

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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Opinions No. 5408 (S.C. Ct. App. Filed June 8, 2016)  
2009-CP-43-2055  
Appellate Case No. 2016-001922

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S.C. SUPREME COURT

MARTINA R. PUTNAM,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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### **PETITIONER'S QUESTION PRESENTED**

Whether the Court of Appeals erred in finding that it was constrained to affirm the PCR court's 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

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 "Trial 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 in this Court on February 27, 2013. Respondent filed its Return to Petition for Writ of Certiorari on May 14, 2013. The case was transferred to the Court of Appeals pursuant to Rule 243(l), SCACR, and on May 21, 2014, the Court of Appeals granted Certiorari. 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 Petitioner failed to demonstrate that this deficiency

was prejudicial and that Petitioner failed to meet her burden of proof by failing to present the testimony of these witnesses at the evidentiary hearing.

Petitioner filed a petition for rehearing on June 23, 2016, to which Respondent filed its Return on July 25, 2016. On August 17, 2016, the Court of Appeals issued an Order denying the petition for rehearing.

On September 23, 2016, Petitioner filed its Petition for Writ of Certiorari to this Court. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

### **I. The Court of Appeals was correct in affirming the PCR court's denial of post-conviction relief where Petitioner failed to meet her burden of proving that she was prejudiced by Trial Counsel's failure to present witness testimony.**

Petitioner's allegation that the Court of Appeals erred in affirming the denial of her PCR application because of her failure to meet her burden of proving prejudice is without merit.

In its opinion, the Court of Appeals made the following findings on the issue of prejudice:

[E]vidence supports the PCR court's conclusion that Putnam did not demonstrate prejudice from trial counsel's failure to subpoena Patrick. First, although trial counsel hoped to introduce testimony regarding Patrick's alleged threats against law enforcement to demonstrate his violent nature, the trial court ruled such testimony was irrelevant to Putnam's guilt and was inappropriate under a third-party guilt approach. Putnam failed to demonstrate the trial court's decision would have been different had Patrick testified at trial. Second, because Patrick did not testify at the PCR hearing, any other testimony by Patrick was merely speculative and therefore insufficient to establish prejudice. Therefore, we hold Putnam failed to show she was prejudiced by trial counsel's failure to subpoena Patrick to testify at trial.

App. II 9. The Court of Appeals clearly explained two separate reasons for finding that the PCR court ruled correctly. First, probative evidence from the trial transcript supports the PCR court's finding that Petitioner failed to prove that the result of the trial would have been different with this witness testimony. Second, because Petitioner failed to present the witness testimony at the PCR hearing, any argument that Petitioner was prejudiced is merely speculative and simply cannot meet the burden of proof required under South Carolina post-conviction relief case law.

In the first explanation of this ruling, the Court of Appeals examined the evidence before the PCR court, including the trial transcript, and found that Petitioner had failed to meet her burden of proof based on the merits of her case. In her Petition for Writ of Certiorari to this Court, Petitioner's argument revolves around the idea that the Court of Appeals made its decision based only upon a technical formality that was not met—Petitioner's failure to present these

witnesses at the evidentiary hearing—rather than on the merits of the argument. She implies that the PCR court and the Court of Appeals failed to consider evidence presented in her application such as the trial transcript, and had they only looked at the transcript, they would find that she met her burden. This is untrue. The PCR court and the Court of Appeals clearly considered the trial transcript and made their decision on the merits of the allegations. The failure to present this witness testimony is only listed as one of the reasons why the application was properly denied.

The trial transcript was used as probative evidence in the PCR court's decision that Trial Counsel's representation was not prejudicial. The PCR Court had the trial transcript before it and considered it in making its decision. App. 572. As the Court of Appeals explained, the trial court ruled that the potential witness's testimony was irrelevant to Petitioner's guilt and was inappropriate under a third-party guilt approach. Even if the witnesses had been present at the trial, Petitioner has not shown that the trial court would have allowed their testimony, and that their presence would have changed the outcome of the trial. Based on this factor alone, it is clear that Petitioner has not met her burden of proving prejudice as outlined in Strickland.

Secondly, the Court of Appeals was correct in holding that, under South Carolina post-conviction relief case law, Petitioner cannot meet her burden of proof because she failed to present the witness's testimony in any form. See 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). The PCR court correctly cited and relied upon this case law in denying the application. App. 576.

Petitioner argues that the Court of Appeals improperly interpreted this Court's ruling in Glover v. State as requiring the witness's attendance at a PCR hearing in order to admit their testimony. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Glover held:

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 814. Petitioner argues that the witness testimony was presented to the court in some other manner consistent with the rules of evidence. This argument is meritless. The testimony of these witnesses has not been presented in any manner to any of the courts involved in this case—not the trial court, the PCR court, the Court of Appeals, nor this Supreme Court. In order to be considered testimony, the witnesses must have testified under oath and the State must have had the opportunity to cross-examine them and impeach their credibility. These witnesses never testified under oath in court or at any deposition or other acceptable forum for their confronted testimony.

Because Petitioner failed to present these witnesses at the PCR hearing, she is unable to prove whether their testimony would have been admitted at trial, what the witnesses would have testified to, or whether it would have changed the jury's verdict. Therefore, under South Carolina case law, Petitioner cannot meet her burden of proof.

Since Petitioner cannot prove, through the trial transcript or otherwise, that this witness testimony would have affected the outcome of the trial, she has failed to meet her burden of proving the prejudice prong of the Strickland test. Because this finding by the PCR court is supported by the probative evidence listed above, the Court of Appeals was correct in affirming the PCR court's denial of post-conviction relief. This Court should affirm the decision of the

Court of Appeals.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the Court of Appeals' ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By:

  
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October 24, 2016

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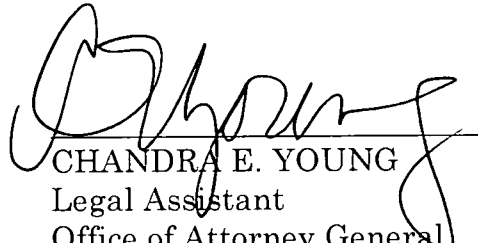
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire  
Post Office Box 11589  
Columbia, SC 29211

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

This 24<sup>th</sup> day of October 2016.

  
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