STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-000178

Mark Anthony Martucci,.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Whether trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel by failing to call witnesses who would have testified that petitioner was not present at the home on the day of the minor's death, showed that petitioner's codefendant had a fight with the minor the night before his death, and contradicted the State's key witness at trial?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the December 2005 term of General Sessions for homicide by child abuse (2003-GS-23-1312). (App.pp.822-23). Steven W. Sumner, Esquire and Thomas J. Quinn, Esquire represented Petitioner.

After the State called the case to trial, it proceeded in absentia.[1] On February 9, 2006, Petitioner was found guilty and the Honorable C. Victor Pyle, Jr. sealed the sentence. (App.p.694; pp.700-01). Petitioner appeared before Judge Pyle on March 6, 2006 and received a sentence of life imprisonment. (App.p.708).

A notice of appeal was filed at the South Carolina Court of Appeals. Eleanor Duffy Cleary, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed Petitioner's conviction and sentence on September 24, 2008. State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008). Elizabeth A. Franklin-Best, Esquire of the South Carolina Office of Appellate Defense filed a petition for writ of certiorari at the South Carolina Supreme Court, which was denied by order dated October 7, 2009.

Petitioner filed an application for post-conviction relief (PCR) on September 24, 2010 (2010-CP-23-7981). (App.pp.710-29). A hearing was convened at the Greenville County Courthouse on November 1, 2012. (App.pp.735-97). Petitioner was present and represented by Joseph G. Armstrong, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable R. Markley Dennis, Jr. denied relief in an order filed December 17, 2012. (App.pp.803-10). Judge

[1] Petitioner was tried with his co-defendant, Brandi Holder.

Dennis denied Petitioner's subsequent post-trial motion by order filed January 8, 2013. (App.pp.811-17; pp.818-19; p.821).

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have called witnesses at trial in order to show he was innocent of the crime of homicide by child abuse.

A.

Petitioner and his co-defendant, Brandi Holder, were jointly tried for the death of Holder's two and a half year-old son. Petitioner was tried in absentia, but was represented at trial by two attorneys – Steven Sumner and Thomas Quinn. The State presented overwhelming evidence that both Petitioner and Holder were guilty of homicide by child abuse.

Nurse Layde Kelly testified she was working in the emergency room when the victim was brought in. (App.pp.138-39). Kelly testified the victim "had multiple bruises over most of his body" and "a very odd pattern" of marks on his face. (App.pp.140-41). Kelly testified the victim's bruises "were all in different stages of healing" and that his

abdomen was "very swollen." (App.p.142).

Dr. Kevin Gregg, the emergency room physician, testified two men told him the victim had fallen off a four-wheeler earlier in the week. (App.p.154). Dr. Gregg testified the victim's injuries were inconsistent with this type of accident. (App.pp.156-57).

Dr. Michael Ward performed the autopsy the day after the victim died. (App.p.192). Dr. Ward testified "there were numerous bruises to [the victim] about the face, the chest, the back, and the extremities. There were injuries that were present around the . . . penis, and to one of the arms that were especially disconcerting to us. . . . There were also injuries to the organs of the abdominal cavity, as well as a rib fracture." (App.p.191; p.197). Dr. Ward explained the victim's external injuries. Dr. Ward testified the bruises and abrasions to the victim's legs were consistent with blunt injury from an object. (App.pp.203-04). Dr. Ward testified there were bruises on the victim's wrist "consistent with a bite mark" and a recent laceration near the base of the victim's penis. (App.pp.204-05; pp.208-09). Dr. Ward testified there were three groups of bruises on the victim's back that were caused by "fairly extensive force" and that the victim had facial bruises consistent with a "blow from a knuckle." (App.pp.209-11; pp.217-20).

Dr. Ward also explained the victim's internal injuries. Dr. Ward testified the victim had 250 milliliters of blood in his abdominal cavity and that there was hemorrhaging, tearing, or trauma to the large intestine, small intestine, pancreas, kidneys, and left adrenal glands. (App.pp.211-15). Dr. Ward testified the hemorrhage "had been there for a period of time, several hours to a couple of days." (App.pp.213-14). Dr. Ward explained it would take "a great deal of force" to cause Bo's internal injuries.

(App.pp.215-16). Dr. Ward testified the victim's injuries were not caused by a four-wheeler accident and that the cause of death was "blunt force trauma of the abdomen." (App.pp.222-24; p.226). Dr. Ward testified the external bruises were two to twelve hours old and the trauma to the internal organs "happened greater than 12 hours before this time and probably greater than a day." (App.pp.231-34). Dr. Ward testified the symptoms and pain associated with the internal injuries would have been noticeable. (App.pp.224-26; p.230).

Robin Center testified that she observed bruises and burns on the victim when she had previously watched after him. (App.pp.251-52).

Brandy Mason testified she observed bruises on the victim's face on the weekend of July 4, 2002. (App.pp.294-95). Mason and Jason Bentley testified they observed the victim had a swollen tongue that weekend. (App.p.296; pp.332-33). Several of Holder's co-workers testified they noticed the victim had bruises on his face in early July 2002. (App.p.280; p.286; p.291; p.295; p.317).

John Parker testified he was friends with Petitioner and Holder and stayed with them occasionally. (App.pp.354-55). Parker testified to numerous times where he observed Petitioner abuse the victim, including: taping the victim's mouth shut, slapping the victim in the face, and holding the victim's head under water. (App.pp.358-60). Parker testified that, when he noticed other bruises on the victim, he was told the victim had fallen. (App.p.360). Parker testified the victim did not appear to be sick or bruised the weekend before his death and that he did not notice anything unusual after the victim was put to bed. (App.pp.361-68; pp.376-77). Parker testified Holder was gone when he

woke on the morning in question and that Petitioner was "yelling and carrying on" while the victim was bruised and "wasn't himself at all." (App.pp.368-69; pp.377-78). Parker testified he briefly left the residence but that Petitioner was giving the victim CPR when he returned. Parker testified Petitioner refused to call an ambulance (but instead called Holder) and that they took the victim to the hospital. (App.pp.369-72).

Petitioner and Holder initially told police at the hospital that day that the victim had a previous four-wheeler accident. (App.pp.403-08). Holder eventually gave two statements. In her first statement, she said the victim had a prior four-wheeler accident but was fine when she left for work that morning. (App.pp.500-21). In her second statement, Holder said she had been noticing bruises and bite marks on the victim and that she saw Petitioner strike the victim on the Sunday before he died. Holder said the victim vomited the day before he died and that she heard "a couple of thuds" from the bathroom while Petitioner was giving the victim a bath. Holder said Petitioner stayed in the victim's room that night and that the victim was hiding under the bed the following morning. (App.pp.521-30). Holder testified at the joint trial.

Petitioner gave a statement to police that he had noticed bruises on the victim and believed Holder inflicted them. Petitioner denied abusing the victim. (App.pp.420-21).

As noted supra, Petitioner did not appear at his trial. Petitioner's attorneys did not present a defense case. (App.p.623).

B.

At the PCR hearing, Petitioner argued he told counsel that he was not at home on the morning in question and had given him "the receipts and places that [he] had gone

to." (App.p.780). Petitioner argued there was a witness (Pruitt) who could verify he was not at the residence that morning. (App.p.781). Petitioner stated counsel "explained the circumstantial and he said that everything they had was just basically he said she said." (App.p.784). Petitioner stated he knew the trial date but chose not to appear because he was scared. (App.p.789).

Petitioner's brother stated he provided counsel with receipts from Waffle House, Wal-Mart, and Home Depot that he alleged showed Petitioner was not home on the morning in question. (App.p.773). Petitioner's brother stated he had been told Parker was "left at the house to watch [the victim]" on the morning the victim died. (App.p.775). Petitioner's brother admitted he was not at Petitioner's residence that day. (App.pp.774-75).

Della Ann Pruitt stated Parker called her on the telephone the morning the victim died. (App.pp.766-67). Pruitt stated she believed, based upon this conversation, that Parker was alone with the victim. (App.p.767). Pruitt stated she called Petitioner that morning and that he was not home. (App.p.767). Pruitt admitted she never went to Petitioner's house that morning and did not see either Petitioner or Parker until she went to the hospital later that day. (App.p.767; p.769).

Attorney Sumner agreed with Petitioner's counsel that he and co-counsel understood the trial was going to be a "he said, she said type trial." (App.756). Sumner said Parker was an important witness for the State. (App.p.757). Sumner testified Petitioner would mention witnesses but not produce them. (App.pp.757-58). Sumner testified they "could never verify there were any witnesses that would actually support

what [Petitioner] said." (App.p.758). Sumner testified they did not feel "comfortable subpoenaing a witness or calling someone on [Petitioner's] behalf to corroborate his version." (App.p.758). Sumner testified the defense strategy was to argue Petitioner was innocent and to portray the co-defendant as the perpetrator. (App.p.763).

Attorney Quinn testified "there were questions about who had the child and at what times." (App.p.739). Quinn testified Parker was at the residence that morning, but there was a dispute between Parker and Petitioner as to whether Parker was alone with the victim. (App.pp.739-40). Quinn testified Parker placed Petitioner at the residence that morning but that the case against Petitioner was largely circumstantial. (App.p.740; pp.744-45). Quinn confirmed the trial strategy was that Petitioner was innocent and the co-defendant was guilty. (App.p.750).

In denying Petitioner's application for post-conviction relief, the PCR judge found trial counsels' testimony was credible. (App.p.807). The PCR judge specifically found Sumner's testimony was more credible on the issue of whether witnesses' names were provided before trial. The PCR judge also found "the testimony at the PCR hearing would likely not have changed the outcome of [Petitioner]'s trial" because the State presented overwhelming evidence of guilt. (App.pp.808-09).

C.

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)).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have presented defense witnesses at trial. Sumner testified that, while Petitioner stated he would provide witness names to them, these names never materialized. (App.pp.757-58). The PCR judge specifically found Sumner's testimony to be "more credible on this point." (App.p.808). This finding must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). Sumner testified he was not comfortable with presenting witnesses for the defense case to corroborate Petitioner's story. (App.p.758). Based upon Petitioner's reluctance to provide witness names and the fact that the trial proceeded in absentia, this was a reasonable decision. In Strickland, the United States

Supreme Court held,

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

466 U.S. at 689, 104 S. Ct. at 2065; 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.") (citation omitted). Further, given that Petitioner never presented any witnesses to defense counsel and then chose not to attend his own trial, counsel made a valid strategic decision in choosing not to call witnesses and instead argue Petitioner was innocent and his co-defendant was guilty. (App.p.750; p.763). 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); Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics."). As such, the PCR judge was correct in concluding trial counsel were not deficient in this matter.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsels' representation was prejudicial to his case. Petitioner presented two witnesses at his PCR hearing to bolster his argument that trial counsel should have called these witnesses at trial to demonstrate he was not at home with the victim that morning. These witnesses, however, were not at Petitioner's home on the morning in

question. These witnesses were only able to recite what Petitioner told them – that he was out running errands that morning and that Parker was watching the victim. As such, neither witness's testimony would have changed the outcome of the case. Furthermore, Dr. Ward testified the fatal injuries were inflicted on the victim prior to the morning he was brought into the hospital. Thus, neither Petitioner's brother nor Della Ann Pruitt could have offered any relevant testimony that would have changed Petitioner's case.

Regardless, Petitioner cannot demonstrate prejudice because the State presented overwhelming evidence that he was guilty of the offense of homicide by child abuse. Numerous witnesses testified to having seen injuries on the victim before the day he died. Medical personnel testified to the extent and serious nature of the victim's injuries. Parker and Holder testified to having observed Petitioner abuse the victim. Holder testified Petitioner was alone with the victim the night before he died and Parker testified Petitioner was at the residence with the victim on the morning he died. Based on this overwhelming evidence, Petitioner cannot prove he was prejudiced because his brother and Pruitt did not testify at his trial. See 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).

E.

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. As Petitioner never provided the names of any witnesses to trial counsel, counsel cannot be ineffective for not contacting these witnesses. Similarly, counsel cannot be ineffective for making the strategic decision not to present witnesses at trial to corroborate Petitioner's story. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's 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.").

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 issue discussed above.

Respectfully submitted,

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By: 
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January 31, 2014

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The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-000178

Mark Anthony Martucci, ... Petitioner,

v.

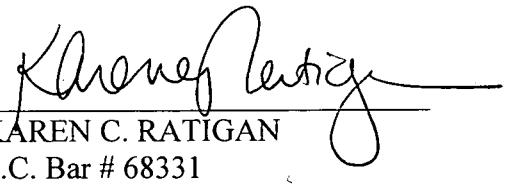
State of South Carolina, ... Respondent.

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:

David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 31st day of January, 2014.



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January 31, 2014

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

Re: Mark A. Martucci v. State of South Carolina
Appellate Case No: 2013-000178
Lower Court Case No: 2010-CP-23-7981

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

Sincerely,

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

KCR/jacc
Enclosures

cc: David Alexander, Esquire
Trisha Allen, Victim Services Counselor