STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County
Hon. Steven H. John, Circuit Court Judge
Appellate Case Tracking No. 2018-000908

Julia Shawnette Gorman, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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S.C. SUPREME COURT

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STATEMENT OF THE CASE

Procedural History

Petitioner was indicted at the September 2008 term of the Horry County Grand Jury for homicide by child abuse (2008-GS-26-03756). Petitioner was further indicted at the February 2010 term for unlawful conduct towards a child (2010-GS-26-00841), and at the May 2010 term for aiding and abetting homicide by child abuse (2010-GS-26-02194). James C. Galmore, III, Esq. represented Petitioner, and Candice Lively, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On November 14, 2011, Petitioner proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Petitioner guilty as indicted on November 18, 2011. Judge Hyman sentenced Petitioner to imprisonment for concurrent terms of 35 years for the homicide, 10 years for the unlawful conduct, and 20 years for aiding and abetting.

Petitioner filed a timely notice of appeal. By opinion decided February 12, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions for homicide and unlawful conduct towards a child, but reversed her conviction for aiding and abetting. State v. Palmer/State v. Gorman, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014).

Both parties filed a Petition for Writ of Certiorari. The Supreme Court granted both Petitions. The Supreme Court of South Carolina affirmed the Court of Appeals holding reversing Petitioner's conviction for aiding and abetting but affirming her conviction for homicide by child abuse and unlawful conduct towards a child. State v. Palmer/State v. Gorman, 413 S.C. 410, 776 S.E.2d 558 (2015). The Remittitur was issued on September 23, 2015.

Petitioner filed an application for post-conviction relief. Upon motion by Respondent, the Honorable William H. Seals, Jr. issued a Conditional Order of Dismissal dated May 11, 2016, and filed May 23, 2016, finding Petitioner exclusively sought relief to which she was not

entitled, and granting Petitioner twenty days to give specific reasons why the order should not become final. Petitioner timely responded and clarified the allegations set forth in the application.

Upon the recommendation of Respondent at the outset of the evidentiary hearing, this Court vacated the Conditional Order of Dismissal and, on February 21, 2018, proceeded to a full hearing on the merits of the application before the Honorable Steven H. John. Petitioner was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent. After hearing testimony, the PCR court issued an Order of Dismissal dated April 5, 2018. Petitioner served and filed a Petition for Writ of Certiorari and this Return follows.

Factual Background

Petitioner and her co-defendant were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Petitioner. Petitioner and her co-defendant lived together for approximately four years. They came into custody of the child after the child's mother had to leave him with them in order to attend to business out of town prior to reuniting with the child's father. (App.206-211).

Petitioner's daughter also indicated her mother did not handle stress well and would let things bottle up. Her daughter testified Petitioner would go into a fit of rage once the anger was "uncorked." (App.246-247).

Prior to the mother leaving, the child was taken to the doctor due to ant bites and congestion from allergies. He was given medication and was scheduled to return later for immunizations. (App.205-207). The treating doctor indicated the toddler looked normal at the time of the examination and treatment. (App.269-270).

On July 14, Lt. Rainbolt with the Horry County Fire and Rescue arrived as a result of the 911 call from Petitioner. (App.300-301). He testified Petitioner's co-defendant was holding the child on the couch when he arrived and he could tell the child was in grave condition. (App.302-303). The child was given over to Erica Rosenthal a paramedic that arrived. Rosenthal testified the child had a right sided gaze and appeared to be having a seizure. (App.318). Petitioner told Rosenthal the victim had been whiny and lethargic since the ant bites. Memorably to Rosenthal, Petitioner also told her the Petitioner had "raised several children in her lifetime and never seen such a bad one." (App.321-322).

The emergency room nurse and the doctor who saw the toddler both testified his condition was critical. (App.329). The nurse indicated Petitioner seemed "very anxious, pacing back and forth in front of the bed, seemed very upset." She also testified when the victim would have a seizure Petitioner's co-defendant wanted to approach the bed to hold the child's hand and talk to him to get him settled down. Petitioner did not do the same at first, but only later on. (App.332). They both indicated he was posturing due to the head trauma. A CAT scan was done and revealed skull fractures and bleeding in the brain. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. (App.358). He testified the injury was not accidental. (App.362). The victim was transferred by helicopter to MUSC for more specialized care. (App.362-363).

Dr. Roberts, a neuro-radiologist with the Medical University of South Carolina (MUSC), testified the toddler suffered blood around the brain, severe swelling of the brain, loss of the gray-white differentiation which indicated dead brain tissue, and severe fractures. (App.406). She testified both sides of the skull were fractured by severe traumatic force. (App.409-410). She indicated the fractures were caused by a force similar to falling out of a three story window

or being involved in a motor vehicle accident. (App.416-417). She indicated the toddler was in a condition from which she would expect no meaningful recovery. (App.411).

Dr. Roberts also testified the injury was acute, or very recent. She testified as a result of the injury, the toddler would have lost the ability to function normally. (App.413-415). She testified a person with the type of injury sustained by the toddler would be immediately and severely symptomatic. She said the child would lose consciousness, have altered breathing, seizures, and would not be able to move or have other normal functions. (App.419; R. 410). She testified the injuries could only have occurred the day the child presented to the emergency room. (App.420-421; 434-435). She testified she would expect symptoms of the injury to be seen, and, if the child was sleeping normally around 4:30 when checked on, then she expected the injuries occurred after that time. (App.427-428).

Dr. Abel, the Director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, testified she was called in to examine the toddler. She testified she took some background history from Petitioner and Petitioner's co-defendant. She testified she examined the child and his CT scans. Dr. Abel testified the fractures of the child's skull were similar to a cracked pot and indicated it appeared to be caused by severe forceful impact against a hard surface. She testified the blows were to both sides of the head. Dr. Abel indicated the degree of force used was "massive." (App.516). Dr. Abel also testified to bruising on the child, including several suspicious bruises in locations it would be unlikely the toddler accidentally received the bruise. (App.519-522). Dr. Abel testified anyone seeing the force being applied to the child would "perceive this was tremendous force." (App.534).

As part of the background, Dr. Abel testified Petitioner indicated the victim had severe developmental problems and behavioral problems. Petitioner described a child to her that could

only say one word, was clingy and whiny, and wanted to be held all the time. Dr. Abel testified the detailed pediatrician notes from when the child was in the custody of its mother indicated otherwise. She testified at nine months the child was saying multiple words and that his development was normal. (App.534-535).

Dr. Abel testified the injury to the child occurred sometime the day he was presented to the emergency room. (App.553-554). She also testified the injury had to occur after people looked at the child and believed him to look normal. (App.554). Dr. Abel testified based on the information provided by Petitioner and her co-defendant about the child napping and appearing normal, the injury occurred within three hours of the victim being taken to the hospital. (App.556-557).

Detective Troxell interviewed and took a statement from both Petitioner and Petitioner's co-defendant. Petitioner's co-defendant indicated Petitioner woke up about 4:45 am and left for work in the early morning. (App.696). Petitioner's co-defendant indicated he woke the child up about 9:30 am and fed him. He testified he fed him lunch about noon, and then put him down for a nap about 3:30pm. (App.696-698). He stated Petitioner arrived home at about 4:15 pm and they both went to the edge of the door to check on the victim who was still down from his nap. (App.698-699). They ate dinner before waking up the toddler. Petitioner went into the room and found him having a seizure. (App.699-700).

Petitioner also gave a statement to Detective Troxell on July 18. Petitioner stated she got up about 4:30-4:45 am and checked on the victim as she left. She stated he was sleeping. (App.748). She arrived home between 4:00 and 4:30pm and checked on the minor victim. (App. 749). He appeared to be sleeping. (App.749-750). She explained they then ate dinner, and after dinner, her co-defendant took the dog out while she went into the toddler's room to wake him up.

(App.750). It was then she found him making strange noises with saliva running from his mouth. (App.750).

Petitioner was asked directly: "So sometime between, something happened between four and six-fifteen, didn't it, because when you went in at six-fifteen he was salivating, okay?" Petitioner responded: "Because, you know, when we checked on him and everything, well I checked on him even after four and he was fine so, so anywhere between dinner time, you know, as we were eating dinner until by six, whatever time I called 911." (App.750-751). She acknowledged only her and her co-defendant cared for the minor victim in the days leading up to his death. (App.759).

When questioned about the possibility of shaking the child out of frustration, Petitioner stated: "I don't think hard, I don't believe I - -." (Oct. T. 163; T.781; R. 135; 708). She stated at one point: "I don't know if I shook him hard, I don't know, I don't." She later stated: "If, if I shook him I swear to you I don't believe I shook him hard, you know. I don't think I have that much, I don't know." (App.792; 795; 797; 800).

ARGUMENT

I. The PCR Court correctly determined Petitioner failed to meet her burden of establishing trial counsel was ineffective in failing to investigate and better establish an alibi defense when she failed to present any witnesses at the PCR hearing and failed to demonstrate how she was prejudiced by any failure to investigate. Additionally, even her claimed alibi would not have provided a complete alibi for the time frame in which the child could have been killed, thereby not establishing an alibi at all.

The PCR court correctly found Petitioner failed to meet her burden of establishing trial counsel was ineffective by failing to investigate and better present an alibi defense. First, even assuming all information provided by Petitioner was true, it still failed to establish an alibi because the child could have been killed at a time when Petitioner was home. Additionally, she failed to present any witnesses or evidence to support her claims there was more investigation trial counsel could have done or what the result of any further investigation would have shown. As a result, she has not met her burden of establishing ineffective assistance of counsel.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334

S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel 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)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Similarly, "[a] PCR applicant cannot show that he [or she] 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." Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover, 318 S.C. at 498, 458 S.E.2d at 540).

At the evidentiary hearing, Petitioner testified Counsel did not adequately investigate an alibi defense. Petitioner argued Counsel should have pulled video footage of her from the various retails establishments she visited over the course of the day. Petitioner claimed Counsel only got the stamped check from the IGA and never explained why he didn't research the defense further. Counsel, in his own testimony, described the defense as a "not quite alibi" defense, for which he did not believe witnesses were necessary. (App.1230).

Significantly, in order to establish the existence of an alibi, Petitioner would need to demonstrate it was physically impossible for her to have committed the crime because she was at another location at all times when the crime could have occurred.

> The literal significance of the word 'alibi' is 'elsewhere'; as used in criminal law, it indicates that line of proof by which an accused undertakes to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime. In other words, by an alibi the accused attempts to prove that he was at a place so distant that his **participation in the crime was impossible**. To be successful, his alibi must cover the **entire time** when his presence was required for accomplishment of the crime. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime. It is not enough for the accused to say that he was not at the scene and must therefore have been elsewhere. The latter statement does not constitute an alibi. And since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, **a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.**

State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (emphasis added) (quoting 21 Am.Jur.2d Criminal Law § 136); see also, State v. Baker, 411 S.C. 583, 591, 769 S.E.2d 860, 865 (2015).

The medical evidence in this case indicated the injury to the child was not accidental and was so significant either adult in this case would have known it happened. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. (T.358; R. 365). He testified the injury was not accidental. (T.362; R. 369). Dr. Roberts testified both sides of the toddler's skull were fractured by severe traumatic force. (T.409-410; R. 400-401). She indicated the fractures were caused by a force similar to falling out of a three story window or being involved in a motor vehicle accident.

The doctors all testified the injuries had to occur the day the child was taken to the hospital. As a result, Petitioner's attempts to explain the injuries by blaming the dog for knocking the child down, or the fact the child's head felt "squishy" to Petitioner when the child arrived with his mom are unavailing. Further, none of the events would explain the significant trauma experienced by the toddler leading to his death.

Significantly, Dr. Roberts testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 404-406). She testified a person with the type of injury sustained by the toddler would be **immediately and severely symptomatic**. She said the child would lose consciousness, **have altered breathing**, seizures, and would not be able to move or have other normal functions. (T.419; R. 410). She testified the injuries could only have occurred the day the child presented to the emergency room. (T.420-421; 434-435; R. 411-412; 402-403).

Most importantly, Petitioner testified at approximately 4:30 when she arrived home, the toddler was **sleeping normally** and she heard him **breathing fine**. (T.984; 994; R. 856; 866). Dr. Roberts, however, testified she would expect symptoms of the injury to be seen, and, if the child was sleeping normally around 4:30 when checked on, then she expected the injuries occurred after that time. (T.427-428; R. 418-419).

Even if the events described by Petitioner of going to the IGA and the video store were entirely true, according to the doctors, the injuries had to occur after she checked on the child at 4:30 and could have happened any time before 911 was called. As a result, her alibi is not a complete alibi, or "not quite alibi" as her counsel styled it. A "not quite alibi" is no alibi, and as a result, even if further investigation would have resulted in a more complete timeline, it would

not have precluded the physical possibility that Petitioner was still the person who savagely smashed the head of the toddler.

Further, as the PCR court concluded, Petitioner failed to present any witnesses or evidence to support her claims, and instead relied solely on the mere speculation of what could have been found had investigation been conducted. Petitioner did not present any video or other evidence demonstrating the times she left work, when she was at the IGA, or when she was at the video store. She did not even present any witnesses from the video store or her office to demonstrate that video surveillance existed at the time of this homicide had it been sought by counsel. Finally, she offered no witnesses to support her claim of alibi. As a result, she failed to demonstrate any prejudice by the alleged failure to investigate by counsel. Her mere speculation is insufficient to support a claim of ineffective assistance of counsel.

Accordingly, the PCR court correctly determined Petitioner failed to meet her burden of establishing counsel was ineffective in the assistance he provided her at trial. This Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

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S.C. Bar No. 15608

BY: _____
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ATTORNEYS FOR RESPONDENT

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Julia Shawnette Gorman, Petitioner,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Return to Petition For Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 24th day of May, 2019.

WILLIAM M. BLITCH, JR.
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May 24, 2019

Victor R. Seeger, Esquire
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Re: Julia Gorman v. State of South Carolina
Appellate Case Tracking No. 2018-000908

Dear Mr. Seeger

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Victim Advocacy Division (enclosure)