STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2019-000329

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JONTA GREEN, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly dismiss Petitioner's application where counsel investigated the character witness and the failure to object was not prejudicial to Petitioner?

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## STATEMENT OF THE CASE

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 On April 19, 2010, Petitioner proceeded to jury trial before the Honorable Deadra L. Jefferson. Demal Mattson represented Petitioner at trial. Rutledge Durant #2009-GS-10-113, 116. 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), SCRCP. 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

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

**The post-conviction relief court properly dismissed Petitioner's application where counsel investigated the character witness and the failure to object was not prejudicial to Petitioner.**

Petitioner contends that trial counsel was ineffective for failing to determine that a character witness called by the defense had burglary conviction from 1996 and for failing to object when the State improperly questioned the witness about the conviction. However, counsel testified that he did investigate the witness and that the testimony about the conviction was not damaging to Petitioner.

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's

decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions...." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S.Ct. 2052. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014).

Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Davis v. State. 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State. 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State. 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778

(1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Petitioner's argument stems from the investigation and following testimony from George Thomas Jr., a character witness presented by the defense at trial:

> 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 did not object to the admission of this testimony at trial. However, the following bench trial occurred directly after the testimony:

> 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, Petitioner amended his application to include failure to investigate witnesses and ineffective assistance of counsel for allowing the character witness "to be impeached by conviction that was outside of 609." (App. 938, lines 10-12.) PCR counsel testified on direct examination that he did not ask the witness if he had a criminal record and was surprised by the testimony at trial. (App. 968, line 25 – p. 969, lines 1-11.) PCR counsel further elaborated when asked if he would have handled the examination differently: "Probably yes, I might not have even called him." (App. P. 970, lines 3-4.) However, PCR counsel also testified on direct examination that he "talked to everybody before the testified, because at one point in time, I even went to Jonta's church to meet the reverend..." (App. p. 968, line 6.) Counsel further testified on direct examination as to his strategy for not objecting to the testimony:

> Counsel: But it was, I believe the question was already out – and out. Sot that's, pardon me. This what I call a damned if you do, damned if you don't situation. If you object, then the judge send the jury out. And they come back in and he was instructed to ask another question. Then the jury wonders what you were keeping from them.

Importantly, counsel enumerated the following on direct examination when asked whether or not he felt the testimony was damaging to Petitioner's case:

> Counsel: Not with the other witnesses that I had testifying on behalf of Jonta. Jonta had an extremely close relationship with the elders in his church and even sponsored and paid for a youth basketball team to keep the kids off the street. And all of that went into evidence. So I think the fact that somebody may have had a burglary charge, when you've got the pastor and other people all testifying, is not a turning point in that trial.

(App. p. 970, lines 7-14.)

The PCR court wrote the following concerning the issue in the final order of dismissal:

> 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 fiancé 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.

The PCR court properly found that trial counsel was not ineffective for failing to discover that the witness had a fourteen-year old burglary conviction or for failing to object to the testimony of the witness concerning the conviction.

## I. Failing to Investigate the Character Witness

Counsel was not ineffective for failing to discover that the witness had a conviction that was over ten years old. Counsel testified at the PCR hearing that he investigated all of the witnesses and spoke to them before they testified at trial. Counsel did testify that he did not ask the witness if he had a criminal record. However, counsel is not charged with discovering everything about a potential witness and the existence of a burglary conviction that was outside the base scope for remoteness per Rule 609(b) could certainly be considered an example of a fact not typically discovered during the investigation of a character witness. Petitioner's argument would carry significantly more weight had counsel not discovered the conviction that would be used to impeach the witness had the witness been a major fact witness or an eyewitness to the incident in dispute. However, the witness in this case was being used as a character witness, in combination with a number of others, in an effort to show Petitioner's respectfulness and willingness to help others. Petitioner argues that if counsel had properly investigated the witness and found the conviction he could have moved to exclude it pursuant to Rule 609(b). Petitioner has failed to show how the discoverable matter would have resulted in a different outcome or how he was prejudiced by the alleged lack preparation by counsel. Davis; Glover Therefore, the PCR court properly found counsel was not deficient in his investigation and this allegation should be upheld on this ground alone.

## II. Failure to Object

Counsel was not ineffective failing to object to the testimony concerning the remote conviction as he enumerated a valid trail strategy for not doing so. Further, Petitioner was not prejudiced by the alleged deficiency where other witness testified as to his good character and his work with the church as well as the significant evidence against Petitioner presented at trial.

First, counsel enumerated a valid trial strategy for not objecting to the testimony once it was heard by the jury. Counsel testified at the PCR hearing that he did not object in an effort to not highlight the brief testimony to the jury and that the jury would wonder what the defense was keeping from them if he did testify. This strategy is further supported by counsel's testimony that he did not believe the testimony was damaging to Petitioner in conjunction with the testimony from the other character witnesses and that he did not believe it was a turning point in the trial. Counsel made a strategic decision to not highlight this rather minor (non-damaging) impeachment evidence against a character witness to the jury.

Second, Petitioner's character and credibility did not rest solely on the testimony of Mr. Thomas, a number of other character witnesses testified on his behalf at trial. Petitioner had three other character witnesses testify as to his character and credibility. The first of these witnesses was Ms. Thomas who testified that he sung in the church choir, he helped get her to her doctor's appointments due to her age, and that he had a reputation for honesty. (App. p. 476-479.) The second witness was Ms. Butler who testified that Petitioner sung in the choir, took her doctor's appointments, had a reputation of honesty, and was trusted to direct the children in the choir. (App. p. 482-483.) The third witness was Mr. Washington, the Pastor of the church. Mr. Washington testified that Petitioner worked with children and in the church and knows him to be an honest individual. (App. p. 480.) The fourth and final character witness was Mr. Thomas. Mr. Thomas testified that Petitioner sung in the choir, was respectful to elders, had a truthful reputation, and would occasionally go with him move a car from Florida. (App. p. 489-490.) Petitioner argues that since Mr. Thomas' testimony was potentially impeached to some degree he was unable to successfully show his credibility and character, thus changing the result of the trial. This argument is rather spurious as, assuming arguendo Mr. Thomas' testimony was

entirely impeached, the only non-cumulative testimony the jury learned from Mr. Thomas was that Petitioner occasionally helped him move cars from Florida. Petitioner was able to successfully present to the jury his character and credibility through the other three witnesses who had nothing but glowing testimony relating to Petitioner. Even assuming the jury disregarded everything Mr. Thomas testified to, Petitioner has failed to show how he was prejudiced where the jury heard all of the significant character testimony through other witnesses and Mr. Thomas provided nothing more than a single non-cumulative comment on moving vehicles.

Third, and finally, failing to object to minor impeachment evidence against a cumulative character witness does not outweigh the significant evidence against Petitioner at trial and the difficulty counsel had in defending Petitioner against the murder charge. Multiple witnesses presented by the State testified that they interacted with Petitioner directly before the incident or were witness to the incident himself. There was further testimony that Petitioner made statements to Ms. Crawford that could be interpreted as malicious, that he couldn't let the victim sneak up on him, and that Petitioner left the scene quickly. Further, Petitioner stipulated at trial that the weapon that was used to kill the victim was possessed by Petitioner and was brought to the scene by him prior the bullet being fired that killed the victim. Finally, PCR worded it best at the close of his testimony during the evidentiary hearing: "But there are times when this wasn't even a situation where he was picked out of a lineup to be identified. These people identified him by name. They knew him. And I was fighting like the devil trying to see that he didn't get convicted of murder."

Petitioner has failed to show how counsel failing to object the admission of the testimony concerning the remote conviction was deficient or how the admission of the testimony so

prejudiced him as to show the result of the proceeding would have been different. Counsel thoroughly investigated the witnesses and enumerated a valid trial strategy for not objecting to the testimony when it arose during trial. Finally, Petitioner has failed to show resulting prejudice where a number of other witnesses testified as to his good character, the witness' testimony was merely cumulative except for a minor irrelevant point, and the evidence presented by the State against Petitioner at trial was substantial. Therefore, the PCR court properly found Petitioner failed to meet his burden of proof and dismissed the allegation.

## CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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December 9, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court



CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable Eugen C. Griffith, Circuit Court Judge

Appellate Case No. 2019-000329

JONTA GREEN, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

**Kathrine H. Hudgins, Esquire**
**S.C. Commission on Indigent Defense**
**PO Box 11589**
**Columbia, SC 29201**

This 9th day of December, 2019.

Jennifer Jennison
Administrative Coordinator for Respondent

ALAN WILSON
ATTORNEY GENERAL



December 9, 2019

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Jonta Green v. State of South Carolina**
**Appellate Case No.: 2019-000329**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jj
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division