

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
Court of Common Pleas  
The Honorable Brooks P. Goldsmith, Circuit Court Judge

**RECEIVED**

**SEP 12 2016**

Appellate Case No. 2015 – 001289  
Lower Court Case No. 2013-CP-40-00233

**S.C. SUPREME COURT**

MELINDA RICHMOND, #331874,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **PETITIONER'S QUESTION PRESENTED**

Did the Circuit Court err in holding that Petitioner failed to meet the burden of proof 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 is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the July 2007 term of the Richland County Grand Jury for Murder (2007-GS-40-4073). (App. p. 1382-83). Petitioner was represented by Carolyn R. (Gripp) Sutherland, Casey M. Secor, and E. Deon O'Neil, Esquires. Petitioner proceeded to trial before the Honorable Edward W. Miller. Petitioner was convicted as indicted by the jury on November 14, 2008. Judge Miller sentenced Petitioner to forty (40) years' imprisonment. A notice of appeal was filed and an Anders<sup>1</sup> appeal was perfected. (App. p. 1352-65). The court affirmed Petitioner's convictions and sentences. State v. Richmond, Opinion No. 2012-UP-418 (S.C. Ct. App. filed July 11, 2012). The Remittitur was sent on July 27, 2012.

Petitioner filed her application for post-conviction relief (PCR) on January 11, 2013 (2013-CP-40-00233). (App. p. 1220-26). Respondent filed a Return on May 8, 2013. (App. p. 1227-33). A hearing was held on April 1, 2015. Petitioner was represented by William M Saltzman, Esquire. The State was represented by J. Clayton Mitchell of the South Carolina Attorney General's Office. An Order of Dismissal was issued by the Honorable Brooks P. Goldsmith on May 18, 2015. (App. p. 1366-81).

Petitioner filed a notice of appeal on June 17, 2015, and a Petition for Writ of Certiorari on April 27, 2016. This Return follows.

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

**Since Petitioner has not identified specific instances of ineffective assistance of counsel, trial counsel cannot be deemed deficient just for being ill where she and the defense team made numerous continuance motions and motions for a mistrial.**

Petitioner argues the PCR Court erred in failing to grant relief in light of how ill Counsel Sutherland was during the trial. Specifically, she argues Counsel Sutherland's illness so affected her performance at trial that she was ineffective. She also argues that prejudice should be presumed. First, Petitioner has not pointed out any specific instances of deficiency. Second, Petitioner's argument essentially raises an issue that was ripe for direct appeal in that Judge Miller erred in denying the numerous continuance motions and motions for a mistrial.

### How The Issue Was Raised Below

Petitioner was called to trial on November 10, 2008. (App. p. 1). Counsel Sutherland<sup>2</sup> was Petitioner's lead counsel and represented her from her bond hearing through the trial. (App. p. 1247). As the trial loomed closer, Counsel O'Neil and Counsel Secor were assigned to Petitioner's case. (App. p. 1248-49). Counsel Sutherland had the flu the week before the trial was set to begin but was recovering. (App. p. 1249). On Monday, November 10, 2008, the jury was selected, pre-trial motions were heard, counsel gave opening statements, and a few State witnesses were presented. (App. p. 1-279). The next day was a holiday and the court reconvened on Wednesday, November 11, 2008, where Counsel Sutherland's illness took a turn for the worse. (App. p. 1251). The defense team then made motions for a mistrial and in the alternative a continuance. (App. p. 279-92; 1252). Counsel O'Neil argued that since Counsel Sutherland was lead counsel and could barely speak above a whisper that a mistrial should be granted or the case should be continued. (App. p. 279-92). Judge Miller denied these motions, but instructed the

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<sup>2</sup> Carolyn Sutherland's maiden name is Gripp which is how she is noted in the transcript.

jury that if they were unable to hear what Counsel Sutherland was saying then they should raise their hand to let the court know. (App. p. 296).

After three more witnesses testified, Counsel Secor renewed the motions for a mistrial or a continuance. (App. p. 351-52). He argued that the court reporter had asked Counsel Sutherland to speak up because she could not hear what she was saying. (App. p. 351). Judge Miller responded that he had figured out how to control the volume on the microphones and would increase the volume when necessary. (App. p. 352). After arguments over the admissibility of photographs, Counsel O'Neil stated for the record the basis of the motion for a mistrial and a continuance. (App. p. 358-360). Counsel O'Neil then noted that the defense had hired a private court reporter in hopes of ensuring an audio recording of the trial was available. (App. p. 359-60). Judge Miller did not allow the private court reporter to transcribe the proceedings. (App. p. 360).

Counsel Sutherland scheduled and attended a doctor's appointment later that afternoon in hopes of receiving treatment to help her condition. (App. p. 360). The trial proceeded in Counsel Sutherland's absence. (App. p. 1255). She was diagnosed with acute sinusitis and laryngitis and was advised not to use her voice. (App. p. 555; 1255). The defense again renewed their motions for a mistrial and a continuance which were denied. (App. p. 555). After the State rested on Friday, the defense renewed their motions relating to Counsel Sutherland's illness. (App. p. 959-60). After the jury returned a guilty verdict, the defense again renewed all motions and objections relating to the illness. (App. p. 1177).

Finally, the defense filed a post-trial motion requesting a new trial based upon Counsel Sutherland's illness and Judge Miller's adverse rulings regarding a mistrial or continuance. (App. p. 1195-1209). The motion argued that Petitioner's constitutional and due process rights were

violated. Specifically, the motion argued that Judge Miller's ruling impeded Petitioner's ability to demonstrate prejudice by not allowing a private court reporter to transcribe and make an audio recording of the trial and that his rulings were an abuse of discretion. Seven affidavits from employees at the public defender's office were attached to the motion. (App. p. 1201-09). The State submitted a response with affidavits including two from alternate jurors who stated that they were able to hear Counsel Sutherland throughout the trial. (App. p. 1210-18). Judge Miller issued an order denying the request for a new trial. (App. p. 1219).

#### Analysis

First, Petitioner did not identify any specific grounds for relief that were caused by Counsel Sutherland's illness. She argues that Counsel Sutherland should be deemed ineffective and prejudice should be presumed because of her illness. Petitioner has failed to point out any specific instance where Counsel Sutherland's representation fell below the standard of reasonable care. To the contrary, Counsel Sutherland and the defense team as a whole made numerous objections and presented a strong challenge to the State's case by attempting to show that codefendant Tenisha McClinton was responsible for the murder. Petitioner argues that because Counsel Sutherland was ill, her presentation to the jury suffered because she was unable 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." (PWC, p. 9). These arguments do not support grounds for relief even if taken as true. See United States v. Eyman, 313 F.3d 741 (2nd Cir. 2002) (holding that an Applicant must point to specific errors or omissions in the conduct of the trial that were the product of the illness). While ill and likely not able to argue the case with as much vigor as she would have hoped, Counsel Sutherland was not deficient in her representation just for being ill.

Prejudice should not be presumed in this case. In Cronic<sup>3</sup>, the court identified three distinct situations in which a presumption of prejudice is appropriate: 1) when the defendant is completely denied counsel “at a critical stage of his trial”, 2) if there has been a constructive denial of counsel, and 3) “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.” Absent these narrow circumstances of presumed prejudice, defendants must show actual prejudice under a normal Strickland analysis. Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2009). To prove actual prejudice Applicants must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. 2052. Here, prejudice should not be presumed. Petitioner was not denied counsel at any critical stage of her trial. Being ill does not rise to the level of a constructive denial of counsel because Petitioner was represented by two other competent attorneys throughout the trial. It’s noteworthy that Judge Miller ensured that no witnesses assigned to Counsel Sutherland testified during her brief trip to the doctor. (App. p. 425-555). Finally, Petitioner’s case does not apply to the third circumstance as the illness of lead counsel was the crux of her allegation.

Second, Petitioner raises the issue of whether Petitioner was ineffective in proceeding to trial with an illness. Counsel Sutherland and the defense team made the proper objections with regards to her illness. It is clear from the record that Counsel Sutherland was ill; but it is also clear from the record that numerous motions for a mistrial and a continuance were made at the proper junctures and were denied by Judge Miller. (App. p. 279-92; 352; 358; 555; 840; 1177). Applicants cannot raise issues that were preserved for direct appeal in PCR. See S.C. Code Ann.

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<sup>3</sup> United States v. Cronic, 466 U.S. 648, 658(1984).

§ 17-27-20(b) (1985); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974) (Post-conviction relief is not a substitute for a direct appeal.). Here, this issue was fully litigated at the trial level. Petitioner did not present the PCR court with any alternative arguments or strategy that should have been pursued by defense counsel in an attempt to combat Counsel Sutherland's illness. In short, defense counsel did all they could to ensure Petitioner received a fair trial despite her lead counsel being under the weather.

Further, all defense attorneys agreed at the PCR hearing that the issue of whether Judge Miller erred in failing to grant a mistrial or continuance was preserved for direct appeal. (App. p. 1262-63; 1265-66; 1284; 1287-88; 1297; 1304). The proper way to assert this issue would be to allege appellate counsel was ineffective in failing to raise the issue on direct appeal. This was done below. The PCR court ruled that Petitioner had not met her burden in proving appellate counsel was ineffective. Appellate Counsel Carter concluded that the issue regarding Counsel Sutherland's illness was preserved and lacked merit which is why she did not raise it in her brief. (App. p. 1304). Counsel Carter actually filed an Anders brief as she did not believe any issues were meritorious. Respondent notes the PCR court's ruling is further supported by the fact that the court of appeals conducted an Anders review of the case and concluded that no arguable issue existed for direct appeal. It is also noteworthy that Petitioner, herself, filed a *pro se* Anders brief which argued that Judge Miller erred in failing to grant a mistrial or continuance because of Counsel Sutherland's illness. (Supp. App. p. 1-5). Therefore, the issue of whether Judge Miller erred in denying the numerous motions for a mistrial and continuance was preserved but was not a meritorious issue for direct appeal.

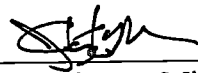
**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's ruling as there is ample evidence of probative value to support the denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 12, 2016

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**William M. Saltzman, Esquire**  
**Post Office Box 11879**  
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This 12th day of September, 2016

  
\_\_\_\_\_  
FELICIA V. HAYES  
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