word, perhaps the worst insult that you can use against a black person. A word so dirty and vile that we don’t say it in polite conversation. I won’t use that word. I don’t feel comfortable using that word.

Then she spit in his face.

His blood boiled and, in a rage, he killed her – with a cord, still plugged into the wall.

App. 160, ll. 1-25.

However, Petitioner did *not* testify. After the state rested its case, trial counsel indicated to the judge that he had discussed with Petitioner whether Petitioner wished to testify. App. 346, ll. 20-23. Nevertheless, trial counsel requested “a few more minutes to speak with” Petitioner. App. 346, ll. 23-24. Thereafter, the judge permitted trial counsel to discuss the matter with Petitioner over lunch. App. 353, l. 20. When the parties returned from lunch, trial counsel informed the judge that Petitioner would not testify. App. 353, l. 22 – App. 354, l. 8. Petitioner told the judge that trial counsel “advised” him that it was not in his “best interest” to testify; therefore, Petitioner was not going to testify. App. 356, ll. 22-24. Petitioner later elaborated that he did not testify because trial counsel advised him that the state would be permitted to “open up [his] file.” App. 610, ll. 1-5.

The only question before the jury was whether Petitioner was guilty of murder or voluntary manslaughter. App. 157, ll. 17-21; App. 382, ll. 10-17; App. 408, ll. 15-18; App. 412, l. 22 – App. 413, l. 15. Ultimately, the jury found Petitioner guilty of murder and grand larceny. App. 448, l. 12 – App. 449, l. 15. Judge Dennis sentenced Petitioner to thirty-five years imprisonment for murder and to five years imprisonment for grand larceny. App. 471, l. 17 – App. 472, l. 2; App. 647; App. 650. He ordered the sentences to be served concurrently. App. 471, l. 25; App. 647; App. 650.

Petitioner filed a notice of appeal, which was perfected by Robert M. Dudek. App. 474-496. On March 2, 2016, the Court of Appeals affirmed Petitioner’s convictions and sentences. App. 530-532; State v. Penn, 2016-UP-114 (S.C. Ct. App. filed Mar. 2, 2016). Subsequently, Petitioner filed a petition for rehearing. App. 533-537. On April 22, 2016, the Court of Appeals denied the petition. App. 538-539. Remittitur issued on July 13, 2016. App. 540-541.

On June 29, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 542-551. On January 29, 2018, the matter proceeded to an evidentiary hearing before the Honorable Maite Murphy. App. 565. John E. James, Jr., represented the state, and Rodney Duane Davis represented Petitioner. App. 565.

Trial counsel affirmed that at the time he delivered his opening statement, he believed Petitioner would testify. App. 593, ll. 5-7. He further admitted that later during the trial, he expressed his opinion to Petitioner “that the main concerns that he had, that he wanted to express, ha[d] been expressed through his confession, and that there was a lot of danger for him in testifying, that these additional crimes could come out.” App. 593, l. 23 – App. 594, l. 2. Trial counsel claimed that after the state rested its case, he discussed with Petitioner whether he would testify. App. 578, ll. 16-20. Trial counsel recalled “telling [Petitioner] that a lot of the concerns that he had, that he wanted to make sure the jury understood, [trial counsel] felt had been addressed in his confession.” App. 579, ll. 1-4. In trial counsel’s view, the confession “was incredibly emotional and sincere.” App. 579, ll. 4-5. To put it succinctly, trial counsel advised Petitioner that “most of the benefit” of his testifying was conveyed to the jury in his confession. App. 579, ll. 7-17.

Trial counsel had no specific recollection of discussing with Petitioner whether any matters in his prior criminal history could be used to impeach him. App. 578, ll. 6-9. All trial counsel could say on this point was that it would have been his “practice, to talk about all of the different things to consider, someone’s record, what would be admissible, what could arguably be admissible, how things would come in that were not necessarily admissible but that could be admissible based on his testimony.” App. 578, ll. 6-15. Nevertheless, Petitioner recalled that he

and trial counsel discussed “in general” that his prior record may be used against him if he were to testify. App. 604, l. 23 – App. 605, l. 6.

Trial counsel had no specific recollection of discussing Petitioner’s prior record with him during the lunch break. App. 579, ll. 18-24. Trial counsel asserted “that would have been a very high thing or one of the most important things that [they] would have talked about in relation to whether or not he should testify.” App. 579, l. 24 – App. 580, l. 2. Prior to trial, however, trial counsel had reviewed Petitioner’s rap sheet that he received through discovery and marked the convictions that he believed would be admissible at the trial. App. 580, ll. 3-20. Specifically, trial counsel was worried that a 2003 conviction for criminal domestic violence, first offense, and 2009 conviction for criminal domestic violence, second offense, would be admissible. App. 581, l. 14 – App. 582, l. 2; App. 582, ll. 17-18. Trial counsel admitted that generally, such an offense would not be admissible, but he “had a concern that possibly, through testimony of the defendant, that that evidence could come in if he made some sort of statement that would put at issue his tendency to violence or no tendency to violence.” App. 581, l. 14 – App. 582, l. 2; App. 582, ll. 19-24. Trial counsel believed a conviction for false information would have been admissible “as a crime of dishonesty,” but he did not believe a 2005 conviction for possession of cocaine, first offense would have been admissible unless Petitioner’s testimony made the information relevant. App. 582, ll. 9-16.

Trial counsel explained that in his experience, a defendant’s testimony has permitted the state to introduce evidence of prior convictions that would otherwise be inadmissible. App. 590, ll. 8-19. He claimed he had discussed “the possibility of that occurring” to Petitioner. App. 590, ll. 20-22. Petitioner admitted that trial counsel discussed with him about the possibility of

“opening the door” to his past history. App. 606, ll. 10-15. However, trial counsel never advised Petitioner on how to avoid such a situation. App. 606, ll. 16-19.

At no point did trial counsel request a ruling from the trial judge on the admissibility of the prior convictions. App. 585, ll. 5-11. The judge did not inquire into the admissibility of Petitioner’s prior convictions, and the state did not make an inquiry. App. 585, ll. 9-11. Nevertheless, trial counsel claimed that in most cases, he requests a ruling on the admissibility of a defendant’s prior convictions. App. 592, ll. 12-17; App. 592, ll. 20-23. According to trial counsel, if Petitioner “had wanted to know that information ... to help form his decision, then [trial counsel] certainly would have asked for that ruling to help him make that decision.” App. 592, ll. 17-20.

By an order filed on April 9, 2018, Judge Murphy denied Petitioner relief from his convictions and sentences. App. 634-644.

## ARGUMENT

I. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to prepare and call Petitioner as a witness where (1) trial counsel informed the jury in his opening statement that Petitioner would testify and (2) the only way the jury could learn that the deceased was armed with a knife was if Petitioner testified, which was imperative to the defense's strategy that he was guilty of voluntary manslaughter, not murder.

### **Relevant facts**

At the PCR hearing, Petitioner explained how he would have testified had he been permitted to do so at trial. The deceased picked up Petitioner early in the morning in order to pay him for some work he was doing on her mobile home. App. 611, ll. 20-25. While the two were at the deceased's home, they discussed what additional work needed to be performed. App. 612, l. 1. During this conversation, the deceased criticized Petitioner's girlfriend and told him that he did not need to be with her. App. 612, ll. 6-18. This irritated Petitioner. App. 612, ll. 17-18. The deceased also called Petitioner the "N word" and spat in his face. App. 612, ll. 19-25. Additionally, the deceased had picked up a knife from the table. App. 615, l. 20 – App. 616, l. 8. Petitioner then grabbed the deceased. App. 613, l. 21. He hit her and pushed her into the living room. App. 616, ll. 17-19. He picked up a cord and wrapped it around her neck. App. 616, ll. 19-20.

Importantly, Petitioner explained that he had neglected to inform the police that the deceased had a knife when she called him a racial slur and spit in his face. App. 620, ll. 1-7.<sup>1</sup>

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<sup>1</sup> Trial counsel recalled discussing the knife with Petitioner; however, he did not recall that the knife was in the deceased's possession before or during the time that she called him a racial epithet or spat in his face. App. 621, l. 23 – App. 622, l. 4.

Thus, this information was not before the jury and could only have been presented to the jury through Petitioner's testimony.

In her order, Judge Murphy found no deficiency on trial counsel's part. App. 642. She also found no prejudice from trial counsel's conduct. App. 642. Judge Murphy noted that "[t]he testimony at the evidentiary hearing was consistent that both [Petitioner] and counsel expected [Petitioner] to testify at the time Counsel presented his opening statement." App. 642. The PCR judge also noted the trial judge engaged in a colloquy with Petitioner regarding his desire to testify, and Petitioner told the trial judge he did not want to testify. App. 642. Finally, the PCR judge noted the judge instructed the jury "they could not take into consideration a defendant's decision not to testify." App. 642. Based upon these facts, the judge found Petitioner "was not prejudiced by the opening statement and any error was cured by the jury charge." App. 642. The PCR judge also relied upon Petitioner "affirm[ing] at the evidentiary hearing that the decision not to testify was his own." App. 642. Thus, the PCR judge found "no deficiency on the part of counsel for the consequences" of Petitioner's decision not to testify. App. 642-643.

### **Discussion**

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the

defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

This Court has held trial counsel ineffective for failing to call crucial witnesses during trial. For example, in Walker v. State, 407 S.C. 400, 407, 756 S.E.2d 144, 147 (2014), this Court held trial counsel rendered ineffective assistance by failing to interview Walker's girlfriend regarding

Walker's whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker's girlfriend testified that when she was dating Walker, which included the time of the alleged kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend's "testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Thus, "it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147. This Court held Walker was entitled to relief based upon his counsel's failure to interview his alibi witness. Id.

In another case, this Court held trial counsel was ineffective by "failing to call the medical personnel who would have cast doubt on the state's sole witness' identification of [Thomas]" as the perpetrator. Thomas v. State, 308 S.C. 123, 124, 417 S.E.2d 531, 532(1992). Thomas was charged with burglary and criminal sexual conduct. Id. The only witness to those offenses was the alleged victim. Id. Several hours after the incident, the alleged victim identified Thomas as her assailant. Id. "As the sole witness to this attack, the victim's credibility and identification of her attorney was crucial to the state's case." Id. Further, this Court held "the omission of this witness" was prejudicial to Thomas because the alleged victim's identification was crucial to the case. Id.

This Court held counsel was ineffective in Pauling v. State, 331 S.C. 606, 607-608, 503 S.E.2d 468, 469 (1998), for failing to call a triage nurse to challenge the state's case. Pauling challenged his convictions for first degree burglary and first degree criminal sexual conduct. Id. at 607, 503 S.E.2d at 469. One of his allegations was that trial counsel failed to prepare a triage nurse as a defense witness. Id. at 607-608, 503 S.E.2d at 469. At trial, counsel questioned a doctor about notes prepared by the triage nurse. Importantly, the notes indicated the alleged

victim told the triage nurse that there was no actual penetration. However, trial counsel's attempt to question the doctor about the notes drew a hearsay objection, which was sustained. Id. at 608, 503 S.E.2d at 470. At his PCR hearing, Pauling introduced the triage nurse's notes indicating the alleged victim said the assailant did not penetrate her vagina. Id. at 609, 503 S.E.2d at 470.

According to this Court, counsel's failure to call the triage nurse as a defense witness was deficient and Pauling suffered prejudice as a result of the deficiency. Id. at 610, 503 S.E.2d at 470. This Court explained "the only evidence of a sexual battery was the victim's testimony" as there "was no corroborating physical evidence of penetration or any forensic evidence of a sexual assault." Id. at 610, 503 S.E.2d at 471. As this Court detailed, "[t]he triage nurse's testimony of the victim's statement shortly after the assault would have been crucial, both as substantive evidence that a sexual battery did not occur (and therefore, there was no CSC) and as evidence to impeach the victim's credibility." Id.

Finally, this Court held counsel was ineffective in failing to call an expert witness whose testimony support the defense. McKnight v. State, 378 S.C. 33, 41, 661 S.E.2d 354, 359 (2008). McKnight gave birth to a stillborn child, and a subsequent autopsy revealed the presence of a by-product of cocaine. Id. at 39, 661 S.E.2d at 356. The state's pathologist concluded the child died as a result of cocaine consumption. Id. at 39, 661 S.E.2d at 357. The state charged McKnight with homicide by child abuse. Id. McKnight's first trial ended in a mistrial; the second resulted in a conviction. Id.

At the first trial, McKnight's counsel called two expert witnesses to present evidence of possible alternative causes of death. Id. at 41, 661 S.E.2d at 358. One of those experts – Dr. Karch – provided very favorable testimony for McKnight. Id. The other expert's testimony

greatly assisted the state and was the centerpiece of the state's closing argument. Id. at 42, 661 S.E.2d at 358. At the first trial, defense counsel failed to call Dr. Karch because he was not available. Id. Nevertheless, counsel called the second expert whose testimony had been so detrimental to McKnight's case. Id.

At her PCR hearing, McKnight presented testimony from another expert who would have testified similarly to Dr. Karch had the witness been called. Id. at 44-45, 661 S.E.2d at 359-360. This Court held trial counsel's decision to call during the second trial the expert who had provided beneficial testimony for the state was unreasonable without calling an expert to rebut the state's expert on the cause of death. Id. at 45, 661 S.E.2d at 360. Additionally, this court held McKnight suffered prejudice as a result of counsel's deficiency. Id. "The methodology used by the *only* expert witness for the defense in determining the cause of fetal death mimicked that of the state's star expert and, in this way, [the second expert]'s testimony primarily served to bolster the state's theory of the case excluding all other potential causes of death in order to conclude that cocaine caused the stillbirth." Id. (emphasis in original). Thus, this Court concluded McKnight's counsel provided ineffective assistance. Id. at 46, 661 S.E.2d at 360.

Petitioner's proffered testimony during the PCR hearing demonstrated exactly why it was necessary for trial counsel to prepare and call him as a witness at his trial. Petitioner's testimony demonstrated how the death of Chrastina was voluntary manslaughter, not murder. He emphasized how Chrastina called him a racial epithet and spat in his face. Petitioner also provided the only evidence that Chrastina was armed with a knife when he killed her. He was the only witness that could have provided such evidence, which was critical to his defense. Additionally, trial counsel promised the jurors they would hear directly from Petitioner, but failed to keep his promise to the jury. When Petitioner did not testify, both Petitioner and trial counsel lost all credibility with the

jury. Trial counsel's failure to prepare and call Petitioner as a witness was ineffective assistance of counsel.

II. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to request a ruling on the state's ability to use Petitioner's prior record for impeachment if Petitioner were to testify where trial counsel indicated his advice to Petitioner not to testify was based upon his fear that the state would use Petitioner's prior convictions against him and a ruling on the matter would have assisted Petitioner in deciding whether to testify.

### **Relevant facts**

In her order, the PCR judge acknowledged there was “considerable case law” on the admissibility of impeachable convictions, but ultimately, concluded that there was “no requirement that defense counsel request a Rule 609 hearing prior to the defendant deciding whether to testify.” App. 643. The PCR judge also admitted “[t]he burden of establishing the admissibility of such evidence is on the party attempting to impeach the witness with prior convictions,” which would have been the state. App. 643. Thereafter, the PCR judge concluded that “where the state does not inform the court of its desire to question the defendant about his or her prior convictions, as was the case here, no Rule 609 hearing needs to occur.” App. 643. “Accordingly, the Court [found] that it was not an error for counsel not to request a ruling from the trial judge as to the admissibility of defendant's prior convictions as impeachment evidence.” App. 643.

### **Discussion**

In a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 695 (1984).

In Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991), this Court addressed a similar issue as the one presented in Petitioner's case. Horton was tried for distribution of cocaine. Id. at 253, 411 S.E.2d at 224. Horton did not testify at his trial. Id. The jury found Horton guilty as charged. Id. In his PCR application, Horton alleged trial counsel was ineffective for advising him not to testify because he would be subject to cross examination on two prior criminal convictions: (1) a 1972 conviction for assault and battery with intent to kill, and (2) a 1980 conviction for simple possession of marijuana. Id. at 253-254, 411 S.E.2d at 224. Using the law in existence at the time – a prior conviction may be used to impeach the credibility of a witness only if such conviction involves a crime of moral turpitude – this Court concluded trial counsel provided deficient advice concerning the ability of the prosecution to introduce Horton's marijuana conviction. Id. at 254, 411 S.E.2d at 224.

Additionally, this Court held trial counsel provided deficient advice concerning the assault conviction because there existed an issue of remoteness in time. Id. At the time, the decision of whether a prior conviction were too remote in time to be used to impeach a defendant was a matter within the sound discretion of the trial judge. Id. However, trial counsel never "sought a ruling on admissibility from the trial judge." Id. As this Court explained, trial "counsel's advice in this instance was premised upon an unsubstantiated legal assumption, and he was under a duty to move the court for a ruling either confirming or invalidating his assumption." Id. Next, this Court rejected the lower court's determination that trial counsel's advice to Horton not to testify was based on a tactical decision because there were "errors of law" "involved." Id. at 255, 411 S.E.2d at 225.

Turning to prejudice, this Court explained the sole evidence against Horton was the testimony of the undercover agent who allegedly purchased drugs from Horton. Id. As this Court explained, "[t]he agent was in the presence of the seller, previously unknown to him, for

approximately four minutes outside at night.” Id. During his PCR hearing, Horton relayed that he wanted to testify about his belief that the confidential informant framed him because of animosity. Id. Horton “acknowledged the ultimate decision not to testify was his alone, but stated that he relied on counsel’s advice in making the decision. Id. Based upon the limited evidence against Horton, his proposed testimony, and his reliance upon counsel’s advice in deciding not to testify, this Court held Horton showed he suffered prejudice by his reliance upon counsel’s erroneous advice. Id.

Under the prevailing law at the time of Petitioner’s trial, the admissibility of prior convictions was governed by Rule 609, SCRE. Pursuant to Rule 609(a)(1), evidence that an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by imprisonment in excess of one year if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. According to Rule 609(a)(2), SCRE, the judge may admit “evidence that any witness has been convicted of a crime ... if it involved dishonesty or false statement, regardless of the punishment.” The rule places a time limit on the admissibility of prior convictions, however.

Evidence of a conviction ... 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, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction support by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE.<sup>2</sup>

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<sup>2</sup> In State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011), the Court of Appeals provided guidance to the trial bench for conducting a Rule 609(a) analysis, stating: “The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue.” 396 S.C. at 178, 720 S.E.2d at 514; see also State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000). Recently, in State v.

According to trial counsel, he was concerned that Petitioner's 2003 conviction for criminal domestic violence, first offense, and 2009 conviction for criminal domestic violence, second offense, would be admissible despite counsel's understanding that *generally*, these convictions would not be admitted under Rule 609, SCRE. App. 581, l. 14 – App. 582, l. 2; App. 582, ll. 17-18.<sup>3</sup> Counsel believed a conviction for false information would have been admissible; however, there was no mention of such a conviction by the solicitor during Petitioner's trial. See App. 582, ll. 9-16.<sup>4</sup> On the other hand, counsel did not think Petitioner's 2005 drug conviction would have been admissible. App. 582, ll. 9-16.<sup>5</sup> Thus, the question for the PCR court was whether trial counsel provided ineffective assistance by advising Petitioner that his prior convictions for criminal domestic violence could have been used to impeach his testimony through a potential "opening the door" scenario and whether trial counsel's failure to obtain a ruling on this issue was ineffective assistance.

In State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008), this Court held "Young's testimony that he hated to see a woman cry did not open the door to the admission of his prior CDV and CSC convictions." This Court explained the testimony must be read "in its proper context,"

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Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), this Court explained: "Ultimately, the Rule is designed to help the jury discern the truth. It is not a tool for the state to bolster its case against the criminal defendant for the mere fact that the defendant has engaged in prior criminal activity.

<sup>3</sup> The convictions for criminal domestic violence were not punishable by imprisonment in excess of one year. S.C. Code Ann. 16-25-30 (1994); S.C. Code Ann. 16-25-20(B)(2)(2008).

<sup>4</sup> During the sentencing proceeding, the state informed the judge that Petitioner's prior record included "a criminal domestic violence from 2003; a purse snatching in 2004; possession of drugs, 2005, and possession of drug paraphernalia; possession of cocaine in 2005; possession of cocaine in 2006; criminal domestic violence in 2007." App. 456, l. 20 – App. 457, l. 3.

<sup>5</sup> State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (explaining that violations of narcotics laws are generally not probative for truthfulness).

which showed “Young was not offering evidence of a specific character trait towards women in general.” Id. Instead, “the isolated statement used to justify admission of the prior CDV and CSC convictions was simply part of Young’s narrative recounting his version of the events that occurred on the night in question.” Id.

In contrast, in State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990), this Court explained “[w]hen the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct.” The prosecution is restricted “to showing bad character only for the traits initially focused on by the accused.” Id. When Major denied having ever used crack cocaine, the prosecutor was permitted to introduce evidence of a prior conviction for simple possession of cocaine. This Court found Major had made a “clear attempt ... to communicate to the jury that he [was] not the sort of individual who would become involved in the drug trade.” Id. at 185-186, 391 S.E.2d at 238. In short, the state was permitted to respond with evidence of Major’s previous drug conviction because Major had insinuated to the jury that he was not the type of person who would engage in the drug business. Id. at 186, 391 S.E.2d at 238.

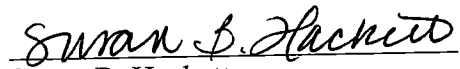
In State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), this Court found a defendant had opened the door to his previous participation in two armed robberies because he had questioned an accomplice regarding prior housebreakings. The accomplice had been charged with the same crimes for which Stroman stood trial. However, the accomplice had entered guilty pleas and agreed to testify for the state. After Stroman questioned the accomplice about prior housebreakings, the prosecutor was permitted to question the accomplice about two robberies in which Stroman was an accomplice. Id. at 512-513, 316 S.E.2d at 398-399. This Court held “[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in

explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.” Id. at 513, 316 S.E.2d at 399 (quoting State v. Albert, 277 S.E.2d 439 (N.C. 1981)).

Based upon the testimony Petitioner proffered during his PCR hearing, there was no danger that he would have “opened the door” to his prior convictions for criminal domestic violence. Petitioner’s testimony was restricted to the circumstances surrounding his relationship with the deceased and her death. Trial counsel’s advice that the convictions were admissible under the Rules of Evidence or under a potential “opening the door” scenario was deficient performance. To the extent trial counsel was uncertain of the admissibility of the convictions pursuant to the Rules, trial counsel was deficient for failing to request a ruling from the trial judge. See Horton, 306 S.C. at 254-255, 411 S.E.2d at 225. Trial counsel’s deficient advice was prejudicial in light of the evidence before the jury and the ultimate question for the jury – whether Petitioner was guilty of murder or voluntary manslaughter. While the state introduced Petitioner’s confession to police, which put forward much of the evidence to support Petitioner’s contention that he was guilty of voluntary manslaughter, not murder, the confession failed to include an important fact – the deceased had a knife in her hand at the time of her death. The only way the jury could have learned of this crucial fact was through Petitioner’s testimony. Thus, trial counsel’s deficient advice was prejudicial to Petitioner.

**CONCLUSION**

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



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————  
Certiorari to Berkeley County

Maite Murphy, Circuit Court Judge

—————  
DAVID JUDSON PENN,

PETITIONER


V.

STATE OF SOUTH CAROLINA,

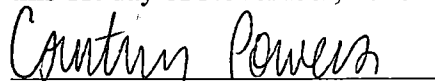
RESPONDENT

—————  
CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on David Judson Penn, #312196, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of November, 2018.

  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 1st day of November, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027