ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Honorable William Jeffrey Young, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 5408 (S.C. Ct. App. Filed June 8, 2016)
Appellate Case No. 2012-212396
09-CP-43-2055

MARTINA R. PUTNAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and was finally ruled on by the Court of Appeals on August 17, 2016.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that it was constrained to affirm the PCR court's prejudice finding, despite its conclusion that trial counsel was deficient in failing to call three witnesses to testify at Petitioner's trial, because the witnesses were not called to testify at the PCR hearing, where both the trial transcript and the PCR hearing testimony of Petitioner and trial counsel supported a finding of prejudice?

STATEMENT OF THE CASE

Introduction

Petitioner Martina Putnam was the thirty-two year old mother of three sons, Sibling 1, Sibling 2, and Decedent. App. 397, l. 16 – 398, l. 5. There were three other people in the house on the morning that Decedent became unresponsive and was rushed to the hospital, but only Putnam was present and testified at her trial. Neither the state nor the defense called Sibling 1, Sibling 2, or Putnam's husband, Patrick Putnam (hereinafter "Patrick") as witnesses. Putnam was convicted of homicide by child abuse and sentenced to twenty-five years incarceration. App. 453; App. 463. She maintained her innocence throughout her trial, sentencing, and post-conviction relief hearing. The PCR court denied her request for post-conviction relief, finding that she failed to prove that trial counsel was deficient or that she was prejudiced. App. 572. The Court of Appeals found that trial counsel was deficient in failing to call Sibling 1, Sibling 2, and Patrick to testify as witnesses at her trial. However, the Court held that Putnam did not establish the prejudice from their failure to testify because they were neither called as witnesses nor was the video of Siblings' interview admitted at the PCR hearing. App. II 8 – 9 (Putnam v. State, ___ S.C. ___, 789 S.E.2d 594 (Ct. App. 2016)).

Sibling 1 and Sibling 2 were from Putnam's first marriage and she gained sole custody of them in 2003 after her divorce. App. 357, l. 14 – 358, l. 10. She moved to Oregon, where Putnam's mother helped care for the children while she worked. App. 358, l. 21 – 359, l. 14. In April 2005, Putnam began working as a long-haul truck driver and met Patrick. They married in June 2005, and moved to Arizona where they and the children lived with Patrick's parents. App. 359, l. 15 – 360, l. 4. On February 5, 2006, Putnam gave birth to Decedent. App. 360, l. 15 – 362, l. 1.

The family moved to Sumter during the Christmas holidays in 2006 for a better truck driving opportunity. App. 362, l. 2 – 363, l. 6. Because of her job, Putnam was on the road for all but a few days each month. App. 395, ll. 4-7. At the end of February 2007, twenty-two year old Patrick quit working and stayed home with Siblings 1 and 2 – then six and nine years of age – and Decedent. After just a few weeks of Patrick serving as the primary caretaker of all three Children, two of whom were not biologically his, Putnam returned from a long haul. On Saturday morning, she woke up at approximately 8:30 or 9:00 a.m. App. 363, l. 7-23; App. 397, l. 22 – 398, l. 5; App. 475, ll. 2-7. The Siblings were up and playing. Petitioner saw Patrick was awake and appeared to have things under control. She checked on Decedent and took a shower.

Putnam got Decedent out of his crib at approximately 9:30 a.m. to feed him baby cereal. App. 363, l. 24 – 364, l. 24; App. 372, l. 16 – 373, l. 1; App. 377, ll. 15-24. Decedent was still learning to sit up on his own and could not crawl or walk. Putnam set Decedent on the floor between her legs while she fed him baby cereal, as she usually did. App. 309, ll. 12-16; App. 364, l. 25 – 365, l. 16; App. 366, l. 4 – 367, l. 3. Decedent seemed "a little bit cranky" and was not eating as much, which was "off for him," but Putnam did not think too much of it. App. 365, l. 17 – 366, l. 3; App. 379, l. 11 – 380, l. 4.

After he finished eating, Putnam brought Decedent to his bedroom to get a fresh diaper and towel for his bath. When they went into the bathroom she took off his pajamas and left him lying on the floor. She realized that she had forgotten the towel, so she went back to the bedroom. When she returned, Decedent was not moving and when she picked him up he was "like a rag doll" in her hands. She panicked, called for Patrick, and attempted rescue breathing. They drove to the emergency room, arriving at around 10:40 a.m. While on the way Putnam continued rescue breathing and pinched Decedent on the leg, but he never responded. App. 367, l. 4 – 369, l. 16;

App. 376, ll. 2-8; App. 380, ll. 5-25. Decedent was pronounced dead later that day, at 6:38 p.m. App. 322, ll. 14-17. According to the pathologists who testified at trial, the death was the result of complications of either shaking and/or an impact injury on a soft or padded surface. App. 221, ll. 8-25; App. 249, ll. 3-9.

Police initially detained Patrick as their main suspect. App. 80, ll. 17-25. However, police arrested Putnam on March 13, 2007. App. 55, ll. 15-19; App. 166, l. 9 – 167, l. 2. Putnam was ultimately arrested because she had told the victim advocate, Gwen Herod, and Investigator David Florence that she was the only one who had "control" of Decedent that morning and she did not implicate anyone else. App. 78, l. 19 – 79, l. 22; App. 263, l. 15 – 264, l. 10. Notably, both Herod and Florence testified that Putnam was not in custody at the time she made the statements to them. App. 41, l. 1 – 54, l. 16; App. 56, l. 24 – 63, l. 10; App. 71, l. 9 – 76, l. 8; App. 77, l, 7 – 82, l. 13. Putnam testified that she was trying to pay attention to the questions they asked, but she was concerned about her child and under the impression that Herod was there to provide comfort and not conducting an investigation. App. 385, l. 10 – 386, l. 9. Additionally, the jury learned that Sibling 1 admitted to Herod that he had "contact" with the Decedent before Putnam got up that morning. App. 37, l. 18 – 40, l. 9; App. 268, ll. 9-15l; App. 271, ll. 5-21. Putnam also testified that Patrick told her he had given Decedent something to drink earlier in the morning. App. 364, ll. 18-22.

Indictment and Trial

On February 21, 2008, the Sumter County Grand Jury indicted Putnam for homicide by child abuse. App. 578 – 579. On April 20 - 22, 2009, she proceeded to trial before The Honorable George C. James and a jury. Putnam was represented by Jack Howle, and the state was represented by assistant solicitor Suzanne Mayes. App. 1.

Putnam never underwent a formal interview by police. App. 267, l. 19 – 268, l. 1. However, investigators and the victims advocate spoke with Putnam both at Tuomey Regional Medical Center ("Tuomey") and Palmetto Richland Hospital ("Richland") while Decedent was receiving medical treatment. Investigator Denison testified that he responded to Tuomey, where Decedent was taken for emergency care by his parents. According to Denison:

> [T]he mother told me that she fed the baby and then took him in and laid him on the bed while she went to run him a bath. When she returned the baby was not breathing and was unresponsive. The mother stated that her [sic] and the father put [Decedent] in the truck and rushed him to Tuomey.

App. 130, l. 25 – 131, l. 6. Denison said that Putnam never implicated anyone else, but he admitted that he did not ask what occurred prior to her feeding the baby. App. 136, l. 9 – 137, l. 19. Putnam testified that she did not recognize Denison and did not recall ever speaking to him. App. 376, l. 9 – 377, l. 9.

Herod also responded to Tuomey, where she located Sibling 1 and Sibling 2 and took them back to her office to "interview the boys about what they may have known that happened." App. 143, l. 1 – 144, l. 7. She told the jury that forensic interviewing of children is "a little different" in that you ask open-ended questions and "try not to assume or ask any leading questions." App. 144, ll. 8-24. Investigator David Florence observed the interview. App. 259, l. 6 – 260, l. 15. Florence testified that they learned that Putnam, Patrick, Sibling 1, Sibling 2, and Decedent were all in the home on the morning of the incident. App. 260, ll. 8-15.

Though Siblings were not present to testify at the trial, pursuant to a stipulation, the jury heard that Sibling 1 had access to Decedent on the morning of the incident and had gone into his room and picked him up, "hugged him" and put him back in his crib. App. 99, l. 3 – App. 101, l. 20; App. 162, l. 17 – 164, l. 15; App. 170, l. 7 – 171, l. 2; App. 175, ll. 15-25. Additionally, the solicitor did not object to testimony that Sibling 1 had picked Decedent up by his ankles in the two

days prior to the incident. App. 171, l. 3 – 172, l. 2; App. 176, ll. 1-13. However, the trial court did not admit testimony that Sibling 1 had seen Patrick hold Decedent by his feet in the past. App. 172, l. 3 – 180, l. 15. Trial counsel told the Court:

> And on this tape, without question, whether she recalls it or not, he goes through this whole process how daddy used to do this and how they would hold his head and everything else. And I'm not going into any of that. But I did just want to say, did he say that he had seen anybody else do that? And she said it was Pat Putnam. I don't think that goes outside of that statute from what Your Honor told us.

App. 178, ll. 6-13. The trial judge ruled that because Sibling 1 was not present to testify at trial, his video statement was not admissible, such that he would only admit those statements to which the solicitor had stipulated. App. 178, ll. 14-23.

Herod also testified *in camera* that she learned that Patrick said that "he had a gun and was going to kill David Florence and Gwen Herod. App. 185, l. 6-20. Trial counsel explained that he had attempted to secure Patrick's presence at trial, at which point he could have asked him about how he'd handled Decedent in the past and potentially his threats to law enforcement. However, while Patrick had originally said he would attend, he left town before he could be served with a subpoena. App. 176, ll. 16-25; App. 189, l. 8 – App. 190, l. 25. The trial judge ruled that Patrick's threats were not relevant. App. 191, ll. 10-20.

Later, Herod travelled to Richland, where Decedent had been transferred for more advanced care, and met with Putnam in the family waiting room. App. 147, l. 18 – 148, l. 3; App. 149, l. 4 – 150, l. 14; App. 152, l. 13- 153, l. 1. Herod said that Putnam "always maintained from our first exchange with each other that she was the only one that had the baby during all of this time" and never indicated that anyone else harmed Decedent in her presence. App. 164, l. 16 – 165, l. 13. On cross-examination, Herod and Florence both admitted that Patrick and the Siblings were awake before Putnam. Sibling 1 also told Herod that he picked Decedent up from his crib earlier

that morning, obviously unbeknownst to Putnam. App. 168, l. 23 – 170, l. 25; App. 181, l. 11 – 182, l. 25; App. 268, l. 9 – 269, l. 3; App. 271, ll. 5-21. Florence admitted that though he asked Putnam why she did not place a pillow under Decedent when he was falling backward after eating, the doctors agreed that was not the cause of Decedent's injuries. App. 270, l. 15 – 271, l. 4. Neither Herod nor Florence interviewed Patrick themselves. App. 182, l. 20-25; App. 271, ll. 22-23.

The State called four different physicians to testify as witnesses, none of whom disputed the cause or manner of death determined by Dr. Joel Sexton. Tr. 246, ll. 10-12; Tr. 249, ll. 3-11. Dr. Sexton was the pathologist who performed the actual autopsy on Decedent. App. 212, ll. 6-12. Dr. Sexton determined that the cause of Decedent's death was an abusive head trauma by either shaking or impact, which caused a subdural hematoma and a subarachnoid hemorrhage. App. 211, ll. 8-25. The manner of death was homicide, meaning that someone else had caused the injury. App. 222, l. 1 – 223, l. 1.

Dr. Sexton noted some minor bruising on Decedent but said that they could have been caused by toppling over, flinging arms, or playing with older siblings. App. 224, l. 23 – 226, l. 2. The other bruises may have been caused by the surgery that Decedent underwent. App. 226, ll. 3-14. While Dr. Sexton could not rule out that the injury may have occurred "just minutes" before Decedent became unresponsive, he said there "also could have been a lucid period" of "a matter of hours" after the injury. App. 219, l. 12 – 220, l. 4; App. 227, ll. 3-15. Dr. Sexton had seen a number of cases where there had been an impact, lucid period, and then unconsciousness, such that it was possible or even probable that such could have occurred in this case. App. 227, ll. 16-19; App. 229, ll. 4-11.

Dissatisfied with Dr. Sexton's conclusions, the state hired pathologist Dr. Clay Nichols. He reviewed Dr. Sexton's report for the State. Dr. Nichols disagreed with Dr. Sexton regarding "lucidity" and said that the symptoms from Decedent's injury would have been apparent within minutes. App. 249, l. 12 – 253, l. 20 – 254, l. 2. The state also called Dr. Richard Cartie, who treated Decedent at Richland, to buttress Nichol's testimony. App. 313, l. 16 – 315, l. 12.

After the State rested, the defense proffered testimony from Terri Starnes regarding an incident that occurred within a few days of Decedent's death, in which Sibling 1 kicked Sibling 2 in the chest so hard that it left a shoe print. Starnes was the foster parent who cared for to Sibling 1 and Sibling 2 following their removal from the family home as a result of Decedent's death. App. 339, ll. 2-10; App. 345, l. 13 – 346, l. 4. Starnes testified that Sibling 1 was also verbally aggressive toward Sibling 2. App. 346, ll. 5-9. Starnes kept Sibling 2 in her care for a couple of months, but Sibling 1 was moved to another placement. App. 345, ll. 20-22. The solicitor objected that the testimony was irrelevant because it was too remote, improper character evidence of a non-witness, and improper third party guilt evidence. App. 348, l. 18 – 349, l. 9. The judge found that it was not too remote and was proven by clear and convincing evidence. App. 349, ll. 20-21; App. 351, l. 20 – 352, l. 8. However, he excluded the evidence from trial because he found that there was not sufficient similarity under Rule 404(b), SCRE, and it only "cast a bear suspicion of guilt on a third party." App. 351, ll. 10-19; App. 352, l. 9 – 354, l. 19.

Putnam took the stand in her own defense. She explained the events of the morning – waking up, taking a shower, getting Decedent from his crib, feeding him baby cereal, preparing to bathe Decedent, finding him limp on the bathroom floor, and rushing him to the hospital. App. 359, l. 21 – 366, l. 11; App. 372, l. 16 – 373, l. 1. Putnam said that while Decedent cried a lot for the first six months of his life, that had improved by the end of 2006. He was no longer

crying just to cry. App. 371, ll. 1-21. Putnam said that she "had no clue" that Sibling 1 was in Decedent's room earlier that morning and was unsure if she mentioned to Herod that Patrick was already up. App. 372, ll. 1-10. Putnam could not think of anything that happened that could have caused Decedent's injuries. App. 373, ll. 18-23.

The jury returned a verdict of guilty. App. 453, ll. 14-22.

Sentencing

Putnam maintained her innocence during sentencing. Putnam expressed that she had two years to think about everything that happened and that she did not do anything with Decedent that she would not have done on any normal day. App. 458, l. 20 – 459, l. 2. She said that she wishes "with all [her] heart" that she knew what caused Decedent's injuries. App. 459, ll. 2-5. Putnam told the Court that she loves her children and that she moved to South Carolina to try to give them a better life. App. 459, ll. 6-15. She does not what know happened to Decedent but she knows that she did not harm him. App. 459, l. 16 – 460, l. 6; App. 460, l. 21 – 461, l. 9. Putnam said: "I refused to accept a lesser plea simply because I know that I didn't do anything. There is nothing on this earth that will make me change what I said. There is nothing on earth that will make me change the way I feel about my children or anything, sir." App. 460, ll. 16-20. She told the Court: "[N]o matter what, I'm still going to make statements that I didn't do anything here because I still don't know what happened and I wish that I did." App. 461, l. 10 – 462, l. 1.

Judge James ultimately imposed a sentence of twenty-five years incarceration. App. 463, ll. 23-25. On April 24, 2009, Petitioner filed a motion to vacate her conviction, or alternatively reconsider her sentence. App. 466 – 467. After a post-trial hearing on November 10, 2009, the trial judge denied the motion by written order dated December 30, 2009. App. 468 – 485.

Direct Appeal

Putnam was represented on direct appeal by appellate defender Wanda H. Carter, who raised the issue of whether the trial judge erred in denying appellant's motion to suppress Putnam's un-Mirandized statements to police. App. 487; App. 501. The Court of Appeals filed an unpublished opinion affirming the conviction on December 2, 2011, and remitted the matter on December 22, 2011. App. 529; App. 531.

Post-Conviction Relief Application and Hearing

On September 8, 2009, Putnam filed an application for post-conviction relief based on the ineffective assistance of her trial attorney. The State filed a return on January 11, 2010. App. 532 – 541. On March 22, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young. App. 542. Putnam was represented by Charles T. Brooks, III, and the state was represented by assistant attorney general Mary S. Williams. App. 543. Both Putnam and trial counsel, Jack Howle, testified at the PCR hearing. As noted in the Court of Appeals' opinion, PCR counsel Brooks did not call the Siblings or Patrick to testify at the PCR hearing, nor did he admit the recorded interview of the children conducted by Herod. See App. 39, ll. 1-23; App. II 8 – 9.

Putnam said that Sibling One and Sibling Two were both subpoenaed to testify and that her ex-husband refused to bring them to the trial from Tennessee. App. 547, l. – 548, l. 11. Had the Siblings testified, they would have been able to give the jury a more complete picture of what all had happened in the house on the day that Decedent died. She also mentioned the videotape of the children being questioned. App. 548, ll. 14-24.

Trial counsel Howle agreed with Putnam that the evidence against her was circumstantial and that there were questions about who else had contact with Decedent that morning and how quickly Decedent's injuries would have been symptomatic. The State's theory was that Putnam was

the only one with access to Decedent and that his injuries were evident immediately. App. 559, ll. 3-15; App. 560, l. 9 – 561, l. 5.

Howle said: "I had some concerns about [Patrick], based on what I had seen had happened in Arizona," referring to a prior DSS case related to Decedent's failure to thrive. App. 561, ll 6-8; App. He said that the police interviewed Patrick shortly after Decedent's death because they suspected him. App. 661, ll. 21-14. Howle said that he "tried to subpoena him [Patrick] and he was out of state, working with a truck company, and as soon as he found out we were trying to get him subpoenaed he took off from -- and the trucking company couldn't tell me where he was." App. 561, ll. 8-12. Thus, Patrick was never served with a subpoena. Patrick had made threats against the victim's advocate and officers. Though he was never charged, Howle said he was convinced that fear of charges for that conduct was part of the reason that Patrick became uncooperative. App. 561, ll. 14-18. Howle said that when law enforcement became aware that they were going to subpoena Patrick, they said that "they wanted to know when he was coming because they wanted to be there." App. 561, ll. 18-22. Howle also testified that Toby Putnam, a relative of Patrick, sat behind the solicitor throughout the trial. She called Howle after the trial and said "basically, I think dad did it." Tr. 565, ll. 2-19.

Howle said that the video of the interviews of the Siblings "would have probably helped," though there were some things in the video that did not. App. 563, ll. 7-12. He said that one of the children was talking about ghosts and he was unsure what the jury would have thought about that. However, he said that "**the thing [in the video interview] that probably helped us the most is the way Ms. Herod was asking her questions.**" App. 563, ll. 13-18. **It was "obvious [that] she was trying to get them [the Siblings] to say something about Martina [Putnam] being the person who did something.** It wasn't just middle of the road questions.

They were definitely directed in trying to get at that response." App. 563, ll. 19-23. Thus, Howle asserted that the Siblings failure to implicate Putnam, even when prompted to do so by the interviewer, would have been helpful to the defense. Howle said that the solicitor agreed that the recorded interview would "come in" if the Siblings were present for cross-examination. App. 563, l. 24 – 564, l. 3. Howle said he thought that the Siblings would be at the trial and subpoenaed them. However, their biological father "said no" and "absolutely refused to come to court." App. 563, l. 24 – 564, l. 11.

Without Patrick or the Siblings there to testify, Howle was also unable to pursue a claim of third-party guilt. App. 562, ll. 23-25. He said that he hoped that they would have been able to present the "third-party guilt aspect of it" because "as I talked with her [Putnam] and started reviewing and looked at some of these other things, I was certainly concerned about Pat Putnam's past experience and the fact that he did have a viol[ent] nature." App. 568, ll. 2-7. He further stated that while they were able to present evidence that the older child, Sibling 1, had gone into Decedent's room and removed him from the crib that morning, the jury never learned of Sibling 1's violent propensities, including the injury he caused to Sibling 2 just days after the Decedent's death. App. 562, ll. 9-22; App. 568, ll. 7-14.

Order of Dismissal

Judge Young filed an order of dismissal on May 22, 2012, finding that Putnam proved neither deficiency nor prejudice regarding any of her claims. App. 572. Regarding the prejudice prong of the Strickland[1] test, the PCR judge wrote:

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1 Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984).

> Further, Applicant has failed to demonstrate prejudice from any failure to present additional expert or lay witnesses. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (no prejudice where claim of failure to investigate is supported only by mere speculation as to the result); Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776 - 777 (2008) (where expert witnesses do not testify, it is merely speculative that these allegedly favorable expert witnesses would have aided defense).

App. 576.

Petition for Writ of Certiorari, Court of Appeals Opinion, and Rehearing

Putnam filed a petition for writ of certiorari with this Court on February 27, 2013. The state filed its return on May 14, 2013. The case was transferred to the Court of Appeals pursuant to Rule 243 (l), SCACR and it granted certiorari on May 21, 2014. Oral argument was held on October 13, 2015. On June 8, 2016, the Court of Appeals issued a published opinion affirming the denial of post-conviction relief. Though the Court of Appeals found that the PCR Court erred in finding that trial counsel was not deficient, it did not reverse, holding that the failure to call the missing witnesses at the PCR hearing precluded a finding of prejudice. App. II 1.

Putnam filed a petition for rehearing on June 23, 2016, to which the State filed its Return on July 25, 2016. App. II 10; App. II 25. On August 17, 2016, the Court issued an Order denying the petition for rehearing. App. II 30.

This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in finding that it was constrained to affirm the PCR court's prejudice finding, despite its conclusion that trial counsel was deficient in failing to call three witnesses to testify at Petitioner's trial, because the witnesses were not called to testify at the PCR hearing, where both the trial transcript and the PCR hearing testimony of Petitioner and trial counsel supported a finding of prejudice.

Introduction

The crux of Putnam's defense was that other people in the home could have caused Decedent's injuries prior to her waking up that morning, yet no one else who lived in the home was called to testify at her trial. The Court of Appeals correctly held, contrary to the PCR court's finding, that trial counsel was deficient in failing to call Sibling 1, Sibling 2, and Patrick to testify at Putnam's trial. Trial counsel should have enforced the out-of-state subpoenas served for the Siblings and should have subpoenaed Patrick rather than relying on him to appear voluntarily. App. II 6 – 9. However, the Court of Appeals erred in upholding the PCR court's finding that Putnam failed to prove prejudice by adopting a mechanical interpretation of this Court's precedent. The Court of Appeals wrote: **"Putnam received inadequate representation in her prior trial proceedings. However, we are constrained by our standard of review to affirm the PCR court's order dismissing Putnam's PCR application because Putnam failed to demonstrate trial counsel's deficient performance prejudiced her trial."** App. II 9 (emphasis added). The Court noted its concern that "PCR counsel – who knew of trial counsel's failure to secure Patrick's and the Children's presence at trial – failed to secure their presence at the PCR hearing or provide evidence of what their testimony would have been at trial." App. II 9, n. 3. While certainly it would have been better for PCR counsel Brooks to have done so, the testimony of Putnam and trial counsel Howle along with the trial transcript were sufficient to meet Putnam's burden of proof regarding prejudice.

Discussion

The Court of Appeals focused on the failure to call the missing witnesses to testify at the PCR hearing, overlooking the proffers and arguments contained in the trial transcript and Howle's PCR testimony that supported a finding of prejudice. See Smith v. State, 386 S.C. 562, 568-69, 689 S.E.2d 629, 633 (2010) (finding applicant was prejudiced by trial counsel's deficient performance after "carefully reviewing the entire transcript of the underlying trial"); see also Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing."). To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Strickland v. Washington, 466 U.S. 668 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Strickland, 466 U.S. at 694.

The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court ruled that: "The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. at 696 (emphasis added). "[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but

to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice." Black v. State, 151 S.W.3d 49 (Mo. 2004).

Though the Siblings were subpoenaed for trial, Putnam's ex-husband refused to bring them from Tennessee and trial counsel did not seek to enforce the out-of-state subpoenas. App. 477, ll. 13-22; App. 547, l. 17 – 548, l. 11. Patrick had originally said he would attend trial but when he heard that the defense was going to subpoena him, he "took off" and trial counsel could not locate him. App. 190, ll. 18-25; App. 561, ll. 8-12. At the PCR hearing, Howle said that Patrick was living out of state and was afraid that there was "a warrant out for him" in South Carolina or that he would be charged with something. App. 473, ll. 8-11; App. 561, ll. 8-22. The Court of Appeals found that trial counsel's failure to properly subpoena all three witnesses and secure their presence at trial was deficient representation. App. II 6 – 9.

While the three witnesses were not called to testify at the PCR hearing, the trial transcript and testimony from Howle were sufficient to meet Putnam's burden of proof as to prejudice. At trial, at the prompting of the trial judge, the solicitor stipulated to the admission of some testimony regarding statements that Sibling 1 made in the recorded interview conducted by Herod. The App. 99, l. 3 – App. 101, l. 20; App. 175, l. 5 – 176, l. 13. The juror heard that Sibling 1 went into Decedent's room earlier in the morning on the day he died. Sibling 1 "picked him [Decedent] up and hugged him and he described him babbling and talking and then he was fine, I think was his words, and then he [Sibling 1] put him back in the crib and [Sibling 1] went outside to play." App. 170, l. 7 – 171, l. 2. Additionally, Sibling 1 had held Decedent by his ankles just days prior to his death. App. 171, l. 3 – 172, l. 2; App. 176, ll. 1-13. However, the trial court did not admit testimony that Sibling 1 had seen Patrick hold Decedent by his feet in the past. App. 172, l. 3 – 180, l. 15; App. 183, l. 1 – 192, l. 2.

Trial counsel told the Court: "And on this tape, without question, whether she recalls it or not, he goes through this whole process how daddy used to do this and how they would hold his head and everything else." App. 178, ll. 6-9. Notably, the solicitor never disputed Howle's recollection. Rather, she argued that the statements regarding what Sibling 1 saw Patrick do with the Decedent were hearsay because Sibling 1 was not there to testify. App. 175, ll. 2-25. Trial counsel also proffered testimony from Terri Starnes, the foster mother with whom the Siblings were placed. Starnes testified regarding an incident that occurred within a few days of Decedent's death, in which Sibling 1 kicked Sibling 2 in the chest and left a shoe print. App. 339, l. 2 – 354, l. 21. Though the trial judge ruled it inadmissible based on the proffer and without Sibling 1 present as a witness, the analysis certainly may have differed had the absence of the witness not been a factor.

Because of trial counsel's deficient performance, the jury never heard the Siblings' videotaped interviews explaining what was going in the house on the day that Decedent died. App. 548, ll. 12-24. Howle said that the most helpful portion of the video interviews was "the way Ms. Herod was asking her questions." App. 563, ll. 9-18. Contrary to Herod's trial testimony that you should not ask leading questions, App. 144, ll. 8-24, Howle said that it was "obvious [that] she was trying to get them [the Siblings] to say something about Martina [Putnam] being the person who did something." App. 563, ll. 19-21. "It wasn't just middle of the road questions. They were definitely directed in trying to get at that response." App. 563, ll. 21-23.

Though Howle expected "early on" that the video was going to be admitted, he said that they were unable to admit in because the Siblings were not there to be cross-examined. He had subpoenaed the Siblings but their father refused to bring them. App. 563, l. 24 – 564, l. 11.

Howle also discussed the testimony that was proffered regarding Patrick's death threat and Sibling 1's assault on Sibling 2, to show their violent tendencies. App. 561, l. 23 – 563, l. 6; App. 568, ll. 2-14. It is evident from both the trial and PCR hearing transcripts that Howle wanted the Siblings and Patrick to testify at trial and that if they have been properly subpoenaed and those subpoenas enforced, he would have called them to testify at trial because he thought their testimony would be favorable to Putnam.

Had the Siblings testified at trial, their absence would have no longer precluded the admission of their videotaped interview at trial pursuant to S.C. CODE ANN. § 17-23-175. Thus, the jury would have heard the suggestive questions to the Siblings and their failure to inculpate Putnam and the statement that Sibling 1 had seen Patrick hold Decedent by his feet. Further, even if not admissible under section 17-23-175, the prior statements on the video could have been used to refresh the Siblings recollection or to impeach them. See Rule 613, SCRE. Even so, for purposes of the PCR hearing, the proffers at trial and Howle's testimony at the PCR hearing discussed the content of the video and the circumstances of the altercation in foster care. Thus, the Court of Appeals erred in its rote application of a rule that a missing witness must testify at the PCR hearing, even though the substance of their testimony was already before the PCR court.

Without Patrick there to testify at trial, Howle could not present a third party guilt defense of any substance. See State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) ("[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible."); see, e.g., Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008)

(finding trial counsel ineffective where trial counsel failed to properly cross-examine witness regarding specifics of other three armed robberies that she committed with third party and failed to point out physical similarities between third party and victim's description of robber and sole defense was mistaken identity and third-party guilt). Howle thought that Patrick was more than likely the person responsible for the injuries to Decedent and even law enforcement investigated him. App. 561, l. 6 – 562, l. 2. Because the State's pathologist testified that there could be some period of lucidity following the incident that caused Decedent's injury, it was possible that the injury to Decedent was inflicted upon him by Patrick, or Sibling 1, before Putnam even got up that morning. App. 227, l. 3 – 228, l. 5.

Undoubtedly, it would be unlikely that Patrick would admit his own guilt on the witness stand. However, trial counsel could have questioned Patrick about his young age and inexperience as a parent, the propriety of holding a disabled baby upside down by its feet, the added stressors of caring for two children who were not his and being a single-parent when Putnam would be away working as a truck driver, his temper and tendencies toward violence, his fleeing South Carolina after the incident, and his lack of cooperation. See App. 561, l. 6 – 562, l. 2; App. 562, l. 23 – 563, l. 6; App. 565, l. 2 – 566, l. 4; App. 568, ll. 2-14. The jury needed to judge Patrick's credibility and see that Patrick had the means, motive, and opportunity to injure the Decedent before Putnam picked him up out of the crib that morning.

The Court of Appeals relied upon this Court's opinions in Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), and Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005), regarding the burden that an applicant bears in proving prejudice from counsel's failure to call a favorable witness at trial. The applicant in Glover presented the testimony of the two witnesses who he claimed would have testified that he was in Florida when the crimes were committed. 318 S.C.

at 497, 458 S.E.2d at 539. A majority of this Court found that the witnesses' testimony did not foreclose the possibility that Glover could have committed the crime and thus did not provide an alibi. Id. at 498, 458 S.E.2d at 540. With respect to other witnesses who applicant claimed could provide an alibi defense but did not call to testify, this Court wrote:

> In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing **or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence**. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.

Id. at 498-99, 458 S.E.2d at 540 (emphasis added). The Court of Appeals improperly interpreted Glover as requiring the witnesses' attendance when this Court has adopted no such rule.

The applicant in Dempsey alleged that counsel was ineffective in failing to subpoena the victim's grandfather, who Dempsey said would have testified that "the victim lied about being sexually assaulted." 363 S.C. at 369, 610 S.E.2d at 814. The Dempsey Court wrote: "A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." Id. (citing Glover, 318 S.C. at 498, 458 S.E.2d at 540). In Dempsey, this Court understandably found that without the grandfather's testimony, any prejudice was "merely speculative" and there was "no evidence that, if counsel had subpoenaed the witness, the result at trial would have been different." Id. Unlike the witnesses contemplated in Glover and Dempsey, here the substance of the witnesses' testimony was sufficiently before the PCR court.

In Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991), this Court reversed the PCR court and remanded for a new trial. 304 S.C. at 40-41, 403 S.E.2d at 113-14. There, Martinez alleged that trial counsel was ineffective in failing to call Tony Wilson, whom he had told

counsel would confirm that he saw Martinez leave a lounge at exactly 1:45 a.m. Id. at 41, 403 S.E.2d at 113. **Trial counsel testified** that had Wilson been present in the courtroom on the day of trial, he would have called him to testify. Id. He further conceded "that Wilson's testimony, placing Martinez at the lounge fifteen minutes prior to the conclusion of the rape, may have been important." Id. at 41, 403 S.E.2d at 113-14. Counsel "candidly admitted he was uncertain whether 'one more piece of evidence' may have made a difference in the verdict." Id. at 41, 403 S.E.2d at 114. The Court reversed because "by counsel's own admission, the testimony of Wilson may have made the difference in obtaining an acquittal." Id. Martinez was distinguished by the Court in Gantt v. State, 354 S.C. 183, 580 S.E.2d 133 (2003). In Gantt, counsel testified that though he failed to preserve the issue, he did not believe that the outcome of trial would have been different. In Martinez, however, trial counsel admitted the testimony of a potential witness could have made a difference. Here too, Howle indicated the testimony of Sibling 1 and Patrick would have helped. App. 562, l. 23 – 563, l. 2; App. 563, ll. 17-23.

More recently, in Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016), this Court held that the PCR court erred in finding trial counsel was not ineffective by failing to cross-examine the State's key witness, Kestner, as to her prior inconsistent statements that the victim was armed at the time of the shooting. In Rutland, the PCR judge found that trial counsel's performance was deficient but determined that Rutland had failed to prove he was prejudiced by the deficient performance. 415 S.C. at 575-76, 785 S.E.2d at 352. Though Kestner was not called to testify at the PCR hearing, her prior written statement was admitted, along with affidavits of individuals attesting to hearing Kestner say that the victim was armed. Id. at 577, 785 S.E.2d at 353. Thus, this Court found that "there is no evidence of probative value supporting the PCR judge's ruling that petitioner failed to present extrinsic evidence of Kestner's prior inconsistent statements." Id.

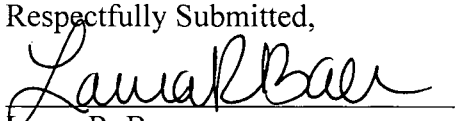
Further, had Kestner denied her prior statements, trial counsel could have impeached Kestner with the written statement or news article in which she was quoted as saying the victim was armed, which would have affected her credibility. Id. at 577-78, 785 S.E.2d at 353-54. Thus, this Court found that there was "a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting." Id. at 578, 785 S.E.2d at 353-54. In the present case, the extrinsic evidence of the information that would have been gleaned from the missing witnesses at trial were found in the trial transcript and trial counsel Howle's testimony at the PCR hearing regarding his investigation.

"[T]he Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146 (1986). The Court of Appeals found that trial counsel was deficient in failing to secure the presence of the Siblings and Patrick to testify at trial. The evidence presented in this case was sufficient to support a finding of prejudice under the "reasonable probability" standard set forth in Strickland. The PCR court and the Court of Appeals erred in finding otherwise.

CONCLUSION

Based on the foregoing, Petitioner Martina Putnam respectfully requests that this Court grant the writ of certiorari, reverse the decision of the Court of Appeals, and remand her case for a new trial, or alternatively, order further briefing on the issue raised herein.

Respectfully Submitted,



Laura R. Baer
Appellate Defender

This 23rd day of September, 2016.

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 5408 (S.C. Ct. App. filed 6/8/2016)
09-CP-43-2055

MARTINA R. PUTNAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of Appendix II in this case has been served on Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Martina R. Putnam, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 23rd day of September, 2016.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day of September, 2016.

(L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.