STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Sumter County

William Jeffrey Young, Circuit Court Judge

MARTINA R. PUTNAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212396

BRIEF OF PETITIONER

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INDEX

INDEX i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) 11

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) 12

Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968) 12

Ingle v. State, 348 S.C 467, 560 S.E.2d 401 (2002) 11

Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) 11, 12

Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998) 12

Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982) 11

State v. Jarrell, 350 S.C. 90, 64 S.E.2d 362 (Ct. App. 2002) 12

Strickland v. Washington, 466 U.S. 668 (1984) 11, 12

Statutes

S.C. Code Ann. § 16-3-85 12

S.C. Code Ann. § 19-9-10 14

S.C. Code Ann. § 19-9-100 14

S.C. Code Ann. § 19-9-110 14

S.C. Code Ann. § 19-9-70 14

Tenn. Code Ann. § 40-17-201 14

Tenn. Code Ann. § 40-17-203 14

Tenn. Code Ann. § 40-17-206 14

Other Authorities

Facts about Retinopathy of Prematurity (ROP) (October 2009),
www.nei.nih.gov/health/rop/rop.asp#1 3

Constitutional Provisions

U.S. Const. amend. VI 11

ISSUE PRESENTED

Whether Counsel's performance was constitutionally deficient for failing to adequately prepare Petitioner's case and call witnesses to her trial to support her defense.

STATEMENT

On February 21, 2008, the Sumter County Grand Jury indicted Petitioner Martina R. Putnam for homicide by child abuse. App. 578—App. 579. On April 20, 2009, she proceeded to trial before The Honorable George C. James and a jury. Jack Howle represented Petitioner and Suzanne Mayes represented the State. App. 1.

On April 22, 2009, the jury found Petitioner guilty as charged, and the trial judge handed down a twenty-five year sentence. App. 453, lines 14-22; App. 463, lines 23-25. Petitioner filed a motion to vacate or reconsider the sentence on April 24, 2009. App. 466—App. 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—App. 485.

Petitioner appealed, and Appellate Counsel Wanda H. Carter filed the final brief of appellant on October 14, 2010. App. 487—App. 500. The South Carolina Court of Appeals filed its opinion affirming the conviction on December 2, 2011, and remitted the matter on December 22, 2011. App. 529—App. 531.

Petitioner filed an application for post-conviction relief on September 8, 2009, claiming ineffective assistance of counsel. The State filed a return on January 11, 2010. App. 532—App. 541. On March 22, 2012, the case proceeded to an evidentiary hearing before the Honorable W. Jeffrey Young. App. 542. Charles T. Brooks, III, represented Petitioner and Mary S. Williams represented the State. App. 543. The PCR court filed its order of dismissal on May 22, 2012. App. 572.

ARGUMENT

THE RECORD CANNOT SUPPORT A FINDING OF EFFECTIVE ASSISTANCE BECAUSE COUNSEL'S FAILURES TO ADDUCE EVIDENCE REGARDING ANOTHER FAMILY MEMBER'S HANDLING OF DECEDENT AND REGARDING THE PRECISE NATURE OF DECEDENT'S INJURY INESCAPABLY SHOW COUNSEL DID NOT ADEQUATELY PREPARE FOR TRIAL.

FACTS

Petitioner Martina Putnam first married in 1994. She had two boys ("boy 1" and "boy 2"), whom she took sole custody of in 2003 after a divorce. She then moved to Oregon and cared for them with help from her mother while working various jobs. In April of 2005, she landed a job as a long-haul truck driver based in Idaho. App. 352, line 20—App. 357, line 15.

Patrick Putnam met Petitioner on her way to Idaho for orientation. Petitioner was around thirty-two years old, and Patrick was twenty-two. The two married in June of 2005 and immediately moved in with Patrick's parents in Arizona. In February of 2006, Petitioner gave birth to her and Patrick's son ("Decedent") by an emergency Caesarean section. Decedent was premature at only twenty-five weeks and had severe apnea, reflux and digestive diseases, and retinopathy.[1] App. 355, line 15—App. 356, line 22; App. 387, lines 18-22; App. 393, line 16—394, line 2; App. 549, lines 6-11.

After his birth, Decedent stayed in the hospital until the end of April of 2006. App. 386, lines 9-15. At the end of 2006, Petitioner and her family moved to Sumter for a better job for her and Patrick. By March of 2007, Patrick had quit working and stayed home with Decedent and boys

[1] Retinopathy of prematurity is an "eye disorder that primarily affects premature infants weighing about 2¾ pounds . . . or less that are born before 31 weeks of gestation." The disorder occurs "when abnormal blood vessels grow and spread throughout the retina, the tissue that lines the back of the eye. These abnormal blood vessels are fragile and can leak, scarring the retina and pulling it out of position." *Facts about Retinopathy of Prematurity (ROP)* (October 2009), www.nei.nih.gov/health/rop/rop.asp#1.

1 and 2—then six and nine years of age—while Petitioner worked. On Saturday, March 10, 2007, Petitioner woke up around 8:30 a.m. Boys 1 and 2 were up and playing, and Decedent was getting restless and was ready to get out of bed. Petitioner saw Patrick was already up, so she took a shower before grabbing Decedent around 9:30 to feed him baby cereal. Petitioner noticed he seemed to be "out of sorts" and cranky. Decedent had not yet developed the ability to crawl and was learning to sit up on his own, so as usual, she set him on the floor between her legs. And as usual, about the time he was finished, he quit holding himself up on her legs and let himself fall backwards on the ground a couple of times, although he did not eat nearly as much as he usually did. App. 118, lines 17-25; App. 358, line 7—App. 363, line 25; App. 374, line 16—App. 376, line 4.

Petitioner brought Decedent to the bathroom and set him on the floor while she went to the bedroom to get a towel for his bath. When she came back, he was motionless. She panicked, called for Patrick, and attempted rescue breathing, as she had been trained to do when Decedent was in neonatal intensive care. They drove to the emergency room around 10:40 a.m., and on the way Petitioner continued rescue breathing and pinched Decedent on the leg, but he never responded. App. 363, line 4—App. 365, line 16; App. 372, lines 2-8.

At trial the State introduced its case by claiming it would prove Decedent died as a result of a blunt trauma intentionally inflicted to the head and evinced through bleeding in his brain and eyes. It would also prove Petitioner inflicted the trauma by showing she was the last person with Decedent while he was alert and healthy. App. 119, line 1—App. 122, line 16. Thus, the prosecution was founded entirely on circumstantial evidence. In Petitioner's opening, Counsel told the jury that all it needed to determine was who caused the injury. App. 123, lines 16-23.

The State first called an investigator who testified she talked with Petitioner at the hospital while Decedent was receiving care. App. 141, line 1—App. 167, line 15. Petitioner told her she did not know how Decedent was injured, she was the only person with him, and he "had been real cranky and she thought he was probably getting a tooth." App. 153, lines 7-11. She said Patrick was already up making breakfast when she awoke. App. 170, lines 2-6. The investigator then testified in camera about speaking with boys 1 and 2. The older boy, boy 2, told her "he went to the crib where [Decedent] was and reported picking him up, and I think he said hugging him and putting him back in the crib before he went . . . outside to play that morning prior to him being injured." App. 162, line 22—App. 163, line 5. He also told her he and boy 1 had been up for some time prior to Petitioner. App. 164, lines 10-15. He also responded to her question about "ways you could have picked him up" by describing picking him up by his feet and hanging him upside down. App. 171, lines 10-23. He learned the behavior from watching Patrick. App. 173, lines 3-24; App. 178, lines 6-9.

Dr. Joel Sexton, a retired forensic pathologist who autopsied Decedent, also testified. App. 208, line 19—App. 224, line 20. The autopsy revealed a subdural hematoma—clotted blood between the brain and the thick membrane coating the interior of the skull; a subarachnoid hemorrhage—bleeding between the surface of the brain and the thin membrane coating it; and retinal hemorrhaging—bleeding in the back of the eye and around the optic nerve. The bleeding in each case resulted from ruptured blood vessels. Dr. Sexton could not determine whether the ruptured vessels resulted from an acute trauma to the skull or shaking of the head. App. 216, line 12—App. 224, line 18; App. 231, lines 7-20.

On cross-examination, Dr. Sexton testified that a child could experience the type of injury Decedent suffered and remain lucid for some period before becoming semiconscious or

unconscious. He elaborated that he "had a number of cases where there was injury, a lucid period and then later unconsciousness . . . ." and that it "could even be probable." App. 227, lines 3-21; App. 229, lines 4-10. He also testified as follows regarding retinal hemorrhaging and prematurity: "It depends on whether the child was born vaginally or by Caesarean. . . . [T]here is often hemorrhage in the retina at the time of birth vaginally but it generally resolves in a week or two." App. 228, lines 9-15.

The State also called Dr. Clay Nichols, another forensic pathologist, who agreed Decedent died as a result of a shaking or impact injury. He reviewed the subdural hematoma, the "minor degree of subarachnoid hemorrhage," and retinal hemorrhaging. App. 242, line 11—App. 245, line 14. When asked about a possible delay between the infliction of the trauma and the onset of symptoms, he stated the progression would depend upon the specific location and severity of the injury:

> I don't know about unresponsiveness or unconsciousness, but usually upon the infliction of such an injury, the child's lifestyle would change almost immediately or in a very short interval of time. Exactly what the symptoms would be would be depending upon the type of injury, the location of injury and the severity of injury.

App. 247, lines 19-25. Specifically, the child would become "perhaps more fussy, more irritable," App. 248, lines 1-6, although "[t]here might be some normal function someplace," App. 249, lines 14-21.

The State also called Dr. Richard Cartie, a specialist in pediatric intensive care. App. 277, line 5—App. 320, line 25. He noted the Decedent had "extensive retinal hemorrhaging both on the surface and deeper in the retina as well as actual bleeding around the optic nerve itself which is something that is not seen as often in severe child abuse cases." App. 300, lines 14-18. Dr. Cartie concluded Decedent suffered acute head trauma based on the "subdural hematoma and retinal

hemorrhaging, the extensive bleeding around the optic nerve." App. 305, lines 13-19. He opined the amount of force required to cause the injuries was "extensive" and comparable to falling out of a second-floor window. App. 311, lines 16-21.

At the close of the State's evidence, Counsel moved for a directed verdict, arguing the evidence did not sufficiently establish who inflicted the trauma. The judge denied the motion on grounds that Decedent "appeared to be in a healthy state" when Petitioner first encountered him, and she was the only one with him up to the time that he became unresponsive. App. 327, line 22—App. 328, line 25.

Petitioner then testified and stated she did not know to what extent Patrick or boys 1and 2 had contact that morning with the Decedent. She also did not know of anything unusual occurring while he was in her care that could have resulted in the injury. She testified that Decedent received Medicaid benefits and insurance for his retinopathy and other conditions, so she had a hard time finding a pediatrician in Sumter to care for him. Because she was the sole breadwinner in the family and was on the road twenty-one to twenty-eight days per month, she counted on Patrick to procure this type of care for the children. App. 388, line 5—App.

In closing, counsel argued that the State failed to meet the burden of proving Petitioner's guilt beyond a reasonable doubt. The jury needed to consider that three people were in the house who could have had contact with the Decedent and that Petitioner was only charged because she was the last one with him. App. 406, line 17—App. 415, line 16.

The solicitor argued that the death of Decedent was "not necessarily a premeditated fact situation" but was "the result of frustration, anger, perhaps being tired, perhaps not having the right parenting skills to begin with." She also emphasized the evidence that the Decedent suffered

"violent blunt trauma resulting in traumatic injuries, especially to produce that degree of retinal hemorrhages as was described." App. 415, line 18—App. 429, line 21.

Although Counsel had not presented any witnesses other than Petitioner, at multiple points in the State's case, he proffered evidence regarding Patrick and Boy 2's violent tendencies. During these colloquies, discussions arose regarding his attempts at securing their attendance.

> **Ms. Mayes:** . . . We're now getting into the father's conduct. And my issue there is Mr. Putnam is someone who had been available to the defense if they wanted to call him. He has been here in South Carolina at bond hearings. I know that he's had some contact with Ms. Putnam. I don't know how recently. But certainly they could have produced him here as a witness. If they want to explore this, they could cross examine him about all of this type of prior behaviors with this baby.

App. 176, lines 16-25.

> **Mr. Howle:** Your Honor, it's not just established that there are other people that are in this chronological line ahead of her even getting up, but I think to establish that Mr. Putnam has a lot of reasons why he's not here. He was on her list as a witness but he's not here.
>
> . . .
>
> **The Court:** Is the jury going to hear about anybody else? Well, I assume if he doesn't come, they're going to know he wasn't here. But does it matter why he's not here? Is there any obligation on the part of anybody to appear in court voluntarily?
>
> **Mr. Howle:** Your Honor, I think he's got a reason not to want to come today. He indicated to us he was going to come. He then said he wasn't going to come back. And I think part of that is he is concerned he is going to be charged if he comes back. I talked to him just in the last few days, and he indicated, I've got things to do, I ain't coming.
>
> . . .
>
> **Mr. Howle:** . . . As part of all this that came out, he has to notify Sumter County, the law enforcement before he even comes back to

> Sumter County because they want to know he's here because of their concerns for this apparently or potential violent nature he has. . . .
>
> **The Court:** Well, isn't there means by which you can get a subpoena certified and served on [Patrick]?
>
> **Mr. Howle:** Your Honor, we called him. He said, I'm going to be on the road. Any my indication was from talking to him and his father that he has purposes gotten in a truck and he's driving somewhere, wherever. We don't know where he is.

App. 189, line 8—App. 190, line 25.

Petitioner also filed an application of post-conviction relief, alleging ineffective assistance of counsel, on September 9, 2009. App. 532-536. The State filed a return dated January 11, 2010. App. 537-541. On March 22, 2012, Petitioner appeared at an evidentiary hear before The Honorable W. Jeffery Young. Charles T. Brooks, III represented Petitioner and Mary S. Williams represented the State. App. 542-543.

Petitioner testified that the evidence presented did not adequately showed that Decedent "was not a normal baby . . . . He wasn't walking, wasn't talking, he couldn't see things—" App. 556, lines 2-8. Decedent's pediatrician at the level-four neonatal intensive care unit explained that a substantial possibility existed that he would not even survive past one year. App. 549, lines 14-17. Petitioner also testified she did not intend to testify but felt compelled to because her only "defense" was Dr. Sexton's testimony and because "the information that was being given wasn't accurate. So I felt like I had to do something, I mean, because I had no choice." App. 550, lines 17-22. She noted that Counsel had subpoenaed boys 1 and 2 to testify, but only after trial commenced, and Patrick refused to travel from Blackstone, Tennessee. App. 548, lines 2-11.

Counsel testified he understood the State would attempt to show no one could have inflicted the injury except Petitioner. He testified to the following efforts in attempting to secure the other family members to appear:

> We tried to subpoena [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. He was out there somewhere. But shortly after all of this happened, he was being interviewed by the police, because they suspected him. He made threats to [an investigator] . . . and one of the detectives.

App. 561, lines 8-15.

> A second thing we did—and this came out in trial—that early that morning the oldest child . . . actually went into the room and took Daniel out of the crib. I couldn't say he dropped him, because he wasn't there to testify that he did that.
>
> Once Martina was arrested, they put these two children in a foster home. Within just a few days, that older child had an altercation with the other one, kicking him so hard that you could see the shoe print on his chest and he had to go to the hospital . . . .

App. 562, lines 3-13.

> Early on we thought that [boy 1 and 2 would be present], but the father said no. We did subpoena him—or the children though him and he absolutely refused to come to court.

App. 564, lines 1-6. As to evidence of Decedent's frail condition, Counsel testified that Dr. Sexton "went into some information on what a child born that early would be and the fact he couldn't sit up. So we had that—before Martina got on the stand and said it herself as the mother—that the doctor was telling the jury the problems the child had." App. 560, line 22—App. 561, line 1.

In the order of dismissal, the PCR court concluded Petitioner failed to establish that Counsel was deficient for failing to adequately prepare the case or call witnesses or that any prejudice resulted from a deficiency. App. 572-577.

DISCUSSION

The record cannot support a finding of effective assistance because Counsel's failures to adduce evidence regarding another family member's handling of Decedent and regarding the precise nature of Decedent's injury inescapably show counsel did not adequately prepare for trial. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687. "'[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting *Strickland* at 690).

"The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C 467, 470, 560 S.E.2d 401, 402 (2002)). "'[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.'" *Lounds* at 460, 670 S.E.2d at 649 (quoting *Ard v. Catoe* at 331-32, 642 S.E.2d at 597); *see also Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)). Counsel must be found deficient when "the trial transcript and . . . PCR testimony

inescapably point to the conclusion that [counsel] simply had not adequately prepared the defense case." *Lounds* at 462, 670 S.E.2d at 650.

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that 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, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

South Carolina Code section 16-3-85 makes unlawful homicide by child abuse:

> (A) A person is guilty of homicide by child abuse if the person:
>
> (1) Causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.

"[E]xtreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002).

In this case, Counsel entertained only one theory of the case in preparing a defense: the State could not prove beyond a reasonable doubt that Petitioner actually inflicted the injury to Decedent, and other family members had clear opportunities to do so. This preparation was unreasonable for two specific reasons. First, Counsel failed to have the other family members appear for the jury at trial. Because the State's case was entirely circumstantial, the solicitor had to sell the jury a convincing motive for Petitioner to abuse Decedent. Accordingly, in closing the solicitor argued that the death was "not necessarily a premeditated fact situation" but was "the result of frustration, anger, perhaps being tired, perhaps not having the right parenting skills to begin with." However, the evidence presents the same motive for Patrick, and indeed such a motive on

his part would have probably been stronger. He married young, moved away from his family, and had three children to supervise. Two were not his own biologically, and the third was very sickly. He declined working, and stayed home while Petitioner was on the road three weeks out of the month. Thus he endured most of the responsibilities for rearing the children. On the other hand, Petitioner was middle-aged and had been raising two children as a single parent for a number of years before Decedent was born.

Similarly, boys 1 and 2 had the opportunity to harm Decedent. Both boys were young and did not likely understand how playing rough with Decedent could be harmful to him. Boy 2 specifically told the State's investigator that he picked Decedent up out of his bed on the morning in question. Based on the testimony that he picked Decedent up by his feet and the evidence that he kicked his brother in a very violent manner, he apparently exhibited a significantly reckless manner of behavior.

By failing to secure the attendance of these witnesses at trial, Counsel let the jury face only one possible culprit for Decedent's death. The jury was never made to confront the fact that Patrick and even boys 1 and 2 were in comparable positions to harm Decedent. Because the State's case was built mostly on Petitioner's alleged motive, had the jury faced these witnesses, it would have had to conclude the State could not logically prove beyond a reasonable doubt that Petitioner inflicted the injury. The testimony of the boy 2 in particular—as he told the State's investigator—that he picked Decedent up that morning and that he and boy 1 were up well before Petitioner would have been meaningful corroborating evidence for Petitioner's account. *C.f. Lounds* at 462, 670 S.E.2d at 650 (finding failure to call corroborating witness not objectively reasonable when the testimony supported the defense's only theory of the case); *see also Walker v. State*, 407 S.C. 400, 405-06, 756 S.E.2d 144, 146-47 (2014); *Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 470-

71 (1998) (applying rule of ineffectiveness in failure to call a favorable witness outside of the alibi context).

Counsel's explanations of his failure to secure the witnesses also shows the inadequacy of his preparation of Petitioner's defense. Both South Carolina and Tennessee have enacted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. S.C. Code Ann. § 19-9-10; Tenn. Code Ann. § 40-17-201. The acts provide procedures for securing the testimony of material witnesses in prosecutions in this state through General Sessions judges and judges of courts of record in Tennessee counties. S.C. Code Ann. § 19-9-70; Tenn. Code Ann. § 40-17-203. The acts prescribe penalties to ensure witnesses attend trials. S.C. Code Ann. § 19-9-100; Tenn. Code Ann. § 40-17-206. South Carolina's specifically provides that a witness is not subject to arrest while travelling in the state for testimony. S.C. Code Ann. § 19-9-110. Remarks in the record from the solicitor reveal that Patrick had been in South Carolina for bond hearings and had been in contact with Petitioner. Counsel's own statements further show the two had sufficient contact for initiation of proceedings under the out-of-state witness act. Further, any concerns about an arrest were unfounded, Counsel should have alleviated those concerns with Patrick. Additionally, Counsel ostensibly failed to even investigate the extent to which boys 1 and 2 had contact with Decedent because he admitted that he did not know until after the commencement of trial that boy 2 picked Decedent up from his crib. *See Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) Petitioner had ample of time to secure the attendance of these witnesses because he knew "early on" that Patrick was not agreeing to come to South Carolina with boys 1 and 2.

Counsel's decision in preparing a defense to focus solely on the State's failure to prove Petitioner actually inflicted the fatal injury was also unreasonable because the State also had to

prove beyond a reasonable doubt that Petitioner acted with extreme indifference to life. The only evidence the State used was the testimony of its experts that the injuries appeared severe and were typical in cases of child abuse. Thus, the State asked the jury to infer that either Petitioner abused the child or she was aware of the abuse by someone else. However, the severity of the injuries was very much in controversy. The State's experts all testified that that Decedent died from either violent shaking or a single, severe blunt trauma to the head. Further, each expert specifically relied on Decedent's retinal hemorrhaging to reach the conclusion. Ample evidence in the record showed cracks in this theory that Counsel could have exploited. Dr. Sexton and Dr. Nichols both testified that Decedent could have suffered the injury yet remained lucid for some period of time thereafter. Dr. Nichols stated the condition would depend on the location on the head and severity of the injury. However, the State offered no evidence as to the specific location or size of the bleeding in Decedent's skull, other than Dr. Nichols' testimony that the subarachnoid hemorrhage was "minor."

Further, the experts failed to understand Decedent's pre-existing conditions and their effects in connection with the injury. Decedent was so infirm from birth that he was not likely to survive past one year. He was born with retinal hemorrhages due to weak blood vessels in his eyes. Dr. Sexton seemed to opine that the bleeding would result from pressure on the child's skull during birth rather than improper vessel formation. Dr. Cartie's testimony also suggested the bleeding he found in Decedent's eyes was caused or exacerbated by conditions outside of any abuse when he stated he found "extensive retinal hemorrhaging both on the surface and deeper in the retina as well as actual bleeding around the optic nerve itself which is something that is not seen as often in severe child abuse cases." Based on the bleeding, he concluded that the amount of force required to cause the injuries was "extensive" and comparable to falling out of a second-floor window.

Counsel adduced no evidence to undermine the expert's highly questionable conclusions based on this evidence nor did he adequately cross-examine the experts on it or argue the points in his closing. The jury was left no conclusion to accept other than that of the experts that Petitioner violently shook Decedent or slammed his head onto the ground when a more studied analysis of the injuries could have disarmed the notion that Petitioner hurt Decedent with extreme indifference to his life. *Compare*

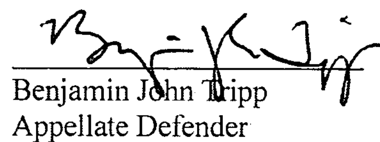
At the PCR hearing, Counsel's only explanation for the dearth of evidence was that was that Dr. Sexton "went into some information on what a child born that early would be and the fact he couldn't sit up. So we had that—before Martina got on the stand and said it herself as the mother—that the doctor was telling the jury the problems the child had." However, Petitioner had explained at the hearing that she never intended to testify, and only decided to do so while at the trial because the State's evidence was inaccurate.

Counsel wagered Petitioner's exoneration at trial solely on the theory that the State had not proved Petitioner actually inflicted abuse on Decedent. He made no good-faith efforts to bring witnesses or other evidence to trial to support two more plausible and readily supportable theories in her defense. No one put the State's case to the test, and counsel therefore did not fulfill the function of making the adversarial testing process work as contemplated by the Sixth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant her application for post-conviction relief, reverse the charges against her, and remand the case for a new trial.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of July, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Sumter County

William Jeffrey Young, Circuit Court Judge

MARTINA R. PUTNAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212396

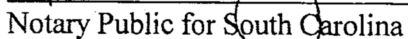
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of July, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of July, 2014.



______________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Sumter County
Court of Common Pleas
William Jeffrey Young, Circuit Court Judge

2009-CP-43-2055
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MARTINA R. PUTNAM,

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STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES 3

ISSUE PRESENTED 4

STATEMENT OF THE CASE 5

STANDARD OF REVIEW 6

ARGUMENT 7

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) 8,13

Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) 6

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) 6

Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) 13

Dempsev v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) 13

Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) 12

Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) 12

State. Cooper, 334 S.C. 540, 549, 514 S.E.2d 584, 589 (1999) 10

State v. Cope, 654 S.E.2d 177, 183 (S.C. App. 2009). 10

State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-45 (1941) 10

Strickland v. Washington, 466 U.S. 668 (1984) 6

Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) 8,13

ISSUE PRESENTED

Whether probative evidence supports the PCR Court's finding that Counsel was not ineffective when preparing Petitioner's case and calling witnesses to her trial to support her defense?

STATEMENT OF THE CASE

Petitioner was indicted at the February 2008 term of the Sumter County Grand Jury for Homicide by Child Abuse (2008-GS-43-0360). Petitioner was represented by Jack D. Howle, Jr. (hereinafter "Counsel"), Esquire. Petitioner proceeded to a jury trial before the Honorable George C. James, Jr., and was found guilty. Petitioner was sentenced to twenty-five years incarceration. Petitioner's motion for reconsideration of her sentence was heard on November 10, 2009. The motion was subsequently denied.

Petitioner filed a notice of appeal and an appeal was perfected. Petitioner's conviction and sentence were affirmed. State v. Putnam, Op. No. 2011-UP-526 (S.C. Ct. App. filed December 2, 2011). The Remittitur was sent on December 22, 2011.

Petitioner filed an application for post-conviction relief on September 8, 2009. Respondent made its Return on January 11, 2010. An evidentiary hearing was convened on March 22, 2012, before the Honorable W. Jeffrey Young. By Order dated May 16, 2012 and filed May 22, 2012, Judge Young denied and dismissed the application with prejudice. Petitioner filed for Writ of Certiorari on February 27, 2013. Respondent filed its Return to Petition for Writ of Certiorari on May 14, 2013. On May 21, 2014, this Court of Appeals granted Certiorari. Petitioner filed her Brief of Petitioner on July 21, 2014. This Brief of Respondent follows.

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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's 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, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner 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. Second, counsel's deficient performance must have prejudiced the Petitioner 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.

ARGUMENT

Probative evidence supports the PCR Courts finding that Counsel was not ineffective when preparing Petitioner case and calling witnesses in support of her defense at trial, where Counsel attempted to subpoena ex-husband, boy 1, and boy 2, Petitioner failed to present any of the witnesses during the PCR hearing, and Counsel proffered testimony relating to ex-husband, boy 1 .

Petitioner argues the post-conviction relief ("PCR") court erred in finding that Counsel was not ineffective in preparing Petitioner's case and calling witnesses in support of her defense. In support of her argument, Petitioner states Counsel should have secured the presence of ex-husband, boy 1, and boy 2 for her trial. Petitioner argues Counsel's failure "to secure the attendance of theses witnesses at trial...[allowed] the jury [to] face only one possible culprit for Decedent's death." Petitioner further states that had the "jury faced these witnesses, it would have had to conclude the State could not logically prove beyond a reasonable doubt that Petitioner inflicted the injury." Petitioner argues that Counsel made no good-faith effort to bring witnesses or other evidence to trial to support two more plausible and readily supportable theories in her defense.

However, Petitioner cannot show that Counsel was deficient for failing to secure the witnesses for trial. 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. In the instant case, Counsel testified he attempted to subpoena Petitioner's ex-husband. Counsel stated ex-husband "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...and the trucking company couldn't tell me where he was." (App. p. 561 lines 8-12.) Counsel further testified Petitioner's ex-husband was interviewed by police as a potential suspect in the crime and ex-husband made multiple threats to

several investigating officers. (App. p. 561 lines 12-15.) Counsel testified he "was convinced that one reason he (ex-husband) didn't come back was because of his concern about...possible charges." (App. p. 561 lines 16-18.) Counsel testified he "wanted to introduce in trial those threats (ex-husbands threats towards investigating officers) to show that Pat Putnam (ex-husband) had....[a] violent nature." (App. p. 561 line 23—p. 562 line 2-62.) Despite Counsel's proffer, the evidence of the threats was ruled inadmissible by the trial judge. (App. p. 561 line 25—p. 562 line 2.) Further, Counsel testified both boy 1 and boy 2 were in Tennessee and he thought early on they would be available for cross-examination, however "the father said no." (App. p. 564 lines 1-4.) Counsel testified, "we did subpoena him – or [boy 1 and boy 2] through him and he absolutely refused to come to court." (App. p. 564 lines 4-6). Based on the foregoing, Respondent submits Counsel cannot be held deficient for failing to secure the presence of fleeing out of state witnesses. Counsel took reasonable efforts to secure the witnesses presence at trial. Despite these efforts, the witnesses refused to comply. Counsel cannot be held deficient because of the witnesses consternation.

Regardless, Petitioner cannot show any prejudice because she failed to secure the witnesses testimony during the PCR hearing. Prejudice from trial counsel's failure to interview or call witness cannot be shown where the witnesses do not testify at the PCR hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rule of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Based on the foregoing, Petitioner can show no prejudice as she did not present any testimony from either the ex-husband, boy 1 or boy 2.

Additionally, Petitioner's argument that she was unable to present a third party guilt defense due to Counsel's failure to secure ex-husband, boy 1 or boy 2's presence for trial is without merit. In determining the relevancy of evidence, "the trial court has broad discretion...and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of the discretion and a showing of prejudice." State v. Cope, 654 S.E.2d 177, 183 (S.C. App. 2009). Evidence of another's guilt must raise a reasonable inference or presumption as to his own innocence, and evidence that only casts a bare suspicion on another is not admissible. State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-45 (1941). Additionally, evidence of remote acts, disconnected and outside the crime itself, cannot be separately proved to show another person was the guilty party. State. Cooper, 334 S.C. 540, 549, 514 S.E.2d 584, 589 (1999).

In the instant case, Counsel was able to successfully proffer testimony from various witnesses regarding ex-husband, boy 1 and boy 2's tendencies to commit violence. Counsel testified during the PCR hearing that he "wanted to introduce in trial those threats (ex-husbands threats towards investigating officers) to show that Pat Putnam (ex-husband) had....[a] violent nature." (App. p. 561 line 23—p. 562 line 2-62.) Despite Counsel's proffer, the evidence of threats was ruled inadmissible by the trial court. (App. p. 561 line 25—p. 562 line 2.) Counsel further attempted to introduce evidence to show that boy 1 had a propensity for violence. (App. p. 562 lines 9-18.) Counsel proffered evidence showing that boy 1 had an altercation with boy 2 and "kick[ed] him (boy 2) so hard that you could see the shoe print on his chest." (App. p. 562 Ln. 9-13.) Counsel further testified, "we wanted to introduce that, because that was to show this propensity that child had the violent...the Court would not let it come in," despite the evidence being proffered. (App. p. 562 lines 13-18.) Counsel further testified both ex-husband and boy 1

"had the most propensities for violence" and Counsel "was concerned about third-party guilt." However, the evidence "ended up being proffered but the Court would not let it come in for the jury to hear." (App. p. 562 line 23—p. 563 line 6.)

Furthermore, Counsel was successful in proffering testimony through Gwen L. Herod ("Herod"), the victim advocate for Sumter County Sheriff's office, alleging that ex-husband had on previous occasions held the victim upside down by his feet. Herod's proffered testimony alleged boy 1 had watched ex-husband pick the victim up by his feet on previous occasions. (App. p. 179 line 22—p. 180 line 8). Herod further stated that ex-husband had threatened to kill her and other investigators. (App. p. 185 lines 11-13). Counsel stated "I am trying to establish...the nature of this individual, the fact that there is a tendency to express violence, the fact that he was not only in the household but he was up that morning earlier." (App. p. 188 lines 15-20). However, the trial court found the testimony irrelevant to the proceedings. (App. p. 191 lines 15-20). Specifically the trial court found "it's not relevant to the issue of guilt or non-guilt of the defendant. Even if it were somehow related to a viable third party guilt approach, I still don't think it would be appropriate testimony." (App. p. 191 lines 15-20).

Additionally, Counsel was successful in proffering testimony through Terri L. Starnes ("Starnes"), the foster mother for both boys. Starnes stated boy 1 had a propensity to commit violence and had seen boy 1 get "physically aggressive with boy 2" and kick boy 2 in the chest. (App. p. 345 line 25—p. 346 line 4). Counsel stated:

> We think it's certainly applicable for several reasons. One, this whole characterization that the State says that Ms. Putnam was the only one who had any access to the child, Your Honor, we understand [boy 1] was there earlier and went into the room. So it's not just he was in the house; he had actual access to [victim]. It's not so much characterizing his character as to show that there is a propensity to do some violence....and I think the fact that [boy 1] has exercised that kind of conduct to a sibling makes it

> admissible to show that the propensity could exist and could have existed on that day.

(App. p. 350 lines 1-19). The trial court found the proffered testimony "doesn't do anything but cast a bear of suspicion of guilt on a third party. And I don't think it survives the analysis of what the Supreme Court set forth in State v. Gregory even as reigned in by the Holmes v. State which is the U.S. Supreme Court case." (App p. 352 line 24—p. 353 line 4). The trial court further found:

> If you look at it under 404(b), evidence of other crimes, wrongs or acts, this would be an act that is not admissible to prove the character of a person in order to show action and conformity therewith. I think it's clear and convincing that the young man did kick the sibling. The defendant has to show that the other act, kicking the sibling in the chest, is of a similar nature to the shaking or the brain injuries sustained by [victim]. I don't think it survives that analysis under 404(b).

(App. p. 351 line 20—p.352 line 22). The trial court ultimately held the proffered testimony of Starnes "wouldn't come in under 404(b) or under any thir[d] party guilty scenario. I think the testimony has been sufficiently proffered and I think the record is protected, but I'm not going to allow the testimony." (App. p. 354 lines 15-20). Therefore, even assuming *arguendo* that ex-husband, boy 1 or boy 2 testified at trial, their testimony would still not arise to a viable third party guilt defense because it does nothing more that cast a mere suspicion of guilt on a third party. As such, Petitioner can show no prejudice from Counsel's failure to secure the presence of ex-husband, boy 1 or boy 2.

Furthermore, Petitioner's argument that Counsel was ineffective for failing to present an expert witness to discuss victim's medical history and possible cause of death is without merit. "[W]hen [C]ounsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d

629, 632 (2010) (*citing* Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). Counsel stated "in his early discussions with Dr. Sexton, he made it very clear that he had seen it many times, and felt it was true in this case....that there was some period of lucid time between whatever the injury was that happened and before the child became totally unconscious." (App. p. 560 lines 10-15). Counsel stated the State's expert concluded the "opposite." (App. p. 560 line 16). Counsel stated "the jury heard two different doctors taking two different positions in that and there was no use for us to get another expert to just say that, when I had the man who did the autopsy [Dr. Sexton] saying that." (App. p. 560 lines 17-21). Counsel further stated that Dr. Sexton discussed the victim's medical history and "the fact that he couldn't sit up" *prior* to Petitioner taking that stand and saying it herself as the mother of the victim. (App. p. 560 line 21—p. 561 line 1).

Furthermore, Counsel was able to thoroughly cross examine both experts during trial. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). (Counsel's failure to procure expert witnesses does not render their representation deficient when counsel vigorously cross-examines the State's witnesses and attached the accuracy of the evidence). Based on the foregoing, it is clear from the record that Counsel cannot be held deficient where he made a valid strategic decision not to present an expert and he was able to thoroughly cross-examine both experts presented a trial.

Furthermore, Petitioner can show no prejudice as a result of Counsel's alleged deficiency. See Dempsev v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"). Prejudice from trial counsel's failure to interview or call witness cannot be shown where the witnesses do not testify at the PCR hearing. Underwood v. State, 309 S.C. 560,

425 S.E.2d 20 (1992). Additionally, Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rule of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Based on the foregoing, Petitioner can show no prejudice as she failed to present an expert witness during the PCR.

CONCLUSION

For the foregoing reasons, this Court should affirm the post-conviction relief court.

Respectfully submitted,

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November 19, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Sumter County
Court of Common Pleas
The Honorable William Jeffrey Young, Circuit Court Judge

MARTINA R. PUTNAM,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 19th day of November, 2014

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