

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Pickens County

Honorable Daniel D. Hall, Circuit Court Judge

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JOHN ADRIAN ZIEGLAR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000482

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

ORIGINAL  
RECEIVED  
AUG 30 2018  
S.C. SUPREME COURT

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The PCR court erred by finding counsel delivered effective representation where petitioner told both the plea judge, after the trial started, and later the PCR judge that he pled guilty because defense counsel was not prepared for the trial that he wanted on the charges, and where defense counsel admitted his preparation began late, and that he failed to subpoena one out-of-state witness.....3

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### **ISSUE PRESENTED**

Whether the PCR court erred by finding counsel delivered effective representation where petitioner told both the plea judge, after the trial started, and later the PCR judge that he pled guilty because defense counsel was not prepared for the trial that he wanted on the charges, and where defense counsel admitted his preparation began late, and that he failed to subpoena one out-of-state witness?

## STATEMENT

Petitioner was indicted at the August 19, 2014 term of the Pickens County Grand Jury for the offenses of kidnapping, assault and battery in the third degree, and pointing and presenting a firearm. All three charges arose from a single incident, on November 27, 2013, with petitioner's cousin, who lived with him. App. 122 – 127.

Petitioner appeared on August 24, 2015 before the Honorable Perry H. Gravely and entered a plea of guilty to all three charges. John DeJong represented petitioner and Graham Buckner was the assistant solicitor. App. 1.

Judge Gravely sentenced petitioner to nine years imprisonment for kidnapping and imposed a concurrent three-year term on the firearms charge, and he imposed a thirty-day jail sentence on the charge of assault and battery in the third degree, which was suspended to time served. App. 25, 1. 13 – 27, 1 16.

Petitioner filed an application for post-conviction relief, and a memorandum in support of his application for post-conviction relief, on December 30, 2015. App. 29 – 38. The state filed a return dated June 29, 2016. App. 39 – 46.

Petitioner filed a memorandum in support of amendment of post-conviction relief application on September 8, 2016. App. 47 – 64.

A post-conviction relief hearing was held on June 28, 2017, before the Honorable Daniel Hall. R. Mills Ariail, Jr., represented petitioner. DeShawn Mitchell was the assistant attorney general. App. 65. Judge Hall issued an order of dismissal which was filed on March 6, 2018. App. 111 – 121.

This appeal follows.

## ARGUMENT

The PCR court erred by finding counsel delivered effective representation where petitioner told both the plea judge, after the trial started, and later the PCR judge that he pled guilty because defense counsel was not prepared for the trial that he wanted on the charges, and where defense counsel admitted his preparation began late, and that he failed to subpoena one out-of-state witness.

### **Relevant Facts**

Petitioner told the plea judge the entire incident “was really like an argument that got out of hand” between petitioner and his cousin, who lived together. App. 20, l. 20 – 23, l. 16. Petitioner said he did not threaten his cousin: “I love her to death and she knows that. I mean -- like I said, I didn’t drag her up here to just run from this and that. She said that she wanted to leave West Virginia to get a better job. I brought her here, did it and paid for everything. I paid for everything out of my pocket -- since they’re saying I didn’t have a job and all this, I did. I worked with my mom at her tax business.” App. 20, l. 20 – 24, l. 7.

Petitioner also told the judge while some things the solicitor claimed about the incident were true, other matters the solicitor raised were simply not true, or they were being exaggerated. Nonetheless, petitioner reasoned, “[I]’ll take it like it is. Like I said, I came in here, I’m unprepared so I just have to take it like it is. Ain’t no use going to trial and losing, getting a bigger sentence. I might as well go ahead and go with it, because *we* are not all the way fully prepared, like I said.” App. 23, ll. 6-12. (emphasis added).

At his subsequent PCR hearing, petitioner repeated that: “I really wanted to go to trial, but as far as to different things going on during trial, it didn’t make it to the point of the court system being reliable. App. 69, l. 23 – 70, l. 4. Petitioner said both he and defense counsel: “We

wanted to go to trial fully.” However, petitioner said that defense counsel was unable to get his witnesses to come to court or subpoena them. Petitioner recalled the trial judge telling him: “It’s never a good day to go to trial, Mr. Ziegler. I explained that to you after you was, you know, kind of listening.” App. 88, ll. 3-25.

Petitioner testified that defense counsel contacted his witnesses on the Saturday before the Monday trial. This did not give the witnesses time to inform their employers of their absence to testify. Petitioner also had an alibi witness that defense counsel did not subpoena, and even though the witness did not want to get involved, petitioner maintained defense counsel should have forced him to come to court by way of a subpoena and tell the truth. App. 75, l. 16 – 77, l. 1.

Defense counsel John DeJong testified that petitioner turned down a seven-year plea offer, and that he wanted a trial. On the day of the guilty plea, they had already “struck the jury. I was probably as surprised as anyone when Mr. Ziegler said he wished to plead guilty. App. 97, l. 17 – 98, l. 1.

DeJong remembered one witness, Cynthia Tyler, who lived in Atlanta. DeJong had talked to her several times and Tyler “faithfully assured me that she would be here when she was needed for trial.” DeJong said at the “midnight hour, she said she could not be here.” DeJong admitted he had not subpoenaed Tyler to ensure her presence via an out-of-state subpoena. App. 100, l. 3 – 101, l. 4.

DeJong said he did not know why, after they had struck a jury, and indeed a second jury because of a Batson motion, that petitioner decided he wanted to plead guilty. However, counsel directly or indirectly admitted his trial preparation was lacking. App. 101, ll. 5-14.

In the order of dismissal, the PCR court found petitioner had failed to carry his burden of showing his defense counsel was ineffective in his lack of preparation. App. 113 – 117.

## **Discussion**

Counsel has a duty to make reasonable investigations or to make a reasonable decision that further particular investigations were unnecessary. See Strickland v. Washington, 466 U.S. 668, 691 (1984); Thompson v. Wainwright, 787 F.2d. 1447, 1450 (11th Cir. 1986).

When evaluating the reasonableness of counsel’s conduct, “the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007). Citing Strickland v. Washington, 466 U.S. at 690. “At a minimum, counsel has the duty to interview potential witnesses and make an independent evaluation of the facts and circumstances of the case. Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986), aff’d, 828 F.2Dd. 670 (11th Cir. 1987).<sup>1</sup>

In Ard v. Catoe, this Court found defense counsel ineffective for failing to properly investigate the expert opinion on gunshot residue evidence, in a case in which the defendant’s defense was the decedent committed suicide. Consequently, defense counsel was not prepared to elicit on cross-examination of the state’s GSR expert that the “interesting” GRS evidence actually meant it favored Ard’s position that the decedent, and not Ard was the shooter.

In the present case, it was undisputed that trial counsel had witness Cynthia Tyler promise him that she would appear for petitioner’s trial. However, when Tyler claimed at the “midnight hour” that she could not attend the trial, defense counsel could not compel her attendance since he had not procured an out-of-state subpoena from the state of Georgia, which a

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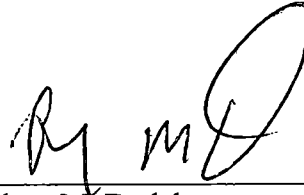
<sup>1</sup> Cited in Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007)

reasonably competent attorney would have done. Further, as seen, petitioner complained that counsel was unable to secure other witnesses due to a lack of diligence on trial counsel's part.

Again, trial counsel expressed his complete surprise when petitioner decided after jury selection and the beginning of the trial to plead guilty. Petitioner told both the plea judge, and the post-conviction court, consistently, that he pled guilty because he did not think "we" were ready for trial, given trial counsel's ineffective investigation and trial preparation. The PCR court erred by finding counsel provided effective representation given these circumstances, and by then finding petitioner was not prejudiced by counsel's omissions.

**CONCLUSION**

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Pickens County

Honorable Daniel D. Hall, Circuit Court Judge

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JOHN ADRIAN ZIEGLAR,

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PETITION TO BE RELIEVED AS COUNSEL

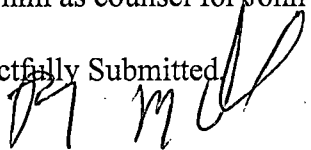
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Counsel for John Adrian Ziegler states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Daniel D. Hall, which was held on June 28, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for John Adrian Ziegler.

Respectfully Submitted,



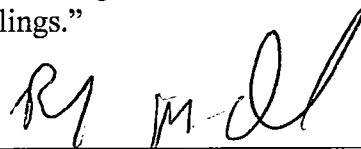
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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 30th day of August, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his 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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ATTORNEY FOR PETITIONER

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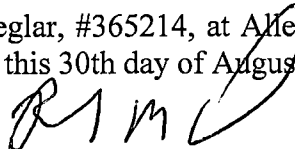
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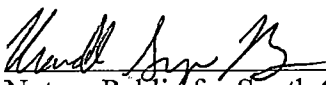
RESPONDENT

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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on John Adrian Ziegler, #365214, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 30th day of August, 2018.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 30th day of August, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028