STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Greenville County
The Honorable Edward W. Miller, Trial Judge
The Honorable Alex Kinlaw, Jr., PCR Judge

Appellate Case No. 2019-000468

POLLY MCABEE HINDMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Did the Post-Conviction Relief Judge err in failing to find trial counsel was ineffective when trial counsel failed to introduce evidence that the legal name of the half-sister of Polly Hindman was Betty Riddle as the State argued the signature of "Betty Riddle" was improper because the name was not spelled correctly?

III. Did the Post-Conviction Relief Judge err in failing to find trial counsel was ineffective when he failed to object to the improper bolstering testimony of Officer John T. Martin when he testified that after completing his investigation he signed the warrants?

Respondent's Issues Presented

I. Did the PCR court correctly find Petitioner failed to prove trial counsel was constitutionally ineffective for not introducing into evidence checks and not calling as a witness an employee of the funeral home when there was no reasonable probability Petitioner would not have been found guilty even if trial counsel had offered the evidence at trial?

II. Did the PCR court correctly find Petitioner failed to prove trial counsel was constitutionally ineffective for failing to conduct an adequate investigation into the spelling of the victim's legal name when there was evidence at trial of the victim's legal name and there was other evidence of Petitioner's abuse of the powers of attorney independent of the discrepancy in the spelling of the victim's name?

III. Did the PCR court correctly find Petitioner failed to prove trial counsel was constitutionally ineffective for not objecting to a law enforcement witness's testimony when the testimony was not objectionable, trial counsel made a reasonable and strategic decision not to object, and Petitioner failed to show that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected?

STATEMENT OF THE CASE

During its October of 2016 term, the Greenville County Grand Jury indicted Polly Hindman ("Petitioner") for the exploitation of a vulnerable adult (2015-GS-23-001563). James P. O'Connell ("trial counsel"), Esquire, represented Petitioner at trial. Assistant Solicitors Sylvia P. Harrison and Julia V. Hendricks of the Thirteenth Circuit Solicitor's Office prosecuted the case. On December 14, 2016, Petitioner proceeded to a jury trial with the Honorable Edward W. Miller ("trial court") presiding. At the conclusion of trial, the jury convicted Petitioner as indicted, and the trial court deferred sentencing so that it could take into account the outcome of the restitution hearing. On December 28, 2016, Clifton F. Gaddy, Jr. ("sentencing counsel"), Esquire, filed a notice of representation. On February 17, 2017, Petitioner appeared before the trial court for the restitution and sentencing hearing.[1] The trial court ordered Petitioner to pay restitution in the amount of $88,000 and sentenced her to imprisonment for five years, suspended upon the service of ninety days' home incarceration and five years' probation, twenty days of public service, and random drug and alcohol testing. Sentencing counsel filed a timely notice of appeal. He later moved to dismiss the appeal, and Petitioner affirmed she wished to dismiss the appeal by way of an affidavit filed with the South Carolina Court of Appeals. The Court of Appeals then granted Petitioner's motion and dismissed the appeal. State v. Hindman, S.C. Ct. App. Order filed August 29, 2018. The remittitur was issued on September 25, 2018.

Clarence Rauch Wise, Esquire, filed an application for post-conviction relief on Petitioner's behalf on November 6, 2018, claiming she was entitled to relief because trial counsel

[1] While representing Petitioner, sentencing counsel filed numerous motions, including a motion to set aside the verdict, a motion for a new sentencing hearing, a motion for a new trial, a motion to modify the restitution that Petitioner was ordered to pay, and another motion for a new trial based upon after-discovered evidence. The trial court denied those motions.

was: (1) constitutionally ineffective for failing to adequately prepare for trial, (2) constitutionally ineffective for failing to call witnesses at trial, (3) constitutionally ineffective for failing to introduce evidence at trial, and (4) constitutionally ineffective for failing to cross-examine Leisa Norris at trial. On March 29, 2019, the State ("Respondent") filed its return. On or around April 10, 2019, Petitioner provided Respondent with an amended application that put forth the claims, in addition to those already raised, that trial counsel was constitutionally ineffective: (1) for failing to move for a directed verdict and (2) for failing to object to inadmissible testimony.

An evidentiary was held before the Honorable Alex Kinlaw, Jr. ("PCR court"), at the Greenville County Courthouse on April 15, 2019. Wise represented Petitioner, and Assistant Attorneys General Samuel Leonard Key and the undersigned represented Respondent. At the conclusion of the hearing, the PCR court instructed the parties to submit proposed orders, and then issued its Order of Dismissal on July 19, 2019, finding therein that Petitioner failed to prove she received constitutionally ineffective assistance of counsel, denying relief, and dismissing the application with prejudice. On August 9, 2019, Petitioner filed a motion to alter or amend the judgment, arguing the PCR court erred by (1) finding Petitioner was not prejudiced by trial counsel's failure to call as a witness the director of the funeral home that provided funerary services to Bette Riddle ("the victim"), (2) finding the director's testimony and supporting documents were merely cumulative to the testimony of Petitioner, and (3) failing to recognize that Petitioner presented evidence in support of her argument that trial counsel was constitutionally ineffective for failing to object to the inadmissible testimony of a law enforcement witness and in finding Petitioner failed to show trial counsel was constitutionally ineffective for the failure to object. Respondent filed a return to Petitioner's motion on October

31, 2019. On March 25, 2020, the PCR court issued an order denying Petitioner's motion, finding, among other things, (1) the evidence at trial of Petitioner's actions with regard to the power of attorney and deed supported her conviction and would not have been rebutted by the funeral director's testimony, (2) the funeral director's testimony was cumulative evidence and it did not support a finding of deficiency in trial counsel's performance or resulting prejudice, (3) a law enforcement witness's testimony that he sought an arrest warrant for Petitioner after conducting an investigation was not testimony Petitioner was guilty of the charged offense that caused Petitioner to suffer prejudice, and (4) trial counsel had a valid and strategic reason for not objecting to the law enforcement witness's testimony. This appeal follows.

STATEMENT OF FACTS

Rachael Garner, a branch manager at Wells Fargo, testified as to the victim's bank account at Wells Fargo and checks drawn off of it. App. 34-35. Between the November and December bank statements for the victim in 2012, Leisa M. Norris's name was added to the account as the attorney-in-fact or agent for the victim. App. 36-37. Garner identified multiple checks at the State's request: (1) check number 3308, which was made payable to Petitioner in the amount of $6,059.16 and indicated on its face that it was for "funeral expenses"; (2) check number 3307, which was dated December 18, 2012, was made payable to Petitioner in the amount of $6,773.70, and indicated on its face that it was for "funeral expenses"; (3) check number 3345, which was dated December 18, 2012, was made payable to Petitioner in the amount of $1,498.00, and indicated on its face that it was for "care"; and (4) check number 3306, which was dated December 18, 2012, was made payable to Petitioner in the amount of $20.00, and indicated on its face that it was for "death certificates." App. 37-39.

Norris testified on the State's behalf at Petitioner's trial. App. 40. She was the victim's half-sister, younger than the victim by more than twenty years, and is Petitioner's sister. App. 40. Before Petitioner's trial, Norris pleaded guilty to exploiting the victim, a vulnerable adult, and had to pay restitution to Harvard Riddle ("Harvard"), the victim's brother-in-law. App. 41, 52. Norris identified three powers of attorney that Petitioner prepared, all of which indicated that they had been signed by the victim on the same date: November 29, 2012. App. 41-42. Norris testified she recognized the victim's signature on the first power of attorney as made in the victim's own handwriting, although the victim had misspelled her name by signing "Betty" instead of "Bette." App. 42-43. Norris did not think that the signatures on the second and third powers of attorney looked like they were the victim's signature. App. 43. The only witnesses or notaries who signed the second and third powers of attorney were Petitioner and R. L. Hindman ("Petitioner's husband"), Petitioner's husband. App. 43-44. Norris used the first power of attorney to add her name to the victim's account at Wells Fargo, but she was unable to do the same to the victim's account at BB&T because that bank would not accept any of the powers of attorney. App. 44. Norris did not sign checks 3308, 3307, and 3345, and testified that the payor's signature on them was not the victim's App. 45. Norris found out in October, November, or December of 2012 that the victim suffered from dementia; the victim was committed on December 19, 2012, and then placed in a nursing home, where she remained at the time of trial. App. 46, 53-54. Norris was aware that the victim's will bequeathed her home to Norris, but Norris had to surrender the home to Harvard in order to make restitution. App. 46-47. While Norris was living in the home after the victim was committed, she paid Petitioner for cutting the grass around the victim's home out of the victim's bank account. App. 47, 53.

Norris testified in regards to a deed, executed in June 6, 2005, and recorded on December 26, 2012, that granted the victim's home to Norris. App. 48-49, 75. The victim owned the home in 2005 together with her husband, but he passed away in 2012. App. 49. The deed, which referenced the 2012 passing of the victim's husband, indicated it was signed in 2004. App. 49-50. Norris testified Petitioner drafted that deed. App. 50. The deed was notarized by Petitioner.[2] App. 75. Norris identified a second deed that was executed on June 16, 2004. App. 50. That deed was drafted by Petitioner and its execution was witnessed by Petitioner and Petitioner's husband. App. 50-51. The second deed indicated the victim's husband died in 2012 and also did not bear his signature. App. 50-51. While being cross-examined by trial counsel, Norris testified that Petitioner did not go with her to Wells Fargo. App. 52. She did not think that the victim signed a check that was written to pay for the victim's funeral expenses. App. 52-53.

Nancy Kay Roof had been the victim's friend for more than forty years and testified the victim was "like [her] mom." App. 55. Roof was familiar with the victim's handwriting and had even seen her signature on checks. App. 57-58. Her familiarity was such that she would be able to recognize whether checks bearing the victim's signature were actually signed by the victim. App. 60. Roof did not think the signature on check 3308 was the victim's, and testified that the signature on check 3307 was not made in the victim's handwriting. App. 58, 59. She also did not believe that the victim's signature on the powers of attorney were actually made by the victim. App. 59-60.

[2] The expiration date next to Petitioner's notary signature indicated Petitioner's commission as a notary public was to expire on March 9, 2016, which was more than ten years into the future from the deed's indicated execution date. App. 75-76.

Mary Ellen Cervetti, who worked in corporate investigations for BB&T, testified at trial. Cervetti began her investigation into the victim's accounts at BB&T because "two individuals, two women" presented a power of attorney that they alleged had been executed by the victim, demanded to be added as authorized users to the victim's account immediately, claimed that the bank had improperly added Harvard as an authorized user to the victim's account, and accused the bank of violating its own policies for its handling of the account. App. 64. The victim's name was spelled differently on the power of attorney from the spelling on the victim's records with the bank. App. 64. The first power of attorney presented to the bank indicated that both Norris and Petitioner were attorneys-in-fact for the victim, but the bank refused to accept the document because the victim's name was misspelled on it. App. 65-66. An employee at the local branch related to Cervetti that Norris and Petitioner returned to BB&T three times, but the employees at the local branch informed the two sisters that they had to communicate with Cervetti exclusively. App. 66. Norris sent a letter to Cervetti offering to end any legal action against BB&T if the bank would authorize Norris's brother as a user of the victim's account in place of Harvard or to surrender to him half of the funds. App. 66, 69. On cross-examination, Cervetti affirmed she was not personally present in the local BB&T branch when Norris and Petitioner tried to access the victim's account, but she testified she spoke to both of them on the phone after their attempt. App. 70.

Investigator John T. Martin testified for the State at Petitioner's trial. App. 84. He began his criminal investigation after two attorneys invited him to review "certain documents" and attend a hearing in the Probate Court. App. 84. Investigator Martin affirmed that, during his investigation, he reviewed some of the items admitted into evidence during the trial. App. 85.

While Investigator Martin was being questioned by the State, the following exchange occurred:

> Q: . . . . Based on your criminal investigation of this case, your review of the documents, once you completed your investigation, what did you do?
> A: I signed warrants.
> Q: On who?
> A: On both of -- [Petitioner] and Leisa.
> . . .
> Q: What did you charge them with?
> A: I charged both of them with exploitation of a vulnerable adult.

App. 86. In response to questions from trial counsel, Investigator Martin affirmed that he prepar[ed] a case and gave the information to a magistrate," and that he "didn't sign the charges and [bring] the charges" himself, but had "to go through a magistrate. . . ." App. 87.

Petitioner testified on her own behalf at trial. App. 94. Petitioner had previously been employed as a real estate title abstractor and was commissioned as a South Carolina Notary Public. App. 94-95. Petitioner testified she had notarized documents before that bore incorrect dates because those incorrect dates were preprinted on the forms she notarized. App. 95. Petitioner testified she printed the form for the power of attorney admitted into evidence as State's Exhibit 5 from the internet because Norris told her that Norris needed a power of attorney in order to help the victim pay her bills and had discovered Harvard was stealing from the victim. App. 96. After Petitioner printed the form from the internet, she went to the victim's home and watched the victim sign it. App. 96-97. Petitioner testified she did not witness or sign the power of attorney admitted into evidence as State's Exhibit 2, which named Norris "and/or" Petitioner as the victim's attorney-in-fact. App. 97-98. Petitioner and her husband served as the witnesses to the power of attorney admitted into evidence as State's Exhibit 4, which named Norris as the

victim's attorney-in-fact, while they visited the victim in the hospital. App. 98. Petitioner identified a third power of attorney dated November 29, 2012, and testified it was signed by the victim and was witnessed by Petitioner and her husband. App. 98-99.

Petitioner blamed any error in the dates on the powers of attorney on the fact that she printed them off of her computer, which did not update the template she used. App. 99. Petitioner testified she did not draft the powers of attorney in order to commit fraud, but wanted to help the victim access healthcare and have her medications refilled since the victim's physicians would not speak to Petitioner. App. 99.

Petitioner disputed Norris's testimony that Norris always signed checks on the victim's behalf by signing Norris's name as power of attorney. App. 100-01. Petitioner claimed she did not know Norris was taking money from the victim for Norris's own personal use. App. 102. Petitioner testified she did not obtain any money from the victim. App. 102. Petitioner explained the presence of any errors in the deeds executed by the victim in favor of Norris by testifying the errors were made because "the date is handwritten, but the year was typewritten." App. 103. Petitioner testified she did not give the victim any legal advice regarding the deeds in question, but merely printed forms off of the internet and gave them to the victim to sign. App. 104.

Petitioner testified because the victim stopped eating and taking care of herself, she sought to have the victim admitted to the emergency room for medical care. The victim was admitted to the hospital until she could be admitted in a nursing home. App. 104-05. Petitioner denied going to Wells Fargo in an attempt to access the victim's bank account, but admitted to going with Norris to BB&T to have Norris added to the account

as an authorized user. App. 105. Petitioner stated Norris had already been writing checks out of the victim's account at that time. App. 105. Petitioner testified she was "repaid for diapers, Depends, clothes, quilts . . . , and underclothes." App. 106, 111. Petitioner testified she did not write checks out of the victim's account, but she would pay for expenses for the victim on her own and then receive a reimbursement check in the mail from Norris paid out of the victim's account. App. 106-07, 111. She testified she helped the victim make advance burial arrangements and paid for them out of her own accounts, which amounted to about $13,000. App. 106.

The assistant solicitor questioned Petitioner about the reasons for her paying for the victim's funeral the day before seeking to have the victim committed. App. 108. Petitioner testified she sought the victim's involuntary commitment because she had threatened Norris with a knife. App. 109. Petitioner denied that she sought the victim's commitment because the victim was mentally ill; instead, she testified, she wanted to get medical care for the victim. App. 110. Petitioner testified the checks she received, that were drawn off of the victim's account were from Norris, not from the victim. App. 111.

Petitioner testified the dates on the powers of attorney were identical because she erred when she printed them off the internet by not looking to change the date and year on them. App. 112. She testified she did not "prepare" the powers of attorney but only printed them out and filled in the dates. App. 118-120. She testified the victim executed the second and third powers of attorney while in the hospital but before she had been declared incompetent, with both executions being witnessed by Petitioner and Petitioner's husband. App. 113. She testified the victim's name was spelled "Betty" on

the first power of attorney because that was the victim's legal name and the victim herself wrote her name that way on the document; she testified the victim sometimes spelled her named "Bette." App. 113-14.

Petitioner affirmed she was paid approximately $16,000 from the victim's account. App. 114. The services Petitioner performed for the victim included mowing the victim's lawn every other week for $50, buying diapers for the victim when Norris could not, and supplying the victim with fingernail polish. App. 114-15. When asked to explain why she was being repaid out of the victim's account to mow the lawn around a house that had been deeded to Norris by the victim, she answered that, in her mind, the home was still the victim's. App. 115. Petitioner testified Norris sent to her a check for $1,500 drawn off of the victim's account to reimburse her for paying $1,000 as a down payment on the victim's spot at an assisted living facility and $498 to buy room furnishings for the victim. App. 115-16.

Petitioner's husband also testified at trial. App. 120. He testified Norris asked Petitioner to prepare the powers of attorney so Norris could stop Harvard from stealing the victim's money. App. 122. He testified Norris and the victim wanted Petitioner to do it because they could not afford a lawyer's services, and they relayed to Petitioner the information they wanted the powers of attorney to contain. App. 122. If Petitioner "did" the powers of attorney, he testified they came off of the internet. App. 123. He denied Petitioner received "any extra money" from her involvement, other than money "for helping out" and for reimbursement for the victim's advance funeral expenses. App. 123. Actually, he testified he thought they had lost money because Petitioner paid for things

for the victim out of pocket without receiving any reimbursement. App. 123. He agreed all of the reimbursements to Petitioner came in the form of checks in the mail. App. 124. He testified he witnessed the victim sign the last two powers of attorney, and he explained the differences in her signatures as caused by her taking medication or her condition. He further testified he witnessed the victim give a signature while she was hospitalized that was hard to recognize, and he testified Petitioner "fussed" with the victim because the victim signed her name with alternate spellings. App. 125.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court correctly found Petitioner failed to prove trial counsel was constitutionally ineffective for not introducing into evidence checks and not calling as a witness an employee of the funeral home because there was no reasonable probability that Petitioner would not have been found guilty even if trial counsel had offered the evidence at trial.

Petitioner argues the PCR court erred in not finding trial counsel was constitutionally

ineffective for not introducing into evidence certain checks and not presenting testimony at trial from an employee of the funeral home that buried the victim. According to Petitioner, the checks and testimony would have established Petitioner prepaid for the victim's funeral and incurred other expenses related to her care of the victim, and Petitioner was being repaid for those expenses and not stealing money from the victim. Petitioner's argument fails because there was sufficient evidence of Petitioner's guilt irrespective of whether she prepaid for the victim's funeral and because the evidence put forth by Petitioner was merely cumulative to the evidence admitted at trial. Accordingly, the PCR court correctly denied relief, and this Court should deny certiorari.

The State offered alternate but related theories of Petitioner's guilt: Petitioner misappropriated the victim's money, Petitioner misused a power of attorney for her own benefit, and Petitioner misused a power of attorney for the benefit of Norris. App. 143-44. Even if the employee from the funeral home had testified at Petitioner's trial about Petitioner's prepaying for the victim's funeral, and even if the checks at issue had been introduced at trial, the State would have nevertheless been able to advance a case for Petitioner's guilt. There was evidence at trial that Petitioner drafted the powers of attorney and deeds at issue so that Norris could abuse them by obtaining some benefit for Norris and so that Petitioner could benefit from them either through her own or Norris's misuse of them. Petitioner drafted, at Norris's request, multiple powers of attorney naming Norris as the victim's attorney-in-fact. App. 122. Norris did not believe the victim's signature on the second and third powers of attorney, the executions of which were witnessed by only Petitioner and Petitioner's husband, was actually made by the victim. App. 43-44, 98-99. The victim's close friend did not believe the signatures on the powers

of attorney that were witnessed by Petitioner and Petitioner's husband were actually made by the victim. App. 59-60. With those powers of attorney in hand, Norris was able to gain access to the victim's Wells Fargo account. App. 36-37, 44. BB&T's internal fraud investigator testified Petitioner and Norris attempted to be added as authorized users on the victim's account by presenting a power of attorney and recalled speaking with them by phone after their requests were declined. App. 64-70. Petitioner admitted to going to BB&T with Norris and conceded she was aware Norris had been issuing checks drawn off of the victim's account even before Norris used the powers of attorney to be added to the victim's account as an authorized user. App. 105.[3] Petitioner drafted, witnessed, and notarized two deeds granting the victim's home to Norris; Petitioner and Petitioner's husband were the witnesses for the execution of the deeds. App. 47-51, 75. While living in the home while the victim was in the nursing home, Norris paid Petitioner to mow the lawn with checks drawn off of the victim's account, benefitting Norris and Petitioner at the victim's expense. App. 47, 53, 114-15. Norris admitted to her part in exploiting the victim, and had to surrender the home in restitution to Harvard. App. 41, 47. Petitioner admitted to receiving approximately $16,000 in the form of checks drawn off of the victim's account. App. 114. Norris testified neither she nor the victim signed those checks. App. 45.

The checks and transcript admitted at the PCR hearing show merely that Petitioner had a hand in prepaying for the victim's funeral. They do not disprove the alternate theories of guilt that the State presented at trial, and, since there was evidence that the victim did not sign the checks sent to Petitioner for "funeral expenses," they do not discount the possibility that Petitioner wrote the reimbursement checks to herself without authorization. In light of this other

[3] At the PCR hearing, Petitioner again admitted to knowing this. App. 303.

evidence, the jury could have reasonably concluded Petitioner was guilty of exploiting the victim even if it had known that Petitioner had actually prepaid for the victim's funeral. Petitioner therefore failed to prove there is a reasonable likelihood that the outcome of trial would have been different had trial counsel called the funeral home employee as a witness and introduced the checks in order to show Petitioner actually prepaid for the funeral.

In turn, the PCR court found Petitioner failed to prove she suffered prejudice from trial counsel's failure to call the director or introduce the checks because that evidence was merely cumulative. Petitioner and her husband both testified at trial that Petitioner accepted the checks drawn off of the victim's account because she was being reimbursed for her prepayment for the victim's funeral. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (noting that the South Carolina Supreme Court previously held that an applicant for post-conviction relief did not suffer any prejudice when his defense attorney did not bring forward at trial evidence that was cumulative).

II. The PCR court correctly found Petitioner failed to prove trial counsel was constitutionally ineffective for failing to conduct an adequate investigation because there was evidence at trial of the victim's legal name and there was other evidence of Petitioner's abuse of the powers of attorney independent of the discrepancy in the spelling of the victim's name.

Petitioner argues the PCR court erred by not finding trial counsel was constitutionally ineffective for not introducing evidence that the victim's legal name was spelled "Betty Riddle" to counter the State's argument that the signature on the checks was misspelled and therefore victim was not the signer. At the PCR hearing, Petitioner testified the victim's legal name was Betty Riddle, and the victim sometimes spelled her first name "Bette" because she did not like the legal spelling. App. 291-92. Petitioner testified her understanding at the time of supplying the

powers of attorney to the victim was that the victim's legal name should be used. App. 293. Petitioner testified evidence of the victim's legal name was available to trial counsel, but went unused, allowing the State to challenge Petitioner's credibility as to the spelling of the victim's name on the power of attorney. App. 293. At Petitioner's trial, the assistant solicitor suggested in closing that it would have been unreasonable for the victim, who was an octogenarian when the powers of attorney were executed, to have decided to change the way her name was spelled "randomly" when signing the first power of attorney presented to her by Petitioner. App. 140. The State made this argument in response to Petitioner's testimony at trial that the victim's legal name was "Betty," but the victim sometimes wrote it as "Bette" out of personal preference.

The PCR court did not err in finding Petitioner failed to prove trial counsel was constitutionally ineffective for not introducing the evidence of the victim's legal name into evidence at trial because the issue is not merely the discrepancy in the spelling of the victim's name in the first power of attorney and its legal spelling; rather, it was the discrepancy in the spellings of the victim's name between the three powers of attorney, all of which were executed on the same day, which rendered the powers of attorney suspicious. Further, other evidence was admitted at trial that could have caused the jury to view the powers of attorney and deeds suspiciously: (1) the powers of attorney were all executed on the same date; (2) the victim's close friend believed the signature on them did not match the victim's handwriting; (3) only Petitioner and Petitioner's husband were witnesses to the execution of two of the powers of attorney (on which the victim's name was spelled "Bette"); (4) and Petitioner was involved in preparing a deed bequeathing the victim's property to Norris and then received payments she knew to be from the victim's account in payment for mowing the lawn at that property. App.

140-41. The PCR properly found that Petitioner failed to demonstrate any deficiency in trial counsel's preparation and investigation and any resulting prejudice.

III. The PCR court correctly found Petitioner failed to prove trial counsel was constitutionally ineffective for not objecting to the law enforcement witness's testimony because it was not objectionable, trial counsel made a reasonable and strategic decision not to object, and because Petitioner failed to show that there is a reasonable likelihood the outcome of trial would have been different had trial counsel objected.

Petitioner argues the effect of the investigator's testimony was to bolster the State's case by informing the jury that the investigator believed Petitioner to be guilty, and trial counsel was constitutionally ineffective for failing to object. As the PCR court correctly found, however, the testimony was not objectionable nor has Petitioner proven it affected the outcome of trial. This Court should deny certiorari on this issue.

Petitioner cites United States v. Flores-De-Jesus, 569 F.3d 8 (1st Cir. 2009), in support of her argument. In Flores-De-Jesus, the defendant and two codefendants were tried together, and the defendant was convicted of various drug offenses and a weapons offense. Id. at 14. The prosecution's lead witness was a law enforcement official who testified for an entire day. Id. at 15, 21. The witness was qualified as an expert in "sales and distribution of illegal narcotics controlled substances." Id. at 21-22 (internal quotation omitted). He testified as to the initiation of his undercover investigation at a "drug point" in a housing project, his installation of a confidential informant in the housing project, the contents of video recordings made by the confidential informant, information provided to him about the defendants from the informant, the cessation of the informant's recording due to the conspirators' murdering an acquaintance of the informant, the status of the defendant as a seller and runner in the drug trafficking conspiracy while circling defendant's name and photograph on a chart, his seizing drugs after conducting a

raid, the nature and use of stash houses in drug operations, and the approximate amount of drugs recovered during the aforementioned raid. Id. at 22-25. Much of the witness's testimony as to the defendant's involvement in the conspiracy was based upon hearsay. Id. at 23-26. The First Circuit Court of Appeals found that the witness's testimony "was permissible to the extent that he was testifying either 1) as a case agent describing the course of the investigation and events in which he had personally participated, or 2) as an expert whose testimony provided background and context . . . ." Id. at 26. On the other hand, the witness's testimony about the defendant's role in the conspiracy was not based on his personal knowledge and served to bolster the credibility of later witnesses at trial, for which there were serious credibility concerns due to the nature of the conspiracy and the status of one as a confidential informant. Id.

The PCR court correctly found that Flores-De-Jesus does not provide support Petitioner's claims. First, the law enforcement witness's testimony at Petitioner's trial is distinguishable from the testimony of the law enforcement witness's testimony at Flores-De-Jesus's trial. The witness at Petitioner's trial did not testify Petitioner had committed illegal acts, either based on his personal experience or upon hearsay. The witness testified that he looked at documents and attended a probate hearing at the request of others and later sought Petitioner's arrest. App. 86. Not only was the witness's testimony not based upon impermissible hearsay, but it fell far short of the testimony of the law enforcement witness at Flores-De-Jesus's trial, which included photographs, charts, estimates of drug amounts, and explicit references to Flores-De-Jesus's engaging in obviously criminal activities. Second, the First Circuit's analysis in Flores-De-Jesus has not been accepted as authoritative in all courts. See United States v. Marquez, 898 F.3d 1036 (10th Cir. 2018) (rejecting Marquez's argument that the trial court's admission of certain

testimony constituted plain error because, among other things, the First Circuit's opinion in Flores-De-Jesus cannot establish well-settled law in the Tenth Circuit Court of Appeals because it is not binding precedent).

Petitioner's reliance upon United States v. Etienne, 772 F.3d 907 (1st Cir. 2014), is also misplaced. In that case, the First Circuit found that the government's witness's testimony was not improper because it consisted of testimony as to the witness's personal actions during the course of his investigation and was not based upon hearsay. Id. at 915-16. The PCR court properly discounted Petitioner's cite to Etienne because the First Circuit in that case recognized the testimony of a government witness could be helpful "when based on his personal knowledge and limited to a description of his activities." Id. at 914. Since the witness at Petitioner's trial testified as to his own actions and did not state what others told him concerning Petitioner's actions, Etienne, which is not binding authority in the courts of this state, afforded trial counsel no reason to object to the testimony and the PCR court no reason to accept Petitioner's argument.

The PCR court also correctly found trial counsel articulated a valid and strategic reason for not objecting to the law enforcement witness's testimony. Petitioner's argument on the lack of a strategy ignores trial counsel's testimony at the PCR hearing. In response to Petitioner's questioning, trial counsel testified as follows:

> Q: . . . How was [the witness's testimony that he sought a warrant] probative of whether or not [Petitioner], actually, stole something?
>
> A: I don't think it's probative of anything. Because, see, he just says he has enough. The problem is if you objected to almost anything in the hearing, not only does the jury not like you, you're going to be there -- you know, I'm not saying time has anything to do with it. But you don't object to everything, especially an argumentative question like that, whether it can be or cannot be.
>
> Q: But, in essence, what [the law enforcement witness] says is, in my opinion, she's guilty?

A: No. In essence, he's saying he had enough to take it to the magistrate to get signed warrants --

App. 338-39. Trial counsel further explained he did not object because the law enforcement witness was merely describing his actions in the investigation, and he did not find the testimony objectionable because, "That's what he did. How can you object to it?" App. 328. Trial counsel's testimony shows he did not believe that the witness's testimony was objectionable, and he believed objecting to it would have alienated the jury. Thus, trial counsel articulated a reasonable and strategic reason for his not objecting. See Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011) ("When counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an objective standard of reasonableness.") (emphasis in original) (quotations omitted).

Petitioner argues the PCR court erred in finding Petitioner was not prejudiced by the testimony and further argues that the record "contains no evidence to establish that this was not prejudicial . . . ." Petitioner's argument here flips the burden of proof applicable in post-conviction relief proceedings. The burden is on Petitioner to establish that a deficiency in trial counsel's performance prejudiced her 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. Petitioner's argument that this Court should review the PCR court's findings because *the State* did not affirmatively disprove prejudice is improper.

Because it applied the law properly, the PCR court correctly found Petitioner failed to demonstrate there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected to the testimony of Investigator Martin. The PCR court found the

witness merely recounted the origins of his investigation and its progress up to his seeking an arrest warrant for Petitioner. App. 419. The witness's testimony was not a statement of his belief in Petitioner's guilt, as Petitioner would have it, but was a factual summary of the course of the investigation. The origin and course of any such investigation is surely the type of information about which a jury could be curious because it provides context and can assist the jury in evaluating arguments from a defendant about the insufficiency of law enforcement investigations.

Furthermore, the trial court's instructions to the jury would have cured any incorrect notions it had about evaluating Petitioner's guilt or innocence upon the facts of her having been arrested and indicted. The trial court instructed the jury the State had the burden of proving Petitioner guilty beyond a reasonable doubt, that Petitioner enjoyed the presumption of innocence, and that the indictment was not evidence and the jury should not make any inference as to Petitioner's guilt or innocence based upon the fact she was indicted. App. 21-22. While instructing the jury before it began deliberations, the trial court instructed as follows:

> I, again, instruct you that the fact that the [Petitioner] was arrested, charged, and indicted in this case is not evidence of guilt, nor does it create any presumption or inference of guilt. These documents are simply the formal written instruments which contain the charge made against this Defendant. And they serve as the formal documents by which this case is processed and brought into court for resolution.

App. 145.

The PCR court correctly found Investigator Martin's testimony was not objectionable, trial counsel had a reasonable and strategic reason for not objecting to the testimony, and Petitioner failed to prove there is a reasonable likelihood the outcome would have been different had trial counsel objected. This Court should deny the petition for a writ of certiorari.

CONCLUSION

Petitioner's argument the PCR court erred in its findings as to the evidence of Petitioner's payment of the victim's funeral expenses fails because there was sufficient evidence of Petitioner's guilt under the State's alternate theories. Petitioner's argument the PCR court erred in its finding about the evidence of the victim's legal name fails because there was evidence the powers of attorney and deeds were fraudulently executed and misused irrespective of the spelling of the victim's name thereupon. Petitioner's argument Investigator Martin's testimony bolstered the State's case fails because the testimony was not objectionable, trial counsel had a reasonable and strategic reason for not objecting, and would not have caused prejudice in light of the trial court's instructions to the jury. For all of the foregoing reasons, the PCR court's decision denying relief was correct, and this Court should likewise deny the petition for a writ of certiorari.

Respectfully submitted,

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