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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Walton J. McLeod, IV, Circuit Court Judge

GEORGE RILEY DREHER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000557

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the court erred in denying post-conviction relief where counsel advised Petitioner to plead guilty based on her inadequate attempts to locate a critical witness, since counsel's deficient performance resulted in Petitioner's entry of pleas that were not knowingly, intelligently, and voluntarily tendered?

STATEMENT

During the November term of 2020, a Berkeley County Grand Jury indicted George Dreher, Petitioner, for attempted murder. During the December term of 2020, it indicted him for failure to stop for blue lights resulting in great bodily injury. App. 222 – 225. On February 18, 2021, Petitioner appeared virtually before the Honorable R. Markley Dennis, Jr., for a guilty plea hearing. Melisa Gay represented Petitioner. Wilton McNeely prosecuted the case. App. 1. The intention that day was for Petitioner to plead guilty to failure to stop for blue lights resulting in great bodily injury and to assault and battery of a high and aggravated nature (ABHAN) reduced from attempted murder. App. 4, l. 15 – 6, l. 7.

The solicitor alleged the following: On April 10, 2020, at approximately 10:40 p.m., deputies responded to a noise complaint at a crossroads in Moncks Corner and tried to stop a Chevy Tahoe "operating without a headlight" which "almost" struck a police car while speeding off. Officers turned on their lights and sirens and tried to stop the Tahoe and a chase ensued. Officers tried to "stop stick" the Tahoe twice during the pursuit. The second time, Deputy Hayden was in the median trying to put out "stop sticks," when the driver of the Tahoe swerved into the median and struck him with the Tahoe, causing great bodily injury (to his leg). The Tahoe then wrecked, crashing into an electrical box and a tree. Petitioner was taken out of the Tahoe and arrested. A man named Brandon Swain was in the front passenger seat. The injuries to the deputy required several surgeries and left him with limited function in his leg. App. 10, l. 13 - 12, l. 9.

The judge asked Petitioner if he agreed with those facts and Petitioner stated: "All besides intentionally swerving. I would have never intentionally swerve and hit an officer . . . there was a passenger in the car. He snatched the wheel." App. 12, ll. 12-21. The court stated it

would not take the plea. App. 12, l. 24 – 15, l. 10. On April 12, 2021, the parties reappeared in front of Judge Dennis for another attempt at a guilty plea hearing. It appears this hearing was held virtually as well. App. 17; App. 41, ll. 7-9. Petitioner pleaded guilty to failure to stop for blue lights resulting in great bodily injury and to ABHAN reduced from attempted murder. This time, Petitioner agreed with the State's recitation of the facts and the court accepted the plea. App. 20, l. 17 – 28, l. 23. During the plea, counsel told the court Petitioner had been advised of his rights. App. 23, ll. 11-13. The court stated it was sentencing Petitioner to twelve years' imprisonment for ABHAN. For failure to stop for blue lights resulting in great bodily injury, the court sentenced Petitioner to ten years' imprisonment suspended to five years of probation. The court ordered the sentences were to be served consecutively.[1] App 40, l. 23 – 42, l. 2; App. 226 – 227.

On June 17, 2021, the parties reappeared before Judge Dennis pursuant to plea counsel's motions to withdraw the guilty pleas based on Petitioner's mental illness and after-discovered evidence. Counsel's written motions were accompanied by an affidavit signed by Brandon Swain several days after the April plea hearing. App. 44; App. 62 – 64. This hearing was also virtual. App. 44. At the outset of the hearing, the judge stated the sentencing sheet for ABHAN inaccurately reflected that he sentenced Petitioner to ten years for that offense when he actually sentenced Petitioner to twelve years for the ABHAN. The court issued an amended sentence sheet. App. 45, l. 18 – 46, l. 14; App. 228.

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[1] The transcript did not capture the term of years for the failure to stop for blue lights offense due to technical problems. However, the sentencing sheet issued that day shows that for failure to stop for blue lights resulting in great bodily injury, the court sentenced Petitioner to ten years' imprisonment suspended to five years of probation. The sentencing sheet issued that day for ABHAN reflects the court sentenced Petitioner to ten years' imprisonment for that offense. App. 226 – 227. The updated sentencing sheet for ABHAN issued in June reflects the twelve year sentence. App. 228.

Plea counsel stated she moved to withdraw the plea based on after-discovered evidence because she obtained an affidavit from Brandon Swain in which he acknowledged jerking the wheel and hitting the deputy. App. 46, ll. 16-25. *See* App. 63. The court noted Petitioner's disagreement with the State's recitation of the facts—over whether Petitioner struck the officer or whether Swain jerking the wheel caused the car to strike the officer—was why the February plea broke down and it asked how this could be after-discovered. App. 47, ll. 1-23. Plea counsel explained the discovery that Swain conceded he jerked the wheel was new. App. 47, l. 24 48, l. 2. Petitioner told the court he did not intentionally strike the officer. App. 49, ll. 3-15. The court noted Petitioner had admitted guilt during the April plea colloquy and it denied the motion. App. 49, l. 16 – 50, l. 2. It also ruled Petitioner was not entitled to withdraw the plea based on mental health problems. App. 48, ll. 9-15; App. 65 – 66.

Petitioner directly appealed and the Court of Appeals subsequently dismissed his appeal after he filed an affidavit indicating he did not wish the appeal to proceed. The remittitur was issued on June 9, 2022. On or about August 24, 2022, Petitioner filed an application for post-conviction relief (PCR). App. 52 – 78. On or about October 5, 2023, the State made its return. App. 79 – 85. A hearing was held on the matter on March 11, 2024, before the Honorable Walton McLeod. J. Taylor Bell represented Petitioner. Danielle Dixon represented the State. App. 86.

At the PCR hearing, Petitioner testified that prior to the first attempted plea in February, he told plea counsel that Swain jerked the steering wheel causing the Tahoe to hit Deputy Hayden. App. 96, ll. 13-21. Petitioner stated plea counsel told him that her investigator had been unable to locate Swain at Swain's father's house. Petitioner testified he told plea counsel he could get someone to show her Swain's campground in the Boulder Bluff woods where Swain

was staying, but counsel "wouldn't listen." App. 97, l. 2 – 98, l. 8. Petitioner also stated plea counsel did not advise him she could subpoena Swain to court. Petitioner explained he believed Swain would testify Swain jerked the wheel, and he would have gone to trial if Swain were called as a witness. However, he pleaded guilty because counsel told him he had no choice. App. 98, l. 14 – 99, l. 25. PCR counsel then introduced Swain's affidavit, as it was presented to the plea court as part of Petitioner's motion to withdraw his guilty pleas. App. 101, l. 25 – 102, l. 20; App. 192.

Plea counsel testified her "investigator," an employee who worked for her for many years but was not a licensed private investigator, attempted to look for Swain more than once by going to Swain's father's house. Counsel stated that in her opinion, Swain did not want to be found since she left word with others for Swain to get in touch. According to counsel, Swain gave a statement to police that the State interpreted as Swain claiming he did not yank the steering wheel. Counsel stated she did not subpoena Swain because the case was resolved by guilty plea, that she was unsure if she would have subpoenaed him for trial, and that although Petitioner was "now saying" Swain was living in the woods, counsel "would have never sent [her] investigator in the woods looking for anybody." App. 119, l. 24 – 121, l. 14; App. 126, l. 22 – 127, l. 18; App. 131, ll. 4-10; App. 140, ll. – 143, l. 6; App. 144, ll. 19-20;

On March 12, 2025, the PCR court issued an order denying PCR. App. 216 – 221. The order addressed Petitioner's claim regarding plea counsel's investigation of Brandon Swain. App. 219 – 220. The order cited to plea counsel's testimony an investigator was unable to locate Swain despite utilizing an investigator. App. 219. The order stated the court found counsel's performance was not deficient since "prevailing professional norms do not require an attorney to go hiking through the woods to search for a potential witness[.]" App. 220. The order

concluded "counsel's investigation of Swain was reasonable under prevailing professional norms and not deficient. Further—and critically—Swain did not testify at the PCR hearing, leaving this Court to speculate about what Swain may have even testified to at a trial and how much, if at all, the testimony may have impacted Applicant's decision to plead guilty." App. 219. The order thus concluded Petitioner did not demonstrate prejudice. App. 220 – 221.

The order also addressed Petitioner's claim that his guilty pleas were not knowingly, intelligently, and voluntarily entered as counsel never advised him she could have subpoenaed Swain to court. App. 221. The order stated the court found credible counsel's testimony she discussed his constitutional rights with him, and that a review of the plea transcript showed the plea was knowingly and voluntarily entered. App. 221.

ARGUMENT

The court erred in denying post-conviction relief where counsel advised Petitioner to plead guilty based on her inadequate attempts to locate a critical witness, since counsel's deficient performance resulted in Petitioner's entry of pleas that were not knowingly, intelligently, and voluntarily tendered.

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). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

"Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596-97 (2007)). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting *Strickland*, 466 U.S. at 691). "So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient." *Edwards*, 392 S.C. at 457, 710 S.E.2d at 65. "[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions . . ." *Strickland*, 466 U.S. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on

information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Id.*

"In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence." *Glover v. State*, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Id.* at 499, 458 S.E.2d at 540. This Court has held that "pure conjecture" is not enough to establish prejudice. *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993).

Counsel should have attempted to locate Swain at his campground. He was able to be found, as evidenced by his eventual affidavit. Counsel's investigation was deficient. A witness lives where a witness lives. In a case involving a homeless witness, the defense's investigation may necessarily involve going somewhere homeless people stay. The PCR court erred where it concluded counsel's investigation did not require searching for this witness simply because he was staying in the woods. Moreover, although Swain did not appear at the PCR hearing, the PCR court erred in concluding Petitioner did not establish prejudice. This situation is similar to *Pauling v. State*, 331 S.C. 606, 607, 503 S.E.2d 468, 469 (1998), where the defendant was tried for burglary and criminal sexual conduct. This Court found Pauling's counsel was ineffective for failing to call as a defense witness a nurse whose notes indicated that the victim said her vagina was not penetrated, and explained that by introducing the nurse's notes at the PCR hearing, Pauling met his burden of proof under *Glover*, although the nurse did not testify. *Id.* at 611, 503 S.E.2d at 471.

At Pauling's trial, a doctor testified she performed a rape protocol examination on the victim, and Pauling's counsel tried to cross-examine the doctor by referring to the notes of a triage nurse. *Id.* at 608, 503 S.E.2d at 470. Pauling introduced the triage nurse's notes at his PCR hearing, which stated: "pt states pt did not penetrate the vagina," and argued his counsel "was ineffective because he was not prepared to present the triage nurse as a defense witness." *Id.* at 608-09, 503 S.E.2d at 470. The state argued Pauling failed to meet his burden of proof because the nurse did not testify at his PCR hearing. *Id.* at 610, 503 S.E.2d at 471. This Court clarified that where a PCR applicant "presented evidence as to the nature of the nurse's testimony by introducing her triage notes[,] [t]his evidence is sufficient under *Glover*." *Id.* at 611, 503 S.E.2d at 471. "The State misconstrues *Glover*." *Id.* at 610, 503 S.E.2d at 471.

In *Jackson v. State*, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998), this Court again explained that a PCR applicant need not produce a witness if the witness' testimony is otherwise properly introduced. "Citing *Glover,* the State claims respondent *must produce the witness* in order to show prejudice. The State is misreading the law. Under our case law, the applicant must produce the witness at the PCR hearing *or* otherwise introduce the witness' testimony in a manner consistent with the rules of evidence." *Id.* (emphasis in original). Petitioner presented the affidavit of Swain at the PCR hearing, and the court accepted it as an exhibit, ruling it was before the plea court.

"To show prejudice, the applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. 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). "A defendant who enters a plea on the advice of counsel may only attack the

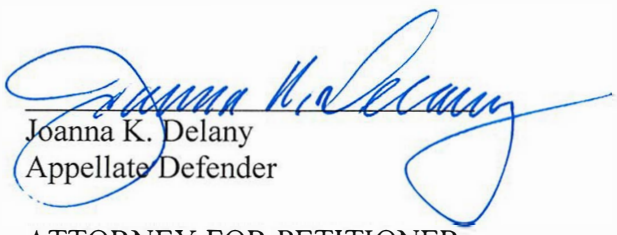
voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing *Hill v. Lockhart*, *supra*). "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).

"[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

Had counsel done an adequate investigation and located Swain to obtain his affidavit prior to the plea she would have advised Petitioner not to plead guilty. Additionally, had counsel informed Petitioner he had the right to subpoena Swain as a witness, Petitioner would not have pleaded guilty. Petitioner established both error and prejudice. This Court should grant the petition for writ of certiorari. *Strickland v. Washington*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

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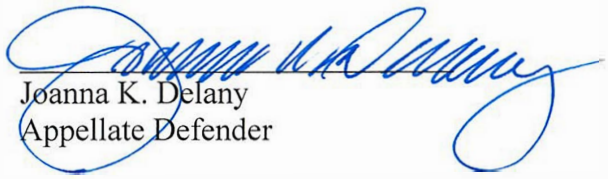
PETITION TO BE RELIEVED AS COUNSEL

Counsel for George Riley Dreher 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 Walton J. McLeod, IV, which was held on March 11, 2024, 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 George Riley Dreher.

Respectfully Submitted,



Joanna K. Delany
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CERTIFICATE OF COUNSEL

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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