

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-212508

Brandi Lynn Turner Holder,..... Petitioner,

v.

State of South Carolina,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

RECEIVED

JUL 03 2013

S.C. SUPREME COURT

TABLE OF CONTENTS

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW5

ARGUMENT

 The PCR judge did not err in finding Petitioner failed to meet her
 burden of proving trial counsel were ineffective in handling the direct
 and cross-examination testimony of her ex-husband.....5

 The PCR judge did not err in finding Petitioner failed to meet her
 burden of proving trial counsel were ineffective in closing argument.....9

 The PCR judge did not err in finding Petitioner failed to meet her
 burden of proving trial counsel were ineffective in not presenting
 character witnesses.....13

 The PCR judge did not err in finding Petitioner failed to meet her
 burden of proving trial counsel were ineffective in not moving to
 enter the SLED report into evidence.....15

 The issue of whether trial counsel were ineffective in failing to
 impeach witness testimony regarding whether DSS had been notified
 of abuse is not preserved for review.17

 The PCR judge did not err in finding Petitioner failed to meet her
 burden of proving trial counsel were ineffective in failing to object
 to the trial judge’s answer to a jury question regarding verdict options.17

CONCLUSION.....20

QUESTIONS PRESENTED

1. Did the lower court err in denying the Petitioner relief where she met her burden of proof with regard to her allegations concerning the errors and omissions of trial counsel relating to the testimony of her ex-husband, James Darren Turner?
2. Was defense counsel ineffective for characterizing the Petitioner as “not the best wife” when cross-examining her ex-husband?
3. Did the lower court err in denying the Petitioner’s application for post-conviction relief where the record below demonstrates trial counsel was ineffective for failing to point out to the jury in closing argument that the evidence that the Petitioner herself was sick the day before her son died with something that made her, like her son, throw up and therefore that she had every reason to believe the child’s illness was from the same source as her own?
4. Did the lower court err in denying the Petitioner’s application for post-conviction relief where the record below demonstrates trial counsel was ineffective for failing to point out to the jury in closing argument that the testimony of multiple State witnesses concerning previous bruises observed on the victim in fact referenced only a few incidents recalled by multiple witnesses?
5. Did the lower court err in denying the Petitioner’s application for post-conviction relief where the record below supported her allegation that defense counsel was ineffective for failing to present numerous readily available character witnesses on behalf of the Petitioner?
6. Did the lower court err in denying the Petitioner’s application for post-conviction relief where she demonstrated in the lower court that defense counsel was ineffective for neglecting to introduce evidence, specifically a SLED Forensic Services Lab Report, documenting that there was a mixed DNA sample taken from bite marks on the victim which yielded DNA not inconsistent with the victim and DNA from an unknown individual with XY amelogenin meaning the DNA came from an unknown male contributor?
7. Did the lower court err in denying the Petitioner relief where the record below documents defense counsel’s failure to present available evidence to impeach claims by State witnesses that they

had reported the victim's possible abuse to DSS?

8. Did the lower court err in finding that the Petitioner was not entitled to relief where the record below supported her claim that defense counsel was ineffective for failing to object to a confusing and incomplete answer given by the trial court in response to a question from the jury concerning verdict options?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner for homicide by child abuse (2003-GS-23-1307). (App.pp.735-37). She was represented by Bruce A. Byrholdt, Esquire and David E. Phillips, Esquire.

After the State called the case to trial,¹ Petitioner was found guilty. On February 9, 2006, the Honorable C. Victor Pyle sentenced Petitioner to twenty-five years imprisonment. (App.p.701; p.734).

A notice of appeal was filed at the South Carolina Court of Appeals and the case was later certified for review by the South Carolina Supreme Court. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Supreme Court affirmed Petitioner's conviction and sentence on May 4, 2009. State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). (App.pp.703-14).

Petitioner filed an application for post-conviction relief (PCR) on April 20, 2010 (2010-CP-23-3160). (App.pp.716-22). Petitioner filed an amended PCR application on April 4, 2012 and a hearing was convened at the Greenville County Courthouse the same day. (App.pp.728-33; pp.745-934). Petitioner was present and represented by Tara D. Shurling, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order dated June 19, 2012 and filed June 25, 2012. (App.pp.975-95).

¹ This was a joint trial with Petitioner's boyfriend and co-defendant Mark Martucci, who was tried and convicted in absentia.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge did not err in finding Petitioner failed to meet her burden of proving trial counsel were ineffective in handling the direct and cross-examination testimony of her ex-husband.

Petitioner alleges trial counsel should have objected to several of the State’s questions during her ex-husband’s direct testimony. Petitioner further alleges trial counsel was ineffective in making a harmful comment about her during the cross-examination of her ex-husband. This argument is without merit.

At trial, Petitioner’s ex-husband (James Darren Turner) testified on behalf of the State. The assistant solicitor asked Turner whether Petitioner knew the identity of the victim’s father and Turner said she did not but that she asked him to be the victim’s father. (App.pp.341-42). Turner testified the victim was covered on his health insurance from the day he married Petitioner until the day the victim died. (App.p.342). Turner stated he contacted Petitioner’s family after learning of the victim’s death and offered to pay for the funeral, which he did. (App.p.347). The assistant solicitor asked Turner if Petitioner ever physically mistreated him, Turner said yes, and Byrholdt objected on

relevancy grounds. (App.pp.347-48).

Regarding the State's questions to Turner about the victim's paternity Byrholdt testified they were probably irrelevant but that they did not hurt Petitioner so he did not want to object and draw attention to them. Byrholdt testified these questions were harmless. (App.pp.765-66). Regarding questions about the victim's health insurance, he did not believe they were relevant. (App.p.771). Byrholdt testified Turner was not tied to the crimes at issue so he did not want to bring in issues (such as those related to insurance) that would inflame the jury. (App.pp.771-72). Byrholdt testified he objected to the relevance of a certain portion of Turner's testimony and then joined when co-defendant's counsel objected to questions about who paid for the victim's funeral. (app.pp.769-71). Byrholdt testified he did not believe this was prejudicial testimony or that it demonstrated "extreme indifference" by Petitioner. (App.pp.771-72). Byrholdt testified Turner likely answered the State's question about physical abuse by Petitioner before he could object. (App.pp.772-73).

Phillips testified he agreed with Bruce's testimony regarding the tactical decisions made about Turner's testimony. (App.p.826). Regarding issues concerning the victim's paternity and the physical abuse Petitioner inflicted on Turner, Phillips testified he deferred to Byrholdt on these issues because he was conducting the cross-examination of that witness. (App.p.829; p.830). Regarding the funeral issue, Phillips testified that – given the other evidence in this case – he did not know if it would have been helpful to question Turner about paying for the victim's funeral. (App.p.831).

In denying Petitioner's application for post-conviction relief, the PCR judge found

Petitioner “failed to prove either error with regard to issues concerning [Turner] or any resulting prejudice.” The PCR judge also found there was no error in trial counsel’s comment during cross-examination because “[t]he overall effect of this question and answer was to highlight the potential bias of the witness against [Petitioner], yet point out his belief in her competence as a mother.” (App.pp.991-92).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet her burden of proving trial counsel improperly handled issues relating to Turner’s testimony. Byrholdt testified the issues Petitioner now complains about were not prejudicial or harmful to the defense case. The victim lived in the same residence as Petitioner and her co-defendant. The State presented evidence and testimony from numerous witnesses that the victim had been seen with bruises and burns prior to his death. The forensic pathologist testified the

autopsy revealed abrasions, a bite mark, and “numerous bruises to [victim] about the face, the chest, the back, and the extremities.” The pathologist testified the victim had multiple internal injuries and hemorrhaging and died as the result of blunt force trauma to the abdomen. (App.p.191; pp.203-05; pp.208-226). Petitioner gave two contradictory statements about the events leading up to the victim’s death. (App.pp.501-21; pp.521-30). The State presented overwhelming evidence at trial that Petitioner was guilty of homicide by child abuse. It is completely improbable that limiting Turner’s testimony about the victim’s paternity, health insurance, and funeral expenses would have resulted in a different outcome. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (holding overwhelming evidence of defendant’s guilt invalidated any argument that trial counsel should have had the first trial transcript available to potentially impeach a witness); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel’s deficient performance could have reasonably affected the result of defendant’s trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that she was prejudiced by trial counsels’ performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172,

174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

II. The PCR judge did not err in finding Petitioner failed to meet her burden of proving trial counsel were ineffective in closing argument.

Petitioner alleges trial counsel were ineffective in failing to highlight two specific points during closing argument: (1) that because she was ill the day before the victim died she had no reason to doubt the victim was ill and (2) that witness testimony about having seen bruises on the victim were from “only a few incidents recalled by multiple witnesses.” (Pet. Cert., p.14). This argument is without merit.

At trial, Petitioner testified she was sick the day before the victim’s death and had not gone to work. (App.p.565; p.579; p.589). Petitioner, however, never testified that she assumed the victim was suffering from the same ailment. Petitioner never testified this belief is why she did not doubt her co-defendant’s statement that the victim was sick the night before and the day of his death.

Angela Eccles, Paula Edmond, and Dianne Turner were Petitioner’s co-workers. They testified at trial about a day in early July 2002 when Petitioner brought the victim into work in order to give him a haircut. All three witnesses testified they saw bruises or marks on the victim’s face. (App.pp.278-81; pp.289-91; pp.314-18). Edmond specifically stated she was describing the same day Eccles had previously described. (App.p.291). Brandy Mason and Jason Bentley testified about a July 4th camping trip in which Mason noticed the victim had multiple bruises and Bentley noticed a single bruise. (App.pp.294-96; pp.331-36).

Byrholdt confirmed several witnesses testified about seeing the victim's injuries both when he came to Petitioner's workplace and during a July 4th camping trip. (App.pp.758-59). Byrholdt testified, however, that while multiple people saw the same thing, no one testified it was an ongoing occurrence. (App.pp.759-60). Phillips testified he handled the closing argument. (App.pp.831-32). Phillips testified he utilized the overall defense strategy of arguing Petitioner did not know about the abuse in this case. (App.p.841). Regarding the issue of whether multiple witnesses testified about the same event, Phillips stated he pointed out in closing that pictures from one of these events – the July 4th camping trip – did not show the victim had any bruises. (App.pp.833-34).

In denying Petitioner's application for post-conviction relief, the PCR judge found – with regard to Petitioner's alleged illness – that

Phillips presented an organized and thorough closing argument in which he argued the State had not proven [Petitioner]'s guilt. Phillips never mentioned [Petitioner]'s previous illness as a reason for not checking on the victim before she went to work because this was not testified to at trial. Regardless, [Petitioner]'s testimony – including that she was ill the day before the victim died – was before the jury. It is clear that, regardless of the strong argument put forth by trial counsel, the jury simply did not accept [Petitioner]'s version of events.

(App.pp.990-92). Regarding the issue of multiple witnesses testifying as to a single event, the PCR judge found “there was no error in how trial counsel questioned these witnesses. It was clear from the testimony that several witnesses saw the victim at a single event – whether it was at [Petitioner]'s workplace or the July 4th camping trip. This information was before the jury, who weighed it in their determination of [Petitioner]'s guilt.” (App.p.986).

Initially, Respondent submits this issue is not preserved for appellate review. The issue is presented in the petition for writ of certiorari without a single case or statute or court rule cited in support of the argument. As such, the issue is not preserved for review by this Court. See, e.g., State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (finding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority).

Regardless, the PCR judge did not err in finding Petitioner failed to meet her burden of proof on this issue. Phillips made a comprehensive closing argument in this case in which he argued the State did not produce any evidence either that Petitioner was responsible for the abuse or neglect of the victim or that she had manifested extreme indifference towards him. It is highly speculative to argue that highlighting two additional arguments to the jury – that Petitioner’s alleged illness explained why she did not question the victim’s purported illness the day he died and that multiple witnesses testified about two events – would have changed the outcome of Petitioner’s trial. This is especially true because the State presented overwhelming evidence of Petitioner’s guilt. See Harris v. State, 377 S.C. at 79-80, 659 S.E.2d at 147; Franklin v. Catoe, 346 S.C. at 570 n. 3, 552 S.E.2d at 722 n. 3; Geter v. State, 305 S.C. at 367, 409 S.E.2d at 346.

As to Petitioner’s alleged illness as the reason she did not doubt the victim was ill on the day he died, Phillips was not deficient in not arguing this to the jury. As noted supra, Petitioner never testified that she believed the co-defendant’s statement that the victim was sick because she had also felt ill. As such, there was no reason for Phillips to have made this argument to the jury. Since counsel is not required to be clairvoyant,

Phillips could not have known Petitioner would raise such a speculative issue at her PCR hearing several years later. See, e.g., Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1992). As to the allegation that Phillips should have argued to the jury that several witnesses who testified about the victim's injuries actually stemmed from only two incidents, it was unnecessary for Phillips to make this specific argument. It was very clear from Petitioner's co-workers' testimony that they all saw the victim – and observed his injuries – on the day Petitioner brought him into her workplace. Similarly, it was clear from Mason's and Bentley's testimony that they saw the victim – and observed his injuries – during the same July 4th camping trip. This evidence was before the jury, who weighed the evidence in their deliberations. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is “the finder of fact and weigher of credibility”). It is clear that, regardless of the strong arguments put forth by trial counsel, the jury simply did not accept Petitioner's version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) (“The credibility of witnesses is for the triers of fact.”); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired). Respondent also submits that mentioning the variety of witnesses who testified to the victim's prior injuries would likely not have been a successful tactic for Phillips to have taken during closing argument.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional

norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that she was prejudiced by trial counsels’ performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

III. The PCR judge did not err in finding Petitioner failed to meet her burden of proving trial counsel were ineffective in not presenting character witnesses.

Petitioner alleges trial counsel were ineffective because they did not present character witnesses at trial who could have testified she was “a good mother and a person with a general reputation for truthfulness.” (Pet. Cert., pp.15-16). This argument is without merit.

At the PCR hearing, Petitioner called several witnesses to testify about Petitioner’s general reputation for truth and veracity. (App.pp.889-92; pp.893-95; pp.896-99; pp.900-03; pp.904-06; pp.906-09; pp.910-13).

Phillips testified he did not recall whether he and co-counsel discussed the idea of presenting character witnesses. (App.pp.815-16; p.818). Phillips testified they did not want to bring “the entire community up here” and that they developed testimony about Petitioner’s character through defense witnesses. (App.p.815; p.816). Rather than questioning witnesses about Petitioner’s reputation, Phillips testified the focus of the defense case was “more on the hard evidence that we were dealing with which was the fact that her two-year-old child had died and we didn’t have a very good explanation from our client to work with as to how it happened or how she could not have known about it happening.” (App.p.818; p.841).

In denying Petitioner's application for post-conviction relief, the PCR judge found "trial counsel were not deficient in failing to call character witnesses during the defense case." The PCR judge concluded that, "given the overwhelming evidence of abuse and neglect of the victim presented at trial, there was no prejudice from the lack of character witness testimony." (App.pp.988-89).

Initially, Respondent submits this issue is not preserved for appellate review. The issue is presented in the petition for writ of certiorari without a single case or statute or court rule cited in support of the argument. As such, the issue is not preserved for review by this Court. See, e.g., State v. Howard, 384 S.C. at 217, 682 S.E.2d at 45.

Regardless, the PCR judge did not err in finding Petitioner failed to meet her burden of proof on this issue. The homicide by child abuse statute is broadly worded. One is guilty of the offense if he or she "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (Supp. 2003). As such, Phillips testified the defense strategy was to attempt to challenge the "hard evidence" in this case. Presentation of character witnesses who could not testify about the abuse or neglect of the victim that was perpetrated in Petitioner's home would not have supported that strategy. And, given the severity of the victim's injuries, this was a valid trial strategy. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) ("Counsel's strategy

will be reviewed under ‘an objective standard of reasonableness.’”) (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). As the State presented overwhelming evidence of guilt, there was no error in not presenting character witnesses at Petitioner’s trial. See Harris v. State, 377 S.C. at 79-80, 659 S.E.2d at 147; Franklin v. Catoe, 346 S.C. at 570 n. 3, 552 S.E.2d at 722 n. 3; Geter v. State, 305 S.C. at 367, 409 S.E.2d at 346.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that she was prejudiced by trial counsels’ performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

IV. The PCR judge did not err in finding Petitioner failed to meet her burden of proving trial counsel were ineffective in not moving to enter the SLED report into evidence.

Petitioner alleges trial counsel were ineffective in failing to enter the SLED report into evidence because it showed there was unknown male DNA in a bite mark on the victim’s wrist. This argument is without merit.

Byrholdt confirmed the SLED DNA Report noted the presence of male DNA in the bite mark on the victim. (App.p.794). Byrholdt testified it was not important for the jury to see this DNA report because the victim was beaten to death, not as the result of a bite mark. (App.p.796). Phillips testified he had nothing to add to Byrholdt’s testimony on this issue. (App.pp.826-27).

In denying Petitioner's application for post-conviction relief, the PCR judge found "the bite mark on the victim was one of the more minor injuries he suffered and did not factor into the cause of death. This Court finds that, based on the overwhelming evidence of the victim's serious injuries, there was no reasonable probability of a different result in this case if the DNA report had been admitted into evidence." (App.p.988).

Initially, Respondent submits this issue is not preserved for appellate review. The issue is presented in the petition for writ of certiorari without a single case or statute or court rule cited in support of the argument. As such, the issue is not preserved for review by this Court. See, e.g., State v. Howard, 384 S.C. at 217, 682 S.E.2d at 45.

Regardless, the PCR judge did not err in finding Petitioner failed to meet her burden of proof on this issue. Petitioner attempts to portray the results of the SLED DNA Report as more substantial than they are. The Report indicates there was male DNA in the victim's bite mark. It was undisputed, however, that the male co-defendant in this case was the last person alone with the victim. And there was never an allegation that Petitioner bit the victim. Regardless, given the severity of the victim's injuries, this information about the bite mark is irrelevant because the bite did not contribute to the victim's death. As the State presented overwhelming evidence that Petitioner was guilty of homicide by child abuse, trial counsel were not ineffective in not introducing the SLED DNA Report into evidence. See Harris v. State, 377 S.C. at 79-80, 659 S.E.2d at 147; Franklin v. Catoe, 346 S.C. at 570 n. 3, 552 S.E.2d at 722 n. 3; Geter v. State, 305 S.C. at 367, 409 S.E.2d at 346.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that

trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that she was prejudiced by trial counsels’ performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

V. The issue of whether trial counsel were ineffective in failing to impeach witness testimony regarding whether DSS had been notified of abuse is not preserved for review.

In the “Questions Presented” section of the petition for writ of certiorari, Petitioner alleges trial counsel were ineffective for failing to impeach witnesses’ testimony about whether they had reported prior abuse to the South Carolina Department of Social Services. (Pet. Cert., p.2). Petitioner, however, does not address this issue in the petition for writ of certiorari itself. As such, this issue must be considered abandoned and not preserved for appeal by this Court. See, e.g., Muir v. C.R. Bard, Inc., 336 S.C. 266, 298-99, 519 S.E.2d 583, 600 (Ct. App. 1999) (holding issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (holding a “one-sentence argument is too conclusory to present any issue on appeal”).

VI. The PCR judge did not err in finding Petitioner failed to meet her burden of proving trial counsel were ineffective in failing to object to the trial judge’s answer to a jury question regarding verdict options.

During their deliberations, the jury requested a copy of the homicide by child

abuse statute and asked, “[d]oes one verdict apply to both Defendants or could we render two different verdicts?” (App.p.689). The jury was brought into the courtroom and given a redacted copy of the statute. The trial judge then stated “[t]he answer to that question is, yes, you can find each Defendant guilty under Section A, or you can find them both under – A(1) or both under A(2), or you can find one guilty of one and one the other.” The jurors all said “yes” when the trial judge asked if this answered their question. (App.p.691).

Byrholdt testified he was pleased with the jury’s question but that, in hindsight, he would have objected. Byrholdt testified, however, that the trial judge answered the question the way it was asked. (App.p.802). Regarding the jury question, Phillips testified he thought of the question as to “the essence of the question rather than the specifics of how it was worded.” (App.p.827).

In denying Petitioner’s application for post-conviction relief, the PCR judge found “there was no error from counsels’ decision not to object. The jury indicated the trial judge’s answer was responsive to their question.” (App.pp.993-94).

Initially, Respondent submits this issue is not preserved for appellate review. The issue is presented in the petition for writ of certiorari without a single case or statute or court rule cited in support of the argument. As such, the issue is not preserved for review by this Court. See, e.g., State v. Howard, 384 S.C. at 217, 682 S.E.2d at 45.

Regardless, the PCR judge did not err in finding Petitioner failed to meet her burden of proof on this issue. The jury asked a question about the possible verdicts they could render in this joint trial. The trial judge offered an instruction on the matter and

asked the jury if it was responsive to their question. The jury indicated that it was. Trial counsel testified they were pleased with the jury's question and neither stated they believed the trial judge's instruction was not responsive to the question. The trial judge's answer to the jury was accurate and proper. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) (holding a trial court is required to charge only the current and correct law of South Carolina). Petitioner has failed to articulate a cognizable legal ground upon which trial counsel should have objected to the judge's instruction to the jury. As such, Petitioner failed to meet her burden of proving this allegation. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that she was prejudiced by trial counsels' performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

July 3, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-212508

Brandi Lynn Turner Holder, Petitioner,

v.


State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Tara D. Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204

I further certify that all parties required by Rule to be served have been served.
This 3rd day of July, 2013.


KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

July 3, 2013

RECEIVED

JUL 03 2013

S.C. SUPREME COURT

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

Re: Brandi Lynn Turner Holder v. State of South Carolina
Appellate Case No: 2012-212508
Lower Court Case No: 2010-CP-23-3160

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. Please be advised that, contrary to the procedure set forth in the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings," the Appendix appears to contain unredacted personal data identifiers. For example, there are several instances where witnesses' home addresses have not been redacted.

If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Tara Dawn Shurling, Esquire
Trisha Allen, Victim Services Counselor