STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-000374

ANDREA PERSON, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

INDEX

ISSUES PRESENTED

I. Is there evidence of probative value to support the post-conviction relief court's ruling that trial counsels were not ineffective in regards to Petitioner's Jackson v. Denno[1] hearing, where counsels articulated a valid and reasonable trial strategy based on the circumstances of Petitioner's case and their vast criminal defense experience?

II. Is there evidence of probative value to support the post-conviction relief court's finding that trial counsels were not ineffective in selecting and calling Kimberly Collins, M.D., as an expert witness, where counsels articulated a sound and reasonable trial strategy based on Collins' ability to provide strong testimony of medical evidence to support pneumonia as a cause of the victim's death independent of Petitioner's statement to counter the State's witnesses?

[1] 378 U.S. 368 (1964).

STATEMENT OF THE CASE

Petitioner was indicted during the May 2007 term of the Richland County Grand Jury for Homicide by Child Abuse (2007-GS-40-3570) stemming from the 1998 death of Zachary Ulengchong (hereafter "Victim"), the first of three infants to die while at Petitioner's in-home day care under Petitioner's sole care during a nine year period.[2] Shortly thereafter, Chief Public Defender for the Fifth Judicial Circuit Douglas S. Strickler (hereafter "Strickler") and Chief Public Defender of Richland County E. Fielding Pringle (hereafter "Pringle") were appointed to represent Petitioner. Following several pre-trial hearings, including a motion to sever and a Jackson v. Denno hearing, Petitioner proceeded to a jury trial before the Honorable Alison R. Lee on November 16, 2009. On November 20, 2009, the jury convicted Petitioner as indicted. Judge Lee sentenced Petitioner to twenty-two years imprisonment.

Petitioner filed a Notice of Appeal, and an appeal was perfected on her behalf. Following briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence by unpublished opinion. State v. Person, 2012-UP-068 (S.C. Ct. App. filed February 8, 2012). The Remittitur was issued on March 5, 2012.

Thereafter, Petitioner filed an application for post-conviction relief on June 19, 2012. Respondent made its Return on July 3, 2012, requesting an evidentiary hearing be held. Thereafter, Petitioner, through her counsel, filed an Amended Application on September 25, 2013, alleging the following grounds for relief:

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[2] Petitioner was indicted by the Richland County Grand Jury for two additional counts of Homicide by Child Abuse related to the April 2, 2007 death of Michael Walker and the January 2001 death of Elijah Brown. It was not until the third death that the two previous deaths, previously ruled to be of natural causes, were investigated and charges were brought against Petitioner. The State initially intended to call all three cases to trial together but was unable to proceed on all three indictments simultaneously after Petitioner's successful severance motion.

1. Ineffective assistance of trial counsel at a critical stage of the case, the pre-trial Jackson v. Denno hearing, including the failure to properly prepare for the hearing, the failure to call witnesses or offer testimony at the hearing, the failure to effectively cross-examine the State's witnesses, the failure to make any sort of argument to the judge regarding the voluntariness of the statement, and the failure to advise Petitioner on the importance and implication of the hearing or her right to testify at the hearing.

2. Ineffective assistance of trial counsel for calling Dr. Kimberly Collins as an expert witness and/or for failing to properly prepare the witness.

An evidentiary hearing into the matter was convened on October 2, 2013, at the Richland County Courthouse before the Honorable James R. Barber, III. Petitioner was present at the hearing and was represented by counsels Alexis K. Lindsay, Esquire, and Thornwell F. Sowell, III, Esquire. Respondent was represented by Assistant Attorney Generals Megan E. Harrigan and Walt Whitmire of the South Carolina Attorney General's Office. Petitioner proceeded forward on the grounds as set forth in her amended Application and testified on her own behalf, as well as presented testimony from Saul Kassin, Ph.D. (hereafter "Kassin"); Marc Harari, Ph.D. (hereafter "Harari"); and Strickler. Respondent presented testimony from Pringle. Following review of proposed Orders from both parties, the post-conviction relief court denied and dismissed Petitioner's application in full, finding that trial counsels' performance was not deficient and Petitioner had failed to meet her requisite burden. An Order to this effect was filed on January 30, 2014.

Petitioner filed a Notice of Appeal on February 27, 2014. Thereafter, Petitioner filed a Petition for Writ of Certiorari on August 7, 2014. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "***any*** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application 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, supra.

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. Strickland, supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, supra. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. 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.

This Court has held that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

ARGUMENT

I. There is evidence of probative value to support the post-conviction relief court's ruling that trial counsels were not ineffective in regards to Petitioner's Jackson v. Denno hearing, where counsels articulated a valid and reasonable trial strategy based on the circumstances of Petitioner's case and their vast criminal defense experience.

On April 2, 2007, Sergeant Kevin Isenhoward (hereafter "Isenhoward"), an investigator with the Richland County Sheriff's Office, responded to Petitioner's in-home day care to investigate the death of a child in Petitioner's care.[3] (App. p. 419). Through his investigation into the incident, Isenhoward learned about the death of Victim in 1998, as well as the death of another infant in 2001. (App. p. 419-20). However, Petitioner failed to reveal anything about Victim's death when Isenhoward spoke with her that day. (App. p. 419).

On April 10, 2007, Isenhoward spoke with Victim's mother about Victim's health before he died. (App. p. 419-20). He then contacted Petitioner, who voluntarily agreed to come to the sheriff's department the next day. (App. p. 420). During their April 11, 2007, meeting, Petitioner was advised of her rights, signed a waiver of rights form, voluntarily agreed to speak with Isenhoward, and informed him she did not reveal Victim's death during their April 2, 2007, encounter because she did not want to look bad. (App. p. 420-21). After this brief meeting, Petitioner left the sheriff's department. (App. p. 421).

Subsequently, Isenhoward arranged another meeting with Petitioner, who voluntarily returned to the sheriff's department around 1:00 p.m. on April 17, 2007. (App. p. 421). Isenhoward met Petitioner in the lobby and noticed her appearance and personal hygiene had gradually deteriorated with each of their meetings. (App. p. 422-23). He then took her to an

[3] On April 2, 2007, two-month-old Michael Walker died at Petitioner's day care; this was the third child to die while under Petitioner's direct care and supervision within a nine year period. (App. p. 79-80; p. 1401).

interview room to meet with Lieutenant James White (hereafter "White"), with the interview beginning at approximately 1:11 p.m. (App. p. 386-88; p. 421). At the outset, White informed Petitioner of her rights, and she again voluntarily signed a waiver of rights form. (App. p. 386-91). Petitioner and White progressed with the interview, which included a polygraph examination, during which Petitioner initially denied injuring Victim. (App. p. 400; p. 412). However, White advised Petitioner he did not believe she was being truthful with her statements about Victim's death. (App. p. 400). Petitioner then confessed to placing her hand over Victim's face and mouth for approximately fifteen seconds after she could not get Victim to stop crying. (App. p. 401). Petitioner stated Victim became motionless and quiet, so she returned him to his crib. (App. p. 402). Petitioner indicated she panicked, left Victim in the crib, and returned fifteen minutes later to find Victim lifeless. (App. p. 402-03). Petitioner informed White that she then called emergency services and falsely reported how Victim died. (App. p. 403). She expressed remorse and stated she was untruthful because she was afraid she would go to jail. (App. p. 402-03).

Following her statements, White contacted Isenhoward and informed him Petitioner admitted to suffocating Victim. (App. p. 404; p. 423-24). Isenhoward entered the interview room, knelt beside Petitioner, and asked her what happened. (App. p. 424). With White present in the room, Petitioner repeated her statements to Isenhoward. (App. p. 404; p. 424-25). Petitioner stated she placed her hand over Victim's mouth for fifteen to twenty seconds until he went limp, left him for fifteen minutes, returned and discovered him lifeless, then called 911 and repeatedly lied to everyone about his death from that point forward. (App. p. 404; p. 424-25). She said she did it because Victim was fussy, irritable, and crying. (App. p. 425).

Thereafter, Petitioner used the bathroom and drank some water; she was offered something to eat but declined any food (App. p. 426). Isenhoward then brought Petitioner to Deputy Chief David Wilson's office, and she again revealed the circumstances of Victim's death. (App. p. 426; p. 428; p. 490). Petitioner told the officers Victim was fussy when he arrived and would not take a pacifier. (App. p. 429; p. 491). She indicated he was uncooperative and she was afraid he was going to wake the other children. (App. p. 429). Petitioner stated she held Victim, and, when he continued to cry, she put her hand over his nose and mouth for fifteen to twenty seconds until he stopped crying in order to quiet him. (App. p. 491-92). Chief Wilson asked Petitioner to demonstrate how much pressure she applied to Victim's face, and Petitioner demonstrated a firm grip on Chief Wilson's hand. (App. p. 429; p. 493). Petitioner stated Victim then gasped for air, stopped crying, and she put him in his crib. (App. p. 429; p. 493). She informed the officers she later discovered he was lifeless and gave a false report of his death to the 911 operator. (App. p. 429-30).

Next, Isenhoward took Petitioner to his cubicle in order to take her written statement. (App. p. 434). After again informing Petitioner of her rights, Isenhoward recorded Petitioner's written statement at 3:56 p.m., approximately two hours and forty-five minutes after her initial interview began at 1:11 p.m. (App. p. 437; p. 440). In the statement, Petitioner admitted the following about Victim's death:

> "On that day [Victim]'s mother dropped him off at my house at [my address]. He arrived there at around 8am. He was sick with a cold and was very fussy. I fed him when he arrived that morning and laid him down for a nap. I got him up at around 9:00-9:30 am and changed his diaper. I fed him his second bottle at around 10am. He was still fussy and I couldn't pacify him. He was sick and full of cold. I went on about dealing with all of the other children and he was crying the whole time. It was naptime and I

> still couldn't pacify him. I picked him up and held him in my arms. I tried to pacify him and rock him to sleep. He was not responding to it. He was still crying very loudly. He was whining and I didn't want the other children to wake up. I put my hand over his nose and mouth and held it there for 15-20 seconds. [Victim] got quiet. When I took my hand off he took a deep breath and it appeared to me that he fell asleep. He wasn't moving and I carried him into the daycare room. I put him in his crib. I went and cleaned up the house and straightened up the kitchen and living room. That took about 15-20 minutes. I got worried because he had been crying all day and now he wasn't crying anymore. I went into the daycare room and checked on [Victim]. I picked him up and he wasn't breathing. I immediately tried to give him mouth-to-mouth resuscitation. He wasn't responding to it. I called 911. A short while after that the ambulance arrived and took him to the hospital."

(App. p. 443-44). Petitioner indicated she felt her actions were responsible for Victim's death, stating: "Yes. I should have chosen a different way to handle him. I should not have put my hand over his face. It was not my intent to kill him. I just wanted him to go to sleep. I am so sorry." (App. p. 448-49). Petitioner concluded the statement by stating:

> "I cannot convey how sorry I am. I should have taken a step back. If I could change things I would. I'm tired of holding on to this. It feels good to say it to someone. I know this is going to change things in my life with my friends but it is the right thing to do. I was wrong for what I did. I want to ask for forgiveness and move on in my life."

(App. p. 450). After the statement was prepared, Petitioner reviewed each page and signed it multiple times. (App. p. 450-454). In addition to Isenhoward, Chief Wilson witnessed Petitioner sign the statement. (App. p. 445-46).

After making the statement, Petitioner alerted Isenhoward she wanted to apologize to Victim's parents. (App. p. 453-54). He offered her a blank piece of paper to write a letter to Victim's family, and Petitioner wrote an apology. (App. p. 454-55). In the apology letter,

Petitioner stated: "Please forgive me and know it was not my intention to cause you such loss. I didn't want to hurt him. But I did. I should have stopped & walked away. What I did was wrong and I'm so sorry." (App. p. 456). Subsequently, Petitioner was arrested and indicted for Homicide by Child Abuse. After a renewed investigation into Victim's death, the coroner's report was amended on April 18, 2008, to reflect a cause of death of cardiac arrest due to asphyxiation due to hand over mouth, and the manner of death was ruled a homicide. (App. p. 359).[4]

On October 30, 2009, Petitioner, alongside her counsels Strickler and Pringle, appeared for a Jackson v. Denno hearing before Judge Lee to determine if Petitioner's statements were admissible. (App. p. 5-170). At the hearing, the State called four witnesses: Captain James S. Smith of the Richland County Sheriff's Department; Lieutenant James E. White of the Richland County Sheriff's Department; Investigator Kevin Isenhoward of the Richland County Sheriff's Department; and Chief David Wilson of the Richland County Sheriff's Department. (App. p. 5-170). After examination and cross-examination of all witness, the trial court ruled that Petitioner's statements were "made freely and voluntarily and without coercion or threats or promises" and went through a lengthy colloquy on the record outlining the reasoning for its ruling. (App. p. 128-34).

In her amended application for post-conviction relief, Petitioner alleged that trial counsels were ineffective in their preparation for and performance at the Jackson v. Denno hearing. (App.

[4] Petitioner was also indicted for two additional counts of Homicide by Child Abuse for the deaths of two other infants who died while in Petitioner's care. The State intended to call all three cases to trial together, but upon motion of Petitioner's trial counsels, the trial court ruled that the cases must be severed, finding that the charges could not be tried together because they did not arise out of a single chain of circumstances. See App. p. 1414-15; p. 1423-24.

p. 1247-1260). Specifically, Petitioner alleged that counsels were ineffective for failing to raise the other two deaths and subsequent interrogations, as well as the polygraph, at the hearing, as this is the only time this information could be raised outside the jury's presence. (App. p. 1251-53). Additionally, Petitioner alleged counsels were ineffective for failing to call witnesses, such as Kassin, Harari and Petitioner herself, to show how she was vulnerable to police questioning, resulting in a false confession. (App. 1253-56). At the evidentiary hearing, Petitioner presented these arguments to the post-conviction relief court, as well as testimony from Kassin, Harari, Petitioner, and Strickler and cross-examination from Pringle.

Following its review of all testimony presented at the hearing and proposed orders from Petitioner and Respondent, the post-conviction relief court rejected Petitioner's allegations, finding nothing in counsels' preparation for or performance at the Jackson v. Denno hearing was deficient. (App. p. 1586-1622.) Specifically, the post-conviction relief court found "that counsel[s] [were] well beyond prepared for the Jackson v. Denno hearing, had amply prepared [Petitioner] for this hearing, and together, [counsels and Petitioner] made a strategic decision that it was in [Petitioner]'s best interest not to call witnesses or present an argument to avoid revealing their case to the State weeks before trial, particularly in light of Kassin's controversial and widely criticized methodology." (App. p. 1619). The court elaborated that "this strategy was valid and prudent based on all testimony presented, and therefore, counsels' performances were not deficient." In support of its findings, the court cited the following testimony from the evidentiary hearing:

> "[t]he uncontroverted testimony reveals that [Petitioner], Pringle, and Strickler discussed the Jackson v. Denno hearing numerous times and weighed benefits and risks of making an argument or calling witnesses at the hearing. Pringle and Strickler testified that

> they both had represented countless defendants in Jackson v. Denno hearings and that the success rate for exclusion of a statement was extremely low, which they advised [Petitioner]. Additionally, Pringle and Strickler testified that there was no valid ground on which to challenge the voluntariness of [Petitioner]'s statement, as [Petitioner] readily admitted that she voluntarily and knowingly waived her rights multiple times and gave a voluntary statement which she [later] insisted was false. Pringle and Strickler both testified that there was no reasonable chance of convincing the court that [Petitioner]'s will was so overborne that her statement should be excluded, especially when [Petitioner] possessed so few of the risk factors that Kassin would testify regarding. Counsels testified that they considered calling Kassin as a witness at the hearing, and even discussed the matter with him, but ultimately decided it would be best to reserve his testimony for trial, as there was an extremely low likelihood that [Petitioner]'s statement would be suppressed and they did not want to give the State a preview of his controversial testimony weeks prior to trial. Additionally, Pringle testified that [Petitioner] was extremely anxious and nervous about testifying and they also did not want the State to have notice of this before trial. Furthermore, counsels testified that they discussed having [Petitioner] evaluated and consulted with a trusted psychologist, who advised against doing so as there was a significant likelihood it would not be in [Petitioner]'s best interest."

(App. 1618-19). This is supported by ample evidence in the record. See App. p. 1386, p. 1415-1417, p. 1438-1443; 1478-1479; 1491-1492.

However, despite ample evidence in the record to support these findings, Petitioner argues that the post-conviction court erred, stating that counsels were deficient and "[i]t is inexplicable how counsel could acknowledge the importance of [Petitioner's] statement yet not make any effort have that 'end all' statement suppressed." (PWC p. 14-15). Specifically, Petitioner cites to five reasons why the post-conviction relief court erred in its findings regarding the Jackson v. Denno hearing: failure to call Kassin; failure to explore the effects of the polygraph on Petitioner; failure to offer witnesses who could testify to the effects and risks of a

"lengthy"[5] interrogation; failure to have Petitioner evaluated by a clinical psychologist and failure to call such as a witness; and failure to call Petitioner as a witness. (PWC p. 6-15). However, the post-conviction relief court's findings, directly refuting all of Petitioner's claims, are clearly supported by more than ample evidence in the record showing that counsels articulated a valid and reasonable trial strategy based on the circumstances of Petitioner's case and their vast criminal defense experience.

Pringle testified at length regarding her and Strickler's strategic approach to the Jackson v. Denno hearing:

> "Based on what I knew, the information that I had at the time, what I knew that Ms. Person would testify to, what I believed law enforcement would testify to, based on the applicable legal standard, based on my experience with Jackson v. Denno hearings, Mr. Strickler's Jackson v. Denno hearing experience, our collective experience in looking at it, we did not believe that it was worth giving the State a preview of Ms. Person's testimony, bringing in Dr. Kassin to let them have a full preview of his testimony, that the potential benefit to that would ever outweigh whatever we believed to be the ultimate [outcome]. And that's not just because it's not a common thing, it's because the factors in this case, just in my opinion, and Mr. Strickler and I agreed, that it was not likely that this would be suppressed, and so you didn't gain anything by putting her up subjecting her to cross examination, she had difficulty in testifying, and it was just not worth it. There were other things that come into play, but ultimately that was the decision we made, and the reason."

(App. p. 1439 lns. 5-24). Pringle elaborated that Petitioner had "difficulty remembering" what happened to her during the questioning and that she "had a hard time recalling the facts and

[5] Petitioner repeatedly cites to the "lengthy" and "long" interrogation she endured at the hands of law enforcement, which she quantifies as lasting more than seven hours. See PWC p. 3, p. 8, p. 11; App. p. 1248, p. 1251, p. 1254, p. 1255, p. 1391 This is misleading and incorrect. Petitioner gave her initial statement about Victim – the only statement relevant to this case – less than three hours after her interview with law enforcement began. See App. p. 437, p. 440, p. 1408-1412, p. 1418-19, p. 1432-1433. Petitioner's self-incriminating statements regarding the deaths of the two other infants – wholly unrelated to the charges subject to this application – came during the following hours of interview.

details," such as whether or not she had eaten, taken her insulin or diabetes medication, or the overall timeline of events. (App. p. p. 1425-26, p. 1439-1441). Pringle also testified that the case was being handled by "very aggressive, very good, very seasoned prosecutors" and she did not want "to give them two shots at [Petitioner] and have her locked in" for impeachment purposes when Petitioner testified at trial, which was an absolute necessity. (App. p. 1440). Pringle testified that Petitioner did not meet many of the risk factors that Kassin associates with false confessions, which are the same factors courts consider during a Jackson v. Denno hearing (App. p. 1435-36), stating that:

> "[Petitioner] just didn't have many of the risk factors. Ms. Person was educated. She's not of low intellectual functioning. She's not mentally retarded. She has grown up with educated people. The medical condition was not something I was able to use, though we tried and talked about it [because Petitioner was not able to remember whether she had eaten or taken her medication and/or insulin] . . . She did have risk factors and Dr. Kassin and I talked about those and identified those. But in a situation where you would expect a statement to be suppressed it wasn't that kind of situation, that she did not have something that I felt I could convince Judge Lee that her will was overborn by the type of interrogation that she was subjected to . . . I don't think I could have prevailed on that given what I did have."

(App. p. 1441 lns. 5-23). Pringle testified that she considered having Petitioner evaluated by a psychologist to see if her personality traits made her more suggestible, but that after speaking with Dr. Geoffrey McKee, a forensic psychologist her office often employs and trusts when representing criminal defendants, she decided against doing so because any possible personality test would not be "normed . . . for a criminal defendant in a false confession kind of situation." (App. p. 1442-1443). Pringle also testified that she had the polygraph results analyzed by two different polygraph experts who never spoke to each other and that both concluded that there was

"very marked deception noted on the Zachary questions." (App. p. 1426-28). She testified that because of this, she made a strategic decision to avoid bringing up the polygraph at the hearing. (App. p. 1428, p. 1451). When questioned by the post-conviction relief court about her ultimate decisions and why, Pringle again reiterated her strategic approach to the Jackson v. Denno hearing. (App. p. 1478-79).

Strickler testified similar to Pringle in regards to the Jackson v. Denno hearing, stating:

> "[W]e didn't just waltz into it and not considered that. We considered the pros of her testifying, she would have had to testified in that situation in order to go ahead and open up the various other attacks that you're talking about, all of which are valid. And the likelihood that in balance that would have been sufficient to go ahead and convince Judge Lee to suppress the statement, which in my experience is a number approaching zero, with the downside there, which would be to give the State an opportunity to go ahead and cross examine her, and they cross examined her with great affect at trial."

(App. p. 1491 ls. 14-25). He testified that after consulting with a forensic psychologist, he and Pringle made the decision not to have Petitioner evaluated because "those tests that were testified to today [by Harari] are set up for a clinical setting, not a forensic setting," which would have created problems that the State would have been able to utilize against Petitioner. (App. p. 1492).

Based on the foregoing, it is clear that counsels made well-reasoned, thoughtful, and informed strategic decisions related to the Jackson v. Denno hearing in light of their vast professional experience and the unique circumstances of Petitioner's case. As counsels articulated valid strategic logic behind their decisions related to the Jackson v. Denno hearing, the post-conviction relief court correctly denied relief. See Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64. These findings are supported by more than ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

II. There is evidence of probative value to support the post-conviction relief court's finding that trial counsels were not ineffective in selecting and calling Kimberly Collins, M.D., as an expert witness, where counsels articulated a sound and reasonable trial strategy based on Collins' ability to provide strong testimony of medical evidence to support pneumonia as a cause of the victim's death independent of Petitioner's statement to counter the State's witnesses.

At trial, the State presented testimony from several medical experts. (App. p. 510; p. 567; p. 593). First, Dr. William Armstrong, the medical examiner who performed Victim's autopsy, testified about his findings during his autopsy. (App. p. 512). Dr. Armstrong opined the cause of Victim's death was suffocation. (App. p. 519-20). He testified it would have been unusual for Victim's mild case of pneumonia to be fatal. (App. p. 520). He noted the reported timeline of Victim being well and then deceased within two and a half hours was too rapid of a time period for Victim to have died of pneumonia. (App. p. 351). He further noted his findings of brain swelling, blue coloration in Victim's fingernails and extremities, and redness in the lungs were all consistent indicators of strangulation. (App. p. 517; p. 521-23). When questioned about the lack of external signs of strangulation, he testified placing one's hand over a child victim's nose and mouth would hardly ever leave detectible marks. (App. p. 540). Based on his review of all available information, Dr. Armstrong concluded Victim was suffocated, and he testified he would have had this opinion in December of 1998 if all the available information would have been available at that time. (App. p. 519-20; p. 523).

Dr. Clay Nichols, the chief medical examiner for Richland County and an expert in forensic pathology, testified he reviewed all the available information regarding Victim's death, including the autopsy report, the emergency room report, Petitioner's statements, Victim's medical records, information from law enforcement, and tissue samples from Victim's lungs. (App. p. 567-68; p. 569-70). Based on his analysis, Dr. Nichols testified Victim died of

asphyxiation due to suffocation. (App. p. 570). He opined Victim's mild case of pneumonia was insufficient to cause death. (App. p. 570-71). He testified Victim's fine health two and a half hours prior to his death and the reported timeframe of his death were inconsistent with a death caused by pneumonia. (App. p. 570-71). He noted Petitioner's admission of responsibility for Victim's death was consistent with his findings. (App. p. 591). Additionally, he noted it was quite common to find no marks present on the body of a suffocated child. (App. p. 573).

Finally, Dr. Gratin Smith, a pediatrician and an expert in the field of pediatrics, testified about his review of the records and information related to Victim's death. (App. p. 593-94). Dr. Smith testified he found a small amount of pneumonia present in Victim's lungs, with the signs of pneumonia confined to only a portion of one of Victim's lungs. (App. p. 599). He stated an infant dying of pneumonia typically would exhibit obvious symptoms of fast breathing, increased exertion to expand the lungs, fatigue, and a struggle to breathe. (App. p. 600). Dr. Smith testified the obvious signs of critical illness and respiratory failure would have been noticeable several hours before the child's death, with a death from pneumonia taking days. (App. p. 600-01). Based on his analysis and review, Dr. Smith concluded Victim did not die of pneumonia. (App. p. 601-02).

Dr. Kimberly Collins, the former chief medical examiner of Charleston County and an expert in forensic pathology, testified on Petitioner's behalf as an expert in pediatric pathology. She testified that she reviewed all of the available information regarding Victim's death. (App. p. 771-72; 775-76). Dr. Collins testified that considering only the medical evidence, she would have concurred in the original finding of pneumonia as the cause of death. (App. p. 776; p. 778). She opined Victim's pneumonia, which she characterized as more significant than the State's

witnesses, was substantial enough to be the cause of death. (App. p. 778-79; p. 788; p. 791-92). Dr. Collins testified there was not a sufficient basis in the autopsy information alone to change the cause of death asphyxiation. (App. p. 804). However, Dr. Collins conceded she had previously changed her opinion regarding a cause of death in unrelated cases after receiving additional information, and she acknowledged a forensic pathologist cannot exclude statements when determining the cause of death. (App. p. 811). Dr. Collins further acknowledged there were no signs of a severe case of pneumonia in the autopsy information. (App. p. 811). However, based solely on the autopsy findings, she testified she believed the cause of death to be pneumonia. (App. p. 822). Dr. Collins did concede that if considering Petitioner's statements, the cause of Victim's death was asphyxiation due to smothering. (App. pp. 822-23). Nonetheless, Dr. Collins reiterated that Victim had lobular pneumonia, that the pneumonia was significant enough to kill Victim, and that the cause of death would be correctly classified as pneumonia based on all medical evidence. (App. p. 824-25).

In Petitioner's closing argument, Strickler stressed to the jury that it was their role – not Dr. Collin's – to determine if Petitioner's statement was voluntary and amounted to a confession. (App. p. 1083). Strickler highlighted this to the jury:

> "The beginning of my discussion with Dr. Collins, I cleared all of that up [regarding considering Petitioner's statement and the surrounding circumstances]. So [the prosecutor]'s 'You didn't hear. You didn't get full details on the questions.' Well, she – she may not have because it doesn't matter, because the premise is if you knew there was a confession, you'd call if suffocation or a confession, okay. That was a given. So let's take that out, because it's a question of whether there's a confession or not is not for her to decide. It is for each and every one of you to decide ultimately. So I wanted to focus [Dr. Collins'] attention on what the medicine says, on what pathology says so that would could weigh her information with that supplied by people from the State."

(App. p. 1083 lns. 10-23). Strickler went on to re-review the qualifications of Dr. Collins compared to the State's medical experts, emphasizing that Dr. Collins' credentials were superior and better suited to form an opinion in this case. (App. p. 1082-85).

In her amended application for post-conviction relief, Petitioner alleged that trial counsels were ineffective for utilizing Dr. Collins as an expert witness at trial. (App. p. 1257-1259). Specifically, Petitioner alleged that counsels were ineffective for "[c]alling an expert witness whose ultimate conclusion [was] consistent with the State's experts." (App. p. 1258). After hearing testimony from Pringle and Strickler, the post-conviction relief court rejected Petitioner's claims, finding that Petitioner "failed to establish any deficient in counsels' representation in regards to the decision to call or prepare Dr. Collins for trial."(App. p. 1620). In support of its findings, the post-conviction relief court cited to the following:

> "Both counsels testified that they knew Dr. Collins would provide the strongest testimony regarding Victim's pneumonia being significant and in better alignment with the physical symptoms than smothering. Additionally, both counsels testified that they were aware that Dr. Collins would testify that if provided with [Petitioner]'s confession, the medical opinion would likely be asphyxiation by smothering. However, both counsels testified that they were surprised with the manner in which she said this, but not the underlying proposition. Strickler testified that regardless of this, Dr. Collins testimony was still necessary, as she was the only witness who could provide the jury with expert testimony that Victim's pneumonia was pervasive and significant enough to be fatal and that the physical symptoms better coincided with death by pneumonia than by smothering. Additionally, Strickler testified that as Applicant's underlying defense was that the confession was false, he wanted to highlight to the jury that the medical expertise showed pneumonia was the cause of death absent this false and coerced confession. In his closing argument, Strickler did highlight to the jury that it was solely their role to determine whether Applicant's confession was false, not Dr. Collins, who

> was strictly there to provide expert testimony on the medical evidence surrounding Victim's death."

(App. p. 1620-21). This is supported by evidence of probative value in the record. See App. p. 1446-47, p. 1449-1469, p. 1479-80, p. 1487-91, p. 1493-95.

However, despite ample evidence in the record to support these findings, Petitioner asserts that the post-conviction relief court erred in holding that Petitioner's trial counsels were ineffective for calling Dr. Collins as an expert witness. Specifically, Petitioner argues that "[t]he decision by defense counsel to call Kimberly Collins, M.D. was ineffective assistance of counsel because her testimony was consistent with and bolstered the prosecution's case." (PWC p. 15). Petitioner expounds that "neither Pringle or Strickler gave a valid strategic reason for offering Dr. Collins as a witness" and that it was error for the post-conviction relief court to hold to the contrary. (PWC p. 16). Petitioner asserts that counsels should have consulted with or called another expert who would not have the same ultimate conclusion as the State's experts. Petitioner also asserts that medical expert testimony based on witness statements is inappropriate and should not be considered by a jury.[6] Finally, Petitioner argues that this Court should reverse the post-conviction relief court in light of McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). However, the post-conviction relief court's findings are supported by ample evidence in the record showing that counsels articulated a valid and reasonable trial strategy based on Collins' ability to provide strong testimony of medical evidence to support pneumonia as a cause of the victim's death independent of Petitioner's statement to counter the State's witnesses.

[6] Petitioner states that this is "not directly at issue in this petition," but proceeds to cite case law that she argues is factually similar to her case and resulted in reversal on appeal. This is not at issue, directly or otherwise, in this case. Petitioner never raised this issue before the post-conviction relief court and the lower court never ruled on it. Therefore, it is not preserved for appellate review. See Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013) (holding that an issue must be ruled upon by the post-conviction relief court to be preserved for appellate review).

Petitioner asserts that "Collins may have been the only witness on the defense's witness list who could testify regarding the pervasiveness of the pneumonia, but she was surely not the only expert available to them" and that counsels "could have and should have found a new expert." (PWC p. 19). However, Petitioner failed to present any such expert at the post-conviction relief hearing and therefore, failed to meet her requisite burden of proof of supporting this claim. See Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR.")

Additionally, Petitioner's reliance on McKnight is in error, as McKnight is readily distinguishable from the present case. McKnight involves deficiencies of counsel that occurred at a retrial of McKnight after the first trial resulted in a mistrial. This is significant because, as this Court cites in McKnight, counsel decided to call an expert after knowing her testimony was used extremely favorably by the State in its closing arguments during the first trial. McKnight, 378 S.C. 359, 661 S.E.2d 44. This Court concluded in McKnight that it was unreasonable for counsel to call an expert after already knowing the weaknesses in the expert's testimony and precisely how the State would exploit these weaknesses to its benefit. Id. Additionally, counsel in McKnight failed to present testimony from another expert who presented favorable testimony at the first trial but did not testify at the second trial, which this Court concluded compounded the prejudice to McKnight. Id. The present case in not analogous with McKnight and does not support reversal of the post-conviction relief court.

Based on the foregoing, it is clear that counsels made a sound and reasonable strategic decision to call Dr. Collins as an expert witness based on Collins' ability to provide strong

testimony of medical evidence to support pneumonia as a cause of the victim's death independent of Petitioner's statement to counter the State's witnesses. As counsels articulated valid strategic logic behind their decision, the post-conviction relief court correctly denied relief. See Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64. These findings are supported by more than ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

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

Respectfully submitted,

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October 6th, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
James R. Barber, III, Circuit Court Judge
Appellate Case No.2014-0011260374

ANDREA PERSON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Alexis K. Lindsay, Esquire
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 2921

I further certify that all parties required by Rule to be served have been served.

This 6th day of October, 2014.

Megan E. Harrigan

MEGAN E. HARRIGAN
ASSISTANT ATTORNEY GENERAL

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ALAN WILSON
ATTORNEY GENERAL

October 6, 2014

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

Re: Andrea Person v. State of South Carolina
Appellate Case No. 2014-000374

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case. Please let me know if anything else is needed.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH
Enclosures

cc: Alexis K. Lindsay, Esquire
Trisha Allen, Victim Services