

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Case No. 2013-CP-40-00233

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Melinda Richmond, #331874,

Petitioner,

v.

State of South Carolina,

Respondent.

APPELLATE CASE NO. 2015-001289

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Circuit Court err in holding that Petitioner failed to meet the burden of proof of showing ineffective counsel, where trial counsel proceeded with the trial while suffering from acute sinusitis and laryngitis, on medication, and how Petitioner was prejudiced as a result?

## STATEMENT OF THE CASE

Petitioner was indicted during the July 2007 term of the Richland County Grand Jury for Murder. App. 1383. Applicant was represented by Carolyn R. (Gripp) Sutherland, Casey M. Secor and Deon O'Neil, Esquires. On November 10, 2008, Petitioner proceeded to a jury trial before the Honorable Edward Miller. App. 1-1192. Petitioner's lead counsel, Counsel Sutherland, suffered from acute sinusitis and laryngitis throughout the trial, and was medicated to treat her sickness. App. 1194; 1255:16-1256:4. Counsel Sutherland had difficulty speaking, had no tone of voice and was in great pain. App. 1249:17-1250:4; 1258:5-11. Counsel Sutherland's co-counsels were not prepared to handle the role of lead counsel. App. 1280:10-12; 1294:23-1295:1. Petitioner motioned on numerous occasions for a continuance or mistrial in order for Counsel Sutherland to have time to regain her health. App. 279:21-295:6; 358:13-13; 1062:11-20; 1177:8-1178:4. However, the motions were denied. *Id.* Counsel Sutherland then proceeded with the trial while suffering from acute sinusitis and laryngitis, and on medication.

On November 14, 2008, Petitioner was convicted of murder and was sentenced to forty (40) years' imprisonment. App. 1190:16-22. Petitioner subsequently filed a Motion for New Trial based on the trial court's failure to grant a continuance or mistrial due to Counsel Sutherland's poor health. App. 1195-1199. The trial court denied the Motion for a New Trial. App. 1219. Petitioner appealed her conviction and it was dismissed by the South Carolina Court of Appeals. State v. Richmond, Opinion No. 2012-UP-418 (S.C. Ct. App. Filed July 11, 2012).

Petitioner then brought this action seeking post-conviction relief ("PCR") in January 2013. App. 1220. The Application for PCR was amended and supplemented on July 29, 2013.

App. 1234-1238. Petitioner alleged that she was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in proceeding with the trial while sick with acute sinusitis and laryngitis, and on medication.
2. Ineffective assistance of appellate counsel in failing to brief the trial court's denial of defense counsel's requests for a mistrial or a continuance due to lead Counsel Sutherland's sickness. App. 1234-1238.

On April 1, 2015, a PCR evidentiary hearing was held before the Honorable Brooks P. Goldsmith. App. 1239-1335. Counsel Sutherland, Counsel Secor, Counsel O'Neil, Assistant Appellate Defender Wanda Carter, Petitioner and Assistant Solicitor Anna R. Good testified at the hearing. Id. Counsel Sutherland testified how she spent countless hours preparing for the trial and how she was the most prepared person to defend Petitioner. App. 1246:3-12; 1246:25-1247:10. As lead counsel, she was tasked with preparing the trial strategy, questioning the critical witnesses and presenting the closing argument. App. 1260:12-14; App. 1290:21-22

Counsel Sutherland then explained how she was recovering from a bout of the flu by the start of the trial on November 10, 2008, but on November 11, 2008 she had a very sore voice, a sore throat, a sinus infection and it hurt to speak. App. 1249:17-1250:20. Court was not held on November 11, 2008 because it was a holiday, so on November 12, 2008, Petitioner motioned for a mistrial or continuance to allow time for Counsel Sutherland to recover. App. 1252:2-4. However, the motion was denied because the victim's family was in attendance from out-of-state, the jury was sworn, witness testimony had already begun and Petitioner had two other attorneys who could handle the case. App. 1252:5-18. Despite her inability to speak with any tone of voice and the pain she was enduring, Counsel Sutherland decided to proceed in trying the case. App. 1252:19-1253:4.

After having her pain get worse and her voice diminish, Counsel Sutherland left the trial on the afternoon November 12, 2008 for approximately two hours in order to see a physician

about her condition. App. 1253:25-1254:19; 1255:3-11. Counsel Sutherland's physician diagnosed her with acute sinusitis and laryngitis, where she was instructed to rest her vocal cords for two days or else the laryngitis would worsen. App. 1194. Counsel Sutherland was also prescribed steroids and antibiotics. App. 1256:1-3. Upon returning from the doctor's office, Counsel Sutherland's voice was so inaudible that whenever she tried facing a witness or the jury, she was instructed to turn back to the court reporter because the court reporter could not hear her, or had to read her lips or needed to be closer to a microphone. App. 1257:14-19. Counsel Sutherland then proceeded in questioning ten witnesses and made the closing argument. App. 236-1111.

Counsel Sutherland described her own voice during the trial as a "whisper" where "[t]here was little to no inflection. And there was no ability to project [her] voice." App. 1259:11. When asked about the importance of being able to have a full range of voice in a trial, Counsel Sutherland stressed how it was "...extremely important[]" and how "[t]here's not much you can do to represent your client if you don't have a voice in trial. The witnesses spoke over [her]. [She] had no control over the witnesses. Cross-examination was very ineffective, oftentimes interrupted by either the court reporter or the witness themselves, asking [her] to...repeat or speak up..." App. 1253:11-16. The presentation of Counsel Sutherland's closing argument, given her lack of a voice, was as "...ineffective as the rest of the trial." App. 1260:17-18. Counsel Sutherland believed "...it would have been a very different trial had [she] had a voice." App. 1259:6-7.

Counsels Secor and O'Neil both corroborated how Counsel Sutherland's voice sounded like a "hoarse whisper" with no tone throughout the trial. App. 1276:5-11; 1292:1-3. They also agreed that Counsel Sutherland was the most prepared person to defend Petitioner and both Counsel Secor and Counsel O'Neil were not prepared to take on Counsel Sutherland's role as

lead counsel in the event she could not continue the case due to her health. App. 1274:23-1275:4; 1280:10-12. Counsel Secor was also practicing law for only one year at the time of the trial. App. 1271:17-20.

Petitioner testified how Counsel Sutherland was in poor condition throughout the trial. App. 1310:1-1311:12. Petitioner felt concerned, scared and disadvantaged that Counsel Sutherland was trying the case with such an illness. App. 1312:18-1312:21.

The Circuit Court denied the PCR application and filed the Order on May 8, 2015. App. 1366. The Circuit Court found that Petitioner failed to meet the burden of proving Counsel Sutherland was ineffective and failed to show any resulting prejudice because Petitioner "...did not present any evidence that the result of the trial would have been different but for counsel's errors." App. 1380. The Circuit Court found the "...affidavits submitted by the juror on the case who indicated that they heard and could follow Counsel Sutherland throughout the trial to be persuasive on the issue." App. 1213; 1215; 1380.

A Notice of Appeal for the PCR application was timely filed and served on June 17, 2015. Petitioner now seeks a Writ of Certiorari to review this denial.

#### ARGUMENT

The Circuit Court erred in holding that Petitioner failed to meet the burden of proof in showing trial counsel was ineffective by proceeding with the trial while suffering from acute sinusitis and laryngitis, and on medication, and that Petitioner was prejudiced as a result. The burden of proof is on the applicant to prove the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The Sixth Amendment of the U.S. Constitution requires a criminal defendant to receive effective assistance of counsel. United States v. Cronin, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must

show that 1) counsel's performance was deficient under prevailing professional norms, and 2) the applicant was prejudiced by counsel's deficient performance where "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. 115, 117-18, 386 S.E.2d 624, 625 (1989); Strickland, 466 U.S. at 694, (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

In certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry...is not worth the cost." Strickland, 466 U.S. at 692 (citing Cronic, 466 U.S. at 658 (1984)). There are certain instances of presumed prejudice, "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Nance v. Ozmint, 626 S.E.2d 878, 880, 367 S.C. 547 (2006) (quoting Cronic, 466 U.S. at 659 (1984)).

"On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). "An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value." Scott v. State, 334 S.C. 248, 252, 513 S.E.2d 100, 102 (1999). "However, an appellate court will not affirm the decision when it is not supported by any probative evidence." Id.

Here, Petitioner met her burden of proof by showing trial counsel's performance was deficient under prevailing professional norms and Petitioner was presumed to be prejudiced by such deficiency to the extent of there being a reasonable probability that, but for trial counsel's

unprofessional errors, the result of the proceeding would have been different. The Circuit Court's ruling was not supported by probative evidence.

### *Deficiency*

Petitioner provided sufficient evidence that Counsel Sutherland was deficient in proceeding with the trial while suffering from acute sinusitis and laryngitis, while medicated. At the evidentiary hearing, Counsel Sutherland testified how she could only speak at a whisper, she was in pain, had no tone of voice and had difficulty controlling witnesses as a result. App. 1249:17-1250:4; 1258:5-11; 1253:11-16. The co-counsels for the defense, Counsels Secor and O'Neil, both testified how they were not prepared to handle the tasks that were assigned to Counsel Sutherland and had difficulty hearing or understanding Counsel Sutherland throughout the trial. App. 1280:10-12; 1294:23-1295:1.

Counsel Sutherland spent numerous hours to prepare for the case, she was to question ten critical witnesses and perform the closing argument. App. 1248:3-12. Counsel Sutherland's assignments were vital to the success of the case. However, her inability to communicate effectively, control witnesses, or speak with any inflection rendered her deficient in trying such a serious and emotional murder case. Counsel Sutherland believed "...it would have been a very different trial had [she] had a voice." App. 1259:6-7.

Proceeding to trial with acute sinusitis and laryngitis is deficient under prevailing professional norms. Petitioner's trial counsels requested several continuances and mistrials because they knew Counsel Sutherland was, and would be deficient in her presentation of Petitioner's case while dealing with acute sinusitis and laryngitis, and medicated throughout the trial. Petitioner also corroborated how Counsel Sutherland was in poor condition throughout the trial. App. 1310:1-1311:12. Petitioner was concerned, scared and felt disadvantaged that Counsel Sutherland was trying the case with such an illness. App. 1312:18-1312:21. Even opposing

counsel, Anna Good, testified that she would have asked for a continuance if she was dealing with laryngitis in a case, just as Petitioner's counsels requested. App. 1324:24-1325:4.

The trial court may have found that the "...affidavits submitted by the juror on the case who indicated that they heard and could follow Counsel Sutherland throughout the trial to be persuasive on the issue." App. 1213; 1215; 1380. However, the affidavits were submitted by alternate jurors, not the actual jurors, and those affidavits were not notarized. App. 1213; 1215.

Counsel Sutherland should not have tried the case with acute sinusitis and laryngitis. She could barely speak, she was in pain and she was unable to communicate effectively. Counsel Sutherland was supposed to be Petitioner's voice, but Counsel Sutherland had no voice. Petitioner was significantly disadvantaged by Counsel Sutherland's poor health condition. Accordingly, Petitioner did provide sufficient evidence that Counsel Sutherland's performance in the trial was deficient under prevailing professional norms.

#### *Prejudice*

Petitioner was prejudiced by counsel's deficient performance and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In Nance v. Ozmint, prejudice was presumed when a lead counsel was suffering from health problems and co-counsel was inexperienced or unprepared to handle the role of lead counsel. Nance, 626 S.E.2d 878, 367 S.C. 547 (2006). Here, just as in Nance, Petitioner was disadvantaged because her lead counsel, Counsel Sutherland, was in ill health with acute sinusitis and laryngitis, and on medication. App. 1194; 1256:1-3 Also, the co-counsels, Counsels Secor and O'Neil, were not prepared to take on the role of lead counsel. App. 1194; 1256:1-3. Further, Counsel Secor was practicing law for only one year at the time of the trial. App. 1271:17-10. Petitioner is presumed to be prejudiced because even though Counsel Sutherland was available to assist Petitioner during the trial and was a competent attorney, the

likelihood that Counsel Sutherland could provide effective assistance, given her illness throughout the trial, was so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. There is also reasonable probability that, had Counsel Sutherland had the ability to speak with more bravado, use the tone of her voice, allow the jurors to hear her with more clarity, have the ability to control the witnesses and not have her voice be such a distraction to the case, the result of the proceeding would have been different. Therefore, Petitioner was prejudiced. Accordingly, Petitioner did provide sufficient evidence to show Petitioner was prejudiced and the Circuit Court erred in finding otherwise.

#### CONCLUSION

Petitioner asks this Court to grant the petition for a writ of certiorari because Petitioner met the burden of proof that trial counsel was ineffective by proceeding with the trial while suffering from acute sinusitis and laryngitis, and on medication, and that Petitioner was prejudiced as a result.

Respectfully submitted,



April 27, 2016

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PROOF OF SERVICE

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I certify that I have served the Petition for a Writ of Certiorari and Appendix on the Respondent by hand delivering a copy of it on April 27, 2016, addressed to Respondent's attorney of record, Alan Wilson and J. Clayton Mitchell, 1000 Assembly Street, Room 519 Columbia, S.C. 29201.

April 27, 2016



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