

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Aug 08 2022

S.C. SUPREME COURT

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Certiorari to Lexington County

Honorable Donald B. Hocker, Circuit Court Judge  
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MARION WADE FRYE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001406  
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI  
—————

JOANNA K. DELANY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court erred in denying Petitioner post-conviction relief where counsel’s deficient representation resulted in Petitioner’s mid-trial entry of a plea that was not knowingly, voluntarily, and intelligently made.....7

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL.....10

**ISSUE PRESENTED**

Whether the PCR court erred in denying Petitioner post-conviction relief where counsel's deficient representation resulted in Petitioner's mid-trial entry of a plea that was not knowingly, voluntarily, and intelligently made?

## STATEMENT

On July 10, 2017, a Lexington County Grand Jury indicted Petitioner for murder. App. 796 – 797. Petitioner was also charged with possession of a weapon during the commission of a violent crime and unlawful conduct toward a child. App. 4, ll. 8-18; App. 70, ll. 6-16. Petitioner proceeded to trial for murder and the weapons charge before the Honorable Knox McMahan and a jury, from February 5 – 8, 2018. Petitioner was represented by David Mauldin. Suzanne Mayes and Gill Bell prosecuted the case. App. 1.

The State alleged that at approximately 7:30 p.m. on October 1, 2015, Petitioner shot and killed Joshua Prine (Decedent) at a mobile home in Red Bank during an argument over whether Decedent had stolen \$500 from Petitioner. Decedent, who was shirtless, was lying in a pool of blood when law enforcement arrived. App. 190, l. 17 – 196, l. 15; App. 268, l. 13 – 279, l. 14; App. 312, l. 7 – 322, l. 20. He had been shot once and the bullet entered his back near his shoulder blades and exited his chest. Although 911 was called immediately, the bullet struck Decedent's lung and he bled to death before emergency personnel got there. App. 214, l. 15 – 220, l. 18; App. 234, l. 13 – 235, l. 20; App. 526, l. 14 – 531, l. 8; App. 522, ll. 12-25.

Petitioner, Decedent, and several other people were living in the home at the time. The circumstances surrounding the shooting were somewhat disputed. Several people were present during the shooting: Petitioner, Decedent, Katie Vinson, Jeffrey Beymer, Aaron Guillian, Ryan Boulware, and Raymond Boyer. App. 299, l. 17 – 321, l. 22; App. 222, l. 21 – 238, l. 11; App. 264, l. 5 – 274, l. 5.

Katie Vinson, Decedent's girlfriend, claimed that earlier in the day Petitioner approached Ryan Boulware, accused him of stealing the missing \$500, and eventually accepted a nine millimeter handgun from Boulware as "collateral" until his money was recovered. Later that

evening, Vinson claimed Petitioner accused her, and then Decedent, of taking the money. Vinson alleged that when Petitioner confronted Decedent, Decedent challenged Petitioner to “do something about it.” Vinson alleged Petitioner then pulled the gun out of his waistband. At that point, Aaron Guillian pulled Vinson out of the home. Vinson heard shots, ran back inside, and saw Decedent on the floor. Vinson claimed Petitioner was not physically assaulted before he pulled out the gun, but she admitted Decedent was cussing at Petitioner. App. 263, l. 11 – 276, l. 11; App. 293, l. 7 – 294, l. 2.

Raymond Boyer agreed that Petitioner had accepted a gun from Ryan Boulware earlier in the day, and that Petitioner accused people of stealing his money. Boyer said Decedent and Petitioner were arguing, and Decedent told Petitioner, “If you think I stole your money, do something about it.” App. 303, l. 9 – 311, l. 16. Boyer said that Decedent “bowed up,” took a fighting stance, and “jumped” at Petitioner. App. 311, l. 20 – 312, l. 11. Boyer claimed Petitioner pulled out his gun, so Boyer jumped on Petitioner’s back in an attempt to disarm him. Boyer said Ryan Boulware jumped over a bar at Petitioner, knocking a shelf down, for the same purpose. Boyer alleged he and Boulware were reaching for the gun, and that he touched it, but Petitioner got control of it and fired. Boyer said he chased Petitioner out the back door and yelled that he would kill Petitioner. Boyer claimed no one made physical contact with Petitioner until he pulled out the gun. According to Boyer, Decedent had turned around and was trying to get away when he was shot. App. 313, l. 8 – 324, l. 8. Boyer and Vinson stayed with Decedent until emergency personnel arrived. App. 325, l. 8 – 327, l. 8.

Jeffrey Beymer, who had stepped outside, heard arguing. He claimed he went inside and saw Petitioner holding a gun at arm’s length away from Decedent, Raymond Boyer, and a third man. A shelf was wrecked. Beymer claimed no one was attacking Petitioner. Beymer did not see

the shooting because he ducked down to the floor, but he heard shots. App. 226, l. 15 – 238, l. 19.

Petitioner was arrested the next day and he had bruises on his arm that looked like they were made by someone grabbing him. App. 435, l. 16 – 436, l. 23; App. 425, ll. 3-9. Petitioner told Officer Booth that he confronted Decedent over his missing money and shot him. Petitioner said Decedent “bowed up” at him so he crouched down and grabbed the gun when three people jumped on him. App. 585, l. 10 – 587, l. 24. Petitioner would testify at a later hearing that Decedent hit Petitioner after Petitioner confronted him about the missing money. Only after being hit did Petitioner grab the gun. The gun went off when all three of the men jumped on Petitioner. App. 705, l. 16 – 706, l. 23.

Dr. Janice Ross was the pathologist that autopsied Decedent. App. 520, l. 5 – 522, l. 11. Dr. Ross opined that the bullet had a downward trajectory, as if the shooter and Decedent were both standing when the shot was fired. However, Dr. Ross admitted her calculations could have been incorrectly transposed and the gunshot may have traveled at an upward angle, consistent with the shooter being crouched down when the shot was fired. Dr. Ross also claimed there was no stippling around the wound, so the shot was fired from at least 18 – 24 inches away. App. 522, l. 12 – 541, l. 22.

After Dr. Ross testified, Petitioner attempted to enter a guilty plea to voluntary manslaughter. However, the plea broke down when the judge asked if Petitioner was satisfied with his attorney. The trial briefly resumed before Petitioner ultimately pleaded guilty to voluntary manslaughter pursuant to *North Carolina v. Alford*, 400 S.C. 25 (1970), several days into the trial. App. 556, l. 15 – 571, l. 18; App. 596, l. 18 – 606, l. 1. Plea negotiations included reducing the murder to voluntary manslaughter, with a negotiated cap of 22 years, and

dismissing the weapon and unlawful conduct charges. App. 798; App. 564, ll. 9-25. Petitioner was sentenced to 22 years' imprisonment. App. 798; App. 647, l. 24 – 648, l. 2.

Petitioner wanted to directly appeal his conviction but on March 13, 2018, the Court of Appeals issued an order dismissing his appeal due to failure to provide a sufficient explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. App. 651 – 652. On February 15, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 653 – 665. On August 22, 2019, the State made its return, partial motion to dismiss, and motion for a more definite statement. App. 666 – 684. On August 24, 2021, Petitioner amended his application. App. 685 – 687. On September 1, 2021, a hearing was held before the Honorable Donald B. Hocker. Ashley McMahan represented Petitioner. Lillian Meadows represented the State. App. 688.

Petitioner testified that he stopped his trial and took the plea because of counsel's performance at trial. Petitioner said counsel told him to take the plea offer or else he might be imprisoned for life. Petitioner felt he had no meaningful alternative to a plea since counsel was not prepared to offer much in the way of a defense. App. 711, l. 1 – 713, l. 3. Counsel only intended to call Petitioner, Petitioner's girlfriend, and Petitioner's sister, as witnesses, which was insufficient. App. 694, ll. 5-8; App. 711, l. 24 – 712, l. 9. Counsel should have spent more time preparing for trial. Petitioner wanted counsel to introduce video footage that showed the dangerous natures of the people in the home. App. 708, ll. 19-23; App. 716, l. 21 – 718, l. 25; App. 740, ll. 11-22; App. 698, l. 13 – 699, l. 9.

Counsel testified that Petitioner pleaded guilty before the defense put up its case. App. 750, l. 21 – 751, l. 1. Counsel said that he met with Petitioner a number of times and hired an investigator. App. 734, l. 18 – 735, l. 22; App. 738, ll. 14-17. Counsel claimed that Petitioner and his girlfriend, Katelyn Turner, would not have made good witnesses. App. 735, l. 23 – 737, l. 14.

Counsel alleged he met with Ryan Boulware and that Boulware's version of events did not fit in with Petitioner's. App. 740, ll. 4-10.

On November 15, 2021, the PCR court issued an order of dismissal. App. 774 – 795. The order of dismissal stated the PCR court found counsel's testimony was credible and Petitioner's testimony was predominantly incredible. App. 783. The order stated that "Applicant failed to establish trial counsel was ineffective in either his investigation or preparation for trial." App. 786. "Applicant failed to present any evidence of what counsel could have discovered or what other defenses Applicant could have requested counsel develop and present had counsel been more prepared." App. 787. The order concluded, "Applicant failed to overcome the presumption that trial counsel's strategic decisions fell below an objective standard of reasonableness (sic)." App. 791. "Mauldin explained that his strategic options were limited given the multiple eyewitnesses to the shooting and the inconsistent statements of Applicant and Turner." App. 791. "Applicant further failed to demonstrate a reasonable probability that, but for trial counsel's errors, he would not have pleaded guilty, and would have continued with his trial." App. 791.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred in denying Petitioner post-conviction relief where counsel's deficient representation resulted in Petitioner's mid-trial entry of a plea that was not knowingly, voluntarily, and intelligently made.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

“In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case.” *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). “[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 U.S. at 58.

A criminal defense attorney has a duty to conduct a “reasonable investigation.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). “[S]trategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation.” *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (internal quotations omitted). Counsel's strategic choices were deficient here. He failed to fully prepare the case for trial and effectively impeach the testimony of the lay

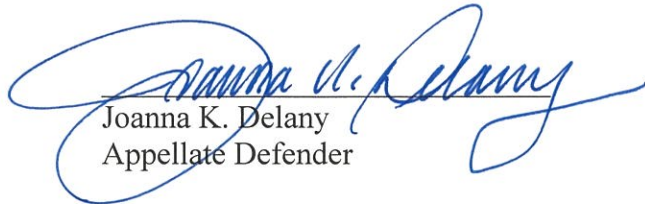
witnesses, such as by using video footage to show that Decedent was likely the aggressor, or by calling additional witnesses such as Ryan Boulware.

To establish prejudice when challenging a guilty plea, a PCR applicant must prove “there is a reasonable probability that, but for, counsel’s errors, the defendant would not have pled guilty, but would have gone to trial.” *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). Here, it was clear that Petitioner would have proceeded to trial, since he had exercised his right to a trial for several days before he pleaded guilty. Petitioner would have continued with trial if he had effective representation, but felt he had no legitimate choice but to plead guilty under these circumstances.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. This Court should grant certiorari. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. at 686.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.



Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Marion Wade Frye states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Donald B. Hocker, which was held on September 1, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Marion Wade Frye.

Respectfully Submitted,

  
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2022.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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Appellate Defender

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Division of Appellate Defense  
PO Box 11589  
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This 8th day of August, 2022.