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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Certiorari to Chesterfield County
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-002302

Mitchell Rivers,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

On Wednesday, July 12, 2023, this Court reversed the PCR court's denial of post-conviction relief upon holding that Trial Counsel was constitutionally ineffective and prejudiced Rivers by failing to renew his pretrial objections to the introduction of evidence of collateral injuries discovered at the time of the infant victim's autopsy. This Court then remanded for a new trial. Because this Court's holding is irreconcilable with the opinion published two weeks prior by the Court of Appeals panel in *State v. Cook*, Op. No. 5995 (S.C.Ct.App. filed June 28, 2023) (Howard Adv.Sh. No. 25 at 55), and because this Court's holding misapprehends the legal impact of the exclusively postmortem medical testimony, Petitioner must respectfully petition for rehearing and further suggest rehearing *en banc* pursuant to Rules 219,[1] 221(a), and 240, SCACR.

[1] Respondent acknowledges that "[a] hearing or rehearing *en banc* is not favored and ordinarily will not be ordered," but asserts that "consideration by the full court is necessary to secure or maintain uniformity of its decisions[.]" Rule 219(a), SCACR.

I. RIVERS IS NOT ENTITLED TO RELIEF UNDER THE REASONING SET FORTH IN *STATE V. COOK*, WHICH UNANIMOUSLY HELD EVIDENCE OF COLLATERAL INJURIES ADMISSIBLE UNDER NEARLY IDENTICAL FACTS.

The Court's opinion filed July 12, 2023, reaches the opposite conclusion of that reached in *State v. Cook*, Op. No. 5995 (S.C.Ct.App. file June 28, 2023) (Howard Adv.Sh. No. 25 at 55)[2] despite each case presenting comparable fact patterns and legal issues: the admissibility of evidence of fractures suffered by a minor victim thought to have been healing for at least two weeks at the time of the victim's death.

In *Cook*, the three-year-old victim was reported as not breathing to law enforcement, who responded and rushed her to the hospital where she was pronounced dead after more than 90 minutes of effort to resuscitate her failed. *Cook* at 56. Law enforcement interviewed Cook at length, and she gave inconsistent descriptions of what occurred in the lead up to the three-year-old victim's death, but which primarily offered that Cook found the three-year-old victim lying in the tub face up and thought she had fallen in the tub. *Id.* at 56-57. Dr. Janice Ross[3] testified that the three-year-old victim perished from a blunt force injury to her head that could not have been caused by a fall in the bathtub, "as her whole brain was swollen." *Id.* at 58.

Also of concern was evidence that the three-year-old victim's arm was healing from a weeks old fracture at the time of her death. Defense counsel moved to suppress evidence of the arm fracture and argued that no evidence showed Cook caused the injury. *Id.* at 59. The trial court denied the motion and concluded that evidence of the healing fracture was admissible as evidence of intent, as it showed Cook's extreme indifference to the well-being of the child through her failure to seek medical care at the time of the injury. *Id.*

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[2] Record accessible at App. Case No. 2019-001417, https://ctrack.sccourts.org/public/caseView.do?csIID=70657

[3] The same Dr. Ross as testified in Rivers' trial.

Consequently, Dr. Ross and other medical witnesses also testified that the three-year-old victim's right humerus had been healing from a fracture for a few weeks, though it could have been the result of a fall from a bed. *Id.* at 59. However, a neighbor additionally testified that the three-year old victim said "[Cook] did it," and the victim's grandmother testified that Cook implied the injury had been treated. *Id.*[4]

On appeal, this Court summarily applied the reasoning as set forth in *State v. Martucci*, 380 S.C. 232, 246, 669 S.E.2d 598, 605 (Ct. App. 2008), and unanimously[5] concluded that the evidence of the three-year-old victim's broken arm "showed that Cook hid her failure to obtain medical treatment for Minor's arm injury." *Cook* at 63. As an additional ground, this Court noted that Cook's disclosure to the neighbor that the three-year-old victim blamed Cook for the injury identified Cook as its perpetrator by clear and convincing evidence. *Id.*

The evidence in Rivers' trial was more narrowly tailored than that presented in *Cook*. The *Cook* trial entailed multiple medical witnesses and multiple lay witnesses to the broken arm, both as it was found post-mortem and as it was observed previously in life. The State in Rivers' trial only offered post-mortem medical testimony and analysis as to the condition of the infant victim at the time of death: Dr. Ross set out her observations from the autopsy (inclusive of the collateral bruises, scratches, and healing rib fractures) and conclusion as to cause of death, and Dr. Clay Nichols testified that the injuries reflected a case of "Battered Child Syndrome." Otherwise, in each case the testimony of collateral injuries served the dual purpose of (1) showing the criminal extreme indifference of the caretakers and (2) refuting claims of accident and mistake.

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[4] *See also Cook*, R. pp. 385-86 ("Kayla [Cook] told me that [Minor] was saying that – and she was saying Mommy did it, and pointing to Kayla [Cook]."), pp. 405-12.

[5] Judge Lockemy dissented in part on other grounds but concurred with respect to the broken arm evidence. *Cook* at 64 ("I concur with the analysis and holding of the majority that the evidence of the arm injury was admissible.").

The difference between unanimous affirmation and unanimous vacation cannot be as little as three words of testimony in a seven day trial on otherwise comparable facts, particularly when those three words are irrelevant to the purpose of Battered Child Syndrome evidence. Just as *Martucci* was a dispositive basis for affirmation in *Cook*, it should be the dispositive basis for affirmation here. Respondent respectfully requests this Court grant this Petition for Rehearing and Suggestion for Rehearing *En Banc*, review this matter *en banc*, withdraw the opinion filed July 12, 2023, and affirm the ruling of the post-conviction relief court.

II. THE COURT'S OPINION MISAPPREHENDS THE LEGAL IMPACT OF THE POSTMORTEM MEDICAL TESTIMONY, WHICH IS GENERALLY ADMISSIBLE AS "BATTERED CHILD SYNDROME" TESTIMONY AND AS EVIDENCE OF *RES GESTAE*, AND IS DISTINGUISHED FROM "COMMON SCHEME OR PLAN" EVIDENCE.

Independent of the immediate conflict with the *Cook* opinion, the Court's opinion in this matter misapprehends the applicability of the precedents it cites and too narrowly analyzes this case through the lens of *State v. Pierce*. Consequently, the Court misses the distinctive characteristics and treatment of evidence of collateral injuries suffered by infant and child victims introduced to establish "Battered Child Syndrome" as opposed to a common scheme or plan.

The central precedent relied upon by the Court in its opinion is the proposition that "[w]hen there is no proof offered to show that a defendant inflicted previous injuries, 'testimony regarding [these] injuries is inadmissible[.]'" *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997) (citing *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989)). At issue in *Pierce* was "common scheme or plan" testimony by hospital employees that they had previously treated the victim for a split lip and a swollen eye and had previously observed Pierce grab the victim by his arm and jerk him from atop a counter. *Id.* As the majority in *Pierce* observed in a footnote, the evidence in that case was not offered to prove "Battered Child Syndrome," and the court

declined to consider whether it would have been admissible in that context. *Id.* 326 S.C. at 178 n.2, 485 S.E.2d at 914 n.2.

In this case, the testimony at issue regards injuries and stages of healing which existed and were observed at the time of the post-mortem autopsy, not testimony of observations made at the time the injuries were incurred. Additionally, the testimony in this case was originally offered not to show a common scheme or plan, but the absence of mistake or accident, to establish intent, and to establish the existence of "Battered Child Syndrome."

Rivers' trial is similarly distinguished from the other precedents relied upon by the Court. *Compare State v. Fletcher*, 379 S.C. 17, 24-25, 664 S.E.2d 480, 483 (2008) (in an HCA case, holding there was not clear and convincing evidence the defendant previously placed the baby victim in an attic or handcuffed him to a bed as discovered by a witness); *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998) (in a murder case, holding there was not sufficiently clear and convincing evidence the defendant previously killed two other children to admit evidence of a common scheme or plan).

By conflating the admissibility of testimony about the then-existing condition of the victim at the time of death with the admissibility of testimony about specific instances of past conduct, the Court commits lower courts to the untenable task of figuring out which injuries discovered post-mortem can and cannot be disclosed to the jury based on what caused the victim's death. The proximate cause of a victim's death is a question of fact to be determined by the jury. *See Dawkins v. Sell*, 434 S.C. 572, 581, 865 S.E.2d 1, 6 (Ct. App. 2021) ("Proximate cause is ordinarily a question of fact for the jury and 'requires proof of: (1) causation-in-fact, and (2) legal cause.'"); *see also The Winthrop Univ. Trustees for the State v. Pickens Roofing and Sheet Metals*, 418 S.C. 142, 162, 791 S.E.2d 152, 163 (Ct. App. 2016) ("Proximate cause is

normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence."); *cf. State v. Brown*, 205 S.C. 514, 32 S.E.2d 825, 828 (1945) ("[T]he burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide."). The undersigned can find no precedent to support the contrary proposition that findings from an autopsy must be fragmented and partially concealed from the jury subject to a judicial finding of a causal link.

Indeed, the whole condition of the victim at the time of autopsy is always relevant, probative, and temporally proximate *res gestae* testimony. *See State v. Martucci*, 380 S.C. 232, 258, 669 S.E.2d 598, 612 (Ct. App. 2008) ("The overall view of the facts provides the context in which the crime occurred and demonstrates the culminating impact on the Child."); *see also State v. Holliday*, 340 So.3d 648, 699 (La. 2020) (Testimony about injury to the victim's anus and penis observed during an autopsy "relates to the victim's injuries at the time of his death, and thus, is directly relevant to the charged offense of first-degree murder. Any and all injury inflicted on the victim in conjunction with his death is probative of whether defendant had specific intent to kill or inflict great bodily harm on the victim[.]"). Homicide by Child Abuse may be committed through a single act or through a continuum of abuse and/or neglect which culminates in the death of a child, such that evidence of temporally proximate "prior" abuse is not evidence of an "other" or "prior" bad act, but rather is evidence of intent for the bad act for which the defendant is on trial. *See Martucci*, 380 S.C. at 254, 669 S.E.2d at 609 ("If the multiple, separately occurring injuries are not admissible in child abuse prosecutions, the crime would be virtually impossible to prove."); and 380 S.C. at 256, 669 S.E.2d at 611 ("The evidence of prior abuse against the same victim was not remotely disconnected in time from the conduct

giving rise to the homicide by child abuse and was part of the same pattern of abuse showing extreme indifference to human life.").

Finally, the Court's opinion cannot be reconciled with the generally approved admissibility of testimony regarding Battered Child Syndrome. *See State v. Lopez*, 306 S.C. 362, 367, 412 S.E.2d 390, 393 (1991) ("[T]estimony regarding the 'battered child syndrome' and the 'shaken baby syndrome' is admissible when given by a properly qualified expert and such testimony may support an inference that the child's injuries were not sustained by accidental means."); *Pierce*, 326 S.C. at 184, 485 S.E.2d at 917 (Burnett, J., dissenting) (quoting same from *Lopez*). Properly qualified expert testimony regarding Battered Child Syndrome necessarily contemplates the existence of injuries other than those which caused the ultimate death of the child, and which often cannot be attributed to the defendant on trial. The purpose of Battered Child Syndrome testimony is to disprove accident or mistake, not prove identity, and so the identity of the prior perpetrators is inconsequential to the admissibility of the testimony.[6] *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). In this regard, the Court's opinion and reliance upon the proposition in *Pierce* runs contrary to not only its own precedent, but possibly the precedent of every other jurisdiction that have considered the issue of Battered Child Syndrome evidence. *See State v. Martinez*, 68 P.3d 606, 616-17 (Haw. 2003) (overruling its own precedent, acknowledging admissibility of Battered Child Syndrome testimony when introduced to show someone, not necessarily defendant, injured the victim, and acknowledging uniformity of conclusions reached by other jurisdictions).[7]

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[6] The Court at oral arguments in this matter expressed its substantial concern about the possibility that a severely neglected or abused child might die while in the care of a person other than that who imposed the abuse or neglect. The hypothetical defense that a defendant is the unlucky loser of a game of "battered child hot potato" is an argument to resolve a question of fact which may be made to a jury, not a reasonable basis to exclude evidence as a matter of law.

[7] *Accord Pausch v. State*, 596 So.2d 1216, 1219 (Fl. Dist. Ct. App. 1992) (acknowledging admissibility of autopsy evidence that the infant victim was undernourished at the time of death without attributing undernourishment to

The State's argument should not be construed to mean that autopsy evidence of a minor victim is *per se* admissible. However, Rule 404(b), SCRE, is categorically inapplicable where the evidence in question is introduced not to establish the character of an unidentified actor[8] but rather to establish a recognized medical condition of the victim. Additionally, even if Rule 404(b) is nonetheless deemed applicable, testimony introduced to show the absence of mistake or accident or to establish intent is specifically excepted from the prohibitive rule. Evidence to establish Battered Child Syndrome, such as autopsy evidence, once its relevance is established, is thus primarily analyzed under Rule 403, SCRE, which is a question of form, not substance (i.e. gruesome pictures versus testimony).

The testimony from Dr. Ross about the infant victim's scratches, bruises, and healing rib fractures regarded the then-existing status of the deceased infant victim at the time of the autopsy, and served to establish the legitimate medical diagnosis of Battered Child Syndrome. No witness testified that Rivers, or any other specific individual for that matter, caused the

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defendant); *State v. Heath*, 957 P.2d 449, 576-77 (Kan. 1998) (acknowledging admissibility of testimony regarding "old injuries" in order to establish Battered Child Syndrome despite lack of evidence to show they were inflicted by Defendant or same person as inflicted "new injuries"); *Futrell v. Commonwealth*, 471 S.W.3d 258, 285 (Ky. 2015) (affirming admissibility of Battered Child Syndrome testimony, and favorably noting the diagnosis did not identify the defendant as the perpetrator, as such would not be valid); *State v. Koon*, 730 So.2d 503, 511 (La. Ct. App. 1999) (adopting *Estelle* reasoning verbatim in affirming admissibility of Battered Child Syndrome evidence); *State v. Chavez*, 793 N.W.2d 347, 355 (Neb. 2011) (acknowledging admissibility of evidence of prior injuries as part of Battered Child Syndrome testimony, relying on *Estelle*); *State v. Elliott*, 475 S.E.2d 202, 215 (N.C. 1996) (adopting *Estelle* reasoning verbatim in affirming admissibility of Battered Child Syndrome evidence); *State v. Howard-French*, 259 A.3d 322, 330-31 (N.J. Super. Ct. App. Div. 2021) (affirming admission of evidence of prior injuries of child victim even when the State did not argue they were consistent with Battered Child Syndrome, or that the defendant caused the injuries, but showed the defendant lied about their cause); *Johnson v. State*, 145 S.W.3d 215, 222 n.23 (Tex. Crim. App. 2004) (acknowledging *Estelle* reasoning while distinguishing it because neither defendant disputed beating the children, such that the only issue in dispute was identity); *State v. Lucero*, 328 P.3d 841, 854 (Utah 2014) (abrogated on other grounds by *State v. Thornton*, 391 P.3d 1016 (2017)) ("[W]hile the State must connect prior child abuse to a defendant by a preponderance of the evidence when doing so to establish identity, it need not connect prior child abuse to a defendant if the prior abuse is being introduced solely to establish BCS in order to prove intent."); *State v. Johnson*, 400 N.W.2d 502 (Wis. Ct. App. 1986) (affirming admissibility of Battered Child Syndrome evidence and describing it as circumstantial evidence).

[8] Logically, evidence of "other bad acts" cannot be admitted "to prove the character of a person in order to show action in conformity therewith" if no evidence of the identity of the perpetrator of the "other bad acts" is introduced.

broken ribs. The State did not introduce the evidence to establish the identity of the perpetrator, but to disprove accident and mistake, and to establish intent. The evidence was admissible.

Respondent respectfully requests this Court grant this Petition for Rehearing, withdraw its opinion, and affirm the denial of relief by the PCR court because Battered Child Syndrome evidence which implies a prior bad act by an unidentified individual is admissible under the laws of this state and, as far as the undersigned can discern, every state, such that Rivers' could not show prejudice from Counsel's failure to renew his meritless objection.

CONCLUSION

For all of the foregoing reasons, the State requests the Court grant the petition for rehearing and suggestion for rehearing *en banc*, withdraw its opinion filed July 12, 2023, and affirm the ruling of the post-conviction relief court.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: _____
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803.734.3737

10 Aug., 2023

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Petition for Rehearing and Suggestion for Rehearing *En Banc* by emailing a copy to Petitioner's counsel of record, Jessica M. Saxon, at her primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 10th day of August, 2023.

CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

Caroline Collins

From: Caroline Collins
Sent: Thursday, August 10, 2023 6:00 PM
To: Saxon, Jessica
Cc: spollard@sccid.sc.gov; Johnny James
Subject: Mitchell Rivers v. State of South Carolina (2017-002302)
Attachments: RIVERS Mitchell - Petition for Rehearing and Suggestion for Rehearing En Banc - 2017-002302 (03360177xD2C78).PDF

Good Afternoon Ms. Saxon,

Attached please find the Petition for Rehearing and Suggestion for Rehearing *En Banc* in Mitchell Rivers v. State of South Carolina (2017-002302). This will be submitted to the South Carolina Court of Appeals today via the AIS OneDrive System.

If you will, please confirm receipt of this email.

Thank you,

CAROLINE COLLINS, Administrative Coordinator
South Carolina Attorney General's Office
Criminal Appeals | Office 803-734-3723 | ccollins@scag.gov
P.O. Box 11549 | Columbia, SC 29211
scag.gov