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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Unpublished Opinion No. 2023-UP-261
Appellate Case No. 2017-002302

Mitchell Rivers,

Respondent,

v.

State of South Carolina,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing and Suggestion for Rehearing *En Banc* was made and finally ruled upon by the Court of Appeals on October 12, 2023.

QUESTION PRESENTED

Did the Court of Appeals err in reversing the post-conviction relief court's determination that Rivers failed to establish that his trial counsel, in a prosecution for homicide by child abuse, was ineffective for failing to object to admission of collateral injuries suffered by the infant victim which supported an expert conclusion that the child suffered from "Battered Child Syndrome," and thus prove Rivers' intent and rebut River's express defense of accident?

STATEMENT OF THE CASE

Mitchell Rivers (hereafter "Rivers") is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Rivers was indicted at the October 2010 term of the Chesterfield County Grand Jury for homicide by child abuse (2010-GS-13-1072), for his culpability in the death of his adopted four-month-old child on August 7, 2005. Matthew Swilley and Tiffany Gibson, Esquires represented Rivers. Suzanne Mayes and Adam Foard, Esquires, of the Fourth Circuit Solicitor's Office, prosecuted the case.

On February 8, 2011, Rivers proceeded to trial before the Honorable Paul M. Burch and a jury. The jury heard significant evidence from two doctors who identified the infant's cause of death as asphyxiation, identified collateral injuries, and testified "[t]his is a classic case of Battered Child Syndrome." (Appx. 148-186). The jury found Rivers guilty as indicted on February 11, 2011. Judge Burch sentenced Rivers to imprisonment for the remainder of his natural life.

Rivers filed a timely notice of appeal and a direct appeal was perfected by Breen Richard Stevens, Esq., who raised the following issues in a brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967):

1. Whether the trial court reversibly erred by admitting evidence of prior physical abuse to Child where the State offered no evidence indicating the injuries were inflicted by Appellant, and where the injuries did not cause Child's death?

2. Whether the trial court reversibly erred by failing to grant Appellant's motions for directed verdict in his trial for Homicide by Child Abuse where the State's theory for proving that the death occurred "under circumstances manifesting an extreme indifference to human life' was based on the failure to obtain adequate health care, despite the facts that Appellant provided CPR and called 911?

The Court of Appeals denied the petition to be relieved as counsel and directed the parties address the following issue and any other issues of arguable merit: "Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?" *State v. Rivers*, S.C. Ct. App. Order dated Sept. 5, 2013.

Rivers, by and through counsel Benjamin John Tripp, Esq., briefed the issue identified by the Court of Appeals. Jennifer Ellis Roberts, Esq., of the South Carolina Attorney General's office, briefed the issue on behalf of the State. The parties proceeded to oral arguments before the Court of Appeals on January 8, 2015. By opinion decided February 11, 2015, the Court of Appeals affirmed Rivers' convictions. *State v. Rivers*, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015). The Remittitur was issued on February 27, 2015.

Rivers filed his application for post-conviction relief on February 27, 2015. (2015-CP-13-00108). Upon amendment dated May 31, 2017, and filed on June 2, 2017, Rivers alleged the following grounds for relief:

1. Ineffective assistance of counsel, in that:
    a. "Counsel failed to object to testimony and argue at trial child's prior injuries were not connected to Applicant."
    b. "Counsel's failure to object to the section (A)(2) charge to jury as lesser included offense of section (A)(1) constituted deficient performance."
    c. "Defense counsel [failed to object to] Supplemental instructions [that] impermissibly enlarged indictment."
    d. "Defense counsel's failure to preserve for appellate review the issue of admissibility of evidence of collateral injuries constituted deficient performance."
2. Ineffective assistance of appellate counsel, in that:
    a. "The issue appellate counsel raised on appeal was 'unpreserved' when 'directed verdict' issue was unequivocally 'preserved for appellate review.'"

The State made its return on December 16, 2016, and an evidentiary hearing into the matter was convened on July 16, 2017, before the Honorable Roger E. Henderson. Rivers was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., of the South Carolina

Attorney General's Office, (undersigned) represented the State. By written order dated October 18, 2017, and filed October 19, 2017, Judge Henderson denied and dismissed the application.

In pertinent part regarding trial counsel's failure to renew a pretrial objection to evidence of collateral injuries suffered by the infant victim, Judge Henderson relied upon *State v. Martucci*, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008); *State v. Smith*, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011); *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991); and *Estelle v. McGuire*, 502 U.S. 62 (1991); and found that "[t]hough it is undeniable that [trial counsel's] failure to object failed to preserve the issue for appellate review, the Court finds that Applicant suffered no prejudice because the evidence was properly admitted to the jury." (Appx. 551). The Court found that all the collateral injuries "were highly probative to the question of whether or not the four-month-old's death was an accident, as was and still is argued by [Rivers]." (Appx. 553). The Court further found that Rivers' "own statements and testimony established the extreme indifference necessary to convict him for homicide by child abuse[,]" and summarized Rivers' testimony as that he "left his helpless child alone immediately after reviving him by CPR." (Appx. 554).

Rivers filed a timely notice of appeal and, by and through Taylor D. Gilliam, Esq., filed a petition for writ of certiorari which raised the following issue:

> Did the PCR court err in denying Petitioner relief, where trial counsel failed to offer a contemporaneous objection, on multiple occasions, to prior injuries suffered by a child, in a homicide by child abuse case, where the evidence of prior injuries was unrelated to Petitioner, and where the Court of Appeals found the issue unpreserved?

The State filed its Return on November 5, 2018. This Court transferred the matter to the Court of Appeals, which granted certiorari and directed further briefing by Order dated October 28, 2020. Rivers, by and through Counsel Gilliam, briefed the matter to the Court of Appeals by filing on March 5, 2021. Chelsey F. Marto, Esq., of the South Carolina Attorney General's

Office, briefed the matter by filing on April 30, 2021. The parties proceeded to oral arguments before the Court of Appeals on December 5, 2022. By opinion decided July 12, 2023, the Court of Appeals reversed the PCR court and remanded the matter for a new trial, finding trial counsels deficient for failing to renew their pre-trial objection to the admission of evidence of collateral injuries found on the infant victim and that Rivers was prejudiced because there was no "nexus between the collateral evidence and the circumstances surrounding Victim's death such that logical relevance may be established to prove intent." *Rivers v. State*, Op. No. 2023-UP-261 (S.C. Ct. App. filed July 12, 2023).

The State filed its Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 10, 2023, arguing the Court of Appeals opinion (1) was irreconcilable with its contemporaneous opinion in *State v. Cook*, 440 S.C. 308, 891 S.E.2d 35 (Ct. App. 2023), and (2) that the opinion misapprehended the legal characterization of postmortem medical testimony and "Battered Child Syndrome" evidence as only "common scheme or plan" evidence rather than the purposes for which it was originally admitted: absence of mistake or accident, to establish intent, to establish the existence of "Battered Child Syndrome" in the infant victim, and as necessary *res gestae* evidence. The Court of Appeals summarily denied both the petition and suggestion on October 12, 2023.

This Petition follows.

STATEMENT OF THE FACTS

a. First responders reported to Rivers' residence on August 7, 2005, and found the infant Victim was not breathing. When they asked Rivers about what happened, he fabricated a story that the child woke up crying at 6 a.m. and had been fine before Rivers went outside to do yard work. The child died.

On August 7, 2005, at 6:53 a.m., emergency medical technician Ron Martin, First Health EMS, responded to a 911 call involving an infant ("Victim"). (Appx 126-28). Martin arrived at the reported residence at 7:10 a.m., raced inside the house, retrieved Victim from the kitchen table, and immediately took him back out to the ambulance. (Appx. 128, ll. 9-24). Victim was not breathing, had no pulse, and presented a bloodshot look from the petechial hemorrhage to his face. (Appx. 129, ll. 3-17). The other adults present kept a conspicuously unusual distance as Martin and his colleagues attempted to resuscitate the child to no avail. (Appx. 129-30). The paramedics took Victim to Chesterfield General Hospital, where doctors took over efforts to resuscitate Victim while another doctor and Martin spoke to Mitchell Rivers ("Rivers") to figure out what happened. (Appx. 130-32).

Martin documented Rivers' first statements: "family members stated the patient was okay at approximately 6:15 a.m. The father told ER MD that he changed the baby's diaper at this time. Then mother checked on him later and discovered that the baby was not breathing." (Appx. 133, ll. 4-15). Rivers also reported Victim suffered a history of bronchitis. (Appx. 133, ll. 21-24). Rivers said nothing about accidentally smothering Victim, or that he had woken to discover Victim not breathing. (Appx. 134, ll. 5-12).

Efforts to resuscitate Victim failed, and the child was pronounced dead at the hospital. (Appx. 134-35; Appx. 139-40).

Investigator Wayne Jordan, of the Chesterfield County Sheriff's Office, responded to the hospital and "was told at that time the only folks that was in the bedroom with the child would

have been the mother, Kimberly Quick Rivers, and Mitchell Rivers." (Appx. 195, ll. 14-21). Accordingly, Inv. Jordan elicited written statements at about 9:50 a.m., after Victim was pronounced dead, from Mitchell Rivers and his wife Kimberly Quick Rivers ("Quick"), Victim's adoptive[1] parents. (Appx. 195-98). Rivers told Inv. Jordan in his written statement, in relevant part:

> This morning around 6:00 a.m. the baby started crying. So, I changed his diaper because he was wet and gave him a bottle. Then I burped him and laid him on his back.
>
> So, I went outside this morning because it was cool, and I decided to get finished cleaning the yard. So, my mother asked me where I was going and that's what I was going to do.
>
> When I came back from the house about 6:45, 6:50 a.m. Kim hollered and said that the baby's not breathing. So I told her to call 9-1-1, to get an ambulance, and the lady on the phone talked me through CPR until the ambulance came, and then they came and took him to the hospital. Then the doctor told me they tried to bring him back, but my baby boy just didn't make it.

(Appx. 201, ll. 11-24). Rivers said nothing and wrote nothing about accidentally smothering Victim, or that he had woken to discover Victim not breathing, or that he performed CPR on Victim. (Appx. 202-03).

b. When paramedics and doctors inspected Victim's body, they found he had died of asphyxiation, but had also suffered cuts and bruises concurrent with his death, as well as fractures in the weeks prior.

While Rivers wrote out his statement, Inv. Jordan inspected Victim and took photographs. (Appx. 203, ll. 5-19). Inv. Jordan photographed the bloodshot petechia across Victim's face; a laceration on the right side of Victim's lip; bruising and a laceration on Victim's left back, around the ribs; bruising on the back of Victim's skull; and bruising inside Victim's

[1] The South Carolina Department of Social Services determined at the time of Victim's birth in April 2005 that his biological mother and Kimberly's sister, Jennifer, was unfit due to an intellectual disability and placed him with Rivers and Quick on April 22, 2005, after Rivers misled DSS agents as to his prior involvement with DSS. (Appx. 108-19).

right ear. (Appx. 204-05). When Inv. Jordan finished taking pictures, he retrieved the written statements from Rivers and Quick, then left to photograph the residence where Victim was found. (Appx. 205, ll. 6-21).

Dr. Janice Ross performed an autopsy on Victim the next day, August 8, 2005, and determined the manner of death was homicide and the cause of death was asphyxia. (Appx. 147-48; Appx. 208, ll. 12-13). Dr. Ross based her conclusion of homicide on "the findings of the petechia[e], . . . causing asphyxia, smothering, and the contusions around his head. There was also, internally around his brain, was subdural hemorrhage, which goes along with a blunt force trauma to the head." (Appx. 154, ll. 3-10; Appx. 162, ll. 6-14). Dr. Ross testified "it would take significant force . . . to put pressure on the chest . . . and to stop the breathing or to put something around the neck to cause the petechia[e]." (Appx. 156, ll. 1-5). Dr. Ross conceded that "an overweight individual rolling over on a child" was "feasible" to achieve the "significant force" necessary to asphyxiate Victim and cause the petechiae. (Appx. 168-69). Asthma or other breathing issues would not cause petechiae. (Appx. 169, ll. 9-13).

Dr. Ross observed that the bruises beneath Victim's scalp "were mostly red, which means they were very recent[,]" and that only some of the bruises "had little areas of yellowness around them" to indicate age. (Appx. 151, ll. 7-15). Dr. Ross opined that the four-month-old victim could not have self-inflicted the small, circular bruises, and that they were consistent with blunt force trauma from a knuckle or fist: "There's no other pattern to them." (Appx. 148, ll. 20-24; Appx. 152, ll. 3-7). The blunt force resulting in the fresh bruises and the suffocation resulting in the petechia and Victim's ultimate death occurred at the same time. (Appx. 153-55).

Additionally, the paramedics, investigators, and Dr. Ross noted Victim had suffered injuries that either occurred at some time distinct from the asphyxiation, or which could not be

conclusively temporally connected to or distinguished from the time of the cause of Victim's death. As mentioned above, some of Victim's bruises beneath his scalp had begun to yellow, indicating some age. (Appx. 151, ll. 7-15). The abrasions likely occurred at the same time as one another and may have occurred at the same time as the asphyxiation but were caused by a different function. (Appx. 167, ll. 12-25). Dr. Ross also identified fractures in Victim's posterior rib cage, which reflected a lot of squeezing pressure of the chest cavity. (Appx. 148, ll. 12-13; Appx. 157, ll. 5-13). Dr. Ross found no significant bleeding around the fractures, and they had begun to heal, so Dr. Ross opined that Victim had suffered the fractures "at least seven to fourteen days" prior. (Appx. 157-58). Radiological findings from x-ray images taken on June 20, 2005, a little more than two weeks prior to Victim's death, reflected no rib fractures. (Appx. 158-59).

Victim's stomach was empty, indicating he had not likely been fed within the hour preceding his death, inconsistent with Rivers' initial story. (Appx. 155, ll. 5-19).

Dr. Ross issued her initial autopsy report on August 9, 2005, and later issued a final report on October 13, 2010, which included the erroneously omitted details of Victim's rib fractures. (Appx. 165-66; Appx. 172, ll. 20-25).

c. Law enforcement again met with Rivers after receiving the initial autopsy report, and once confronted with the inconsistencies in his initial story, Rivers gave a new statement in which he asserted he accidentally suffocated Victim, then left him for dead to smoke crack outside.

Coroner Donnie Baker reported the preliminary results of Dr. Ross' autopsy to Inv. Jordan at some point on or after August 9, 2005. (Appx. 208-09). Inv. Jordan requested assistance from the South Carolina Law Enforcement Division ("SLED") and scheduled another interview with Rivers at the SLED Pee Dee Region Office in Florence, South Carolina. (Appx.

209-10). Inv. Jordan picked Rivers up from his residence and drove him to the office where Rivers met with "Agent Charles and Sergeant Duff." (Appx. 210-11).

Thus, on September 15, 2005, Sergeant Julie Duff, of the Florence Police Department, and SLED Special Agent Rick Charles interviewed Rivers again. (Appx. 231-37; Appx. 245-48). Rivers started by giving his original story. Victim woke up crying around 6:00 a.m., so Rivers changed the baby's diaper, fed him a bottle, and put him back in the play pen. (Appx. 237, ll. 14-25). Rivers said the baby was fine and face up, so he went outside to cut grass. (Appx. 237-38). Quick woke up to find Victim face down in the pillow, not breathing, and she called 9-1-1. (Appx. 238, ll. 7-10). Rivers attempted CPR on Victim around 6:50 a.m. until EMS arrived. (Appx. 238, ll. 10-15).

Rivers gave up the charade of his original story after the investigators informed him of Victim's rib fractures and empty stomach. (Appx. 249-50). Rivers told Sgt. Duff and S/A Charles that he wanted to change his story. (Appx. 238, ll. 16-22; Appx. 250, ll. 10-16). Rivers "confessed that he had done it, and I asked him what do you mean, and he said I did it." (Appx. 238, ll. 22-24). Duff summarized Rivers' statements in some detail:

> He said that the baby, [Victim], was not in the bed, I mean, excuse me, was not in the play pen, that he was in the bed with him.
>
> He was holding the baby in the crook of his arm, and that the baby had slept with him most of the night, and that his arm – he must of pulled the baby into his chest. He said the baby was face down in the crook of his arm, and the baby was not breathing. The baby was not breathing.
>
> He also stated that he didn't tell the truth, that he said he had not fed the baby any bottle. He said he did not change the baby. He stated that he did try to do CPR, but he, he wasn't certified or qualified on CPR and really didn't know what he was doing with the CPR.
>
> He said at that point in time he placed the baby face down in the play pen. He said he then went outside. He did not wake up his wife and tell Kimberly there was something wrong with the baby. At that time of the morning he didn't seek any help. He went outside, he knew the baby was not breathing, and he went

> outside to smoke some crack, and he said later his wife notified him that the baby was not breathing. He also stated that he must have accidentally smothered the baby in his arm.

(Appx. 238-39). Rivers denied any knowledge of Victim's rib fractures. (Appx. 239, ll. 21-24; Appx. 251, line 23). After Rivers spoke to the SLED agents, Rivers met with Inv. Jordan and SLED Special Agent Mike Anderson in a conference room and recorded a video statement. (Appx. 211-15).

After the video statement, Inv. Jordan instructed Rivers to meet with him at the Chesterfield County Courthouse on September 19, 2005, at which time Rivers was Mirandized and gave a final written statement, which provided in pertinent part:

> Saturday, about 8:00 p.m., my wife, Kim, said that, said she was going to give the baby a bath and she did. So, she put on an outfit with daddy little helper on it. About 9:00 p.m., she, myself, and the baby went into my brother's room and played the game. Around about 10:00 the baby went to sleep, and we put him in bed, put him to bed.
>
> So, my wife and me kept playing the game until about 12:00, close to 1:00. Then we decided to go to bed. That night our baby had slept in the same bed, and I was – laid him on the side between my chest and armpit, and we both went to sleep.
>
> Around 6:00 a.m. I woke up and the baby was not breathing, and I tried my hardest and hardest to do CPR that morning to bring him back, and his color had started coming back and he had started breathing.
>
> So, I laid him down in the play pen and went outside to clean off the yard. I came back inside and she had said he stopped breathing. So, I told her to call 9-1-1 to help me this time, and I kept doing CPR like she said till the ambulance get there, and that's when I did, I know I was wrong for not calling the 9-1-1 first when that happened, and I should have told them that, everybody, but I did not know what to do. Lord knows I would never hurt my own son, and I'm sorry, and I regret it everyday. But I please beg you, all of you to please help me.

(Appx. 220-21). Chesterfield County arrested Rivers later that day and charged him with homicide by child abuse. (Appx. 221, ll. 14-22; Appx. 385-86).

d. The State moved to admit evidence of Victim's injuries as relevant and necessary to counter Rivers' argument of mistake or accident, to show his motive, and as valid evidence of battered child syndrome; Counsel objected pre-trial, but erroneously relied on a remark by the Court that he was protected and did not renew his objections during trial.

The State moved by written filing prior to trial to admit evidence of Victim's collateral injuries. (Appx. 387-88). In its written Motion in Support of Evidence of Abuse, the State argued "the constellation of injuries is evidence of child abuse and neglect, directly relevant pursuant to SCRE Rule 404(b) to counter the argument of 'mistake or accident.'" (Appx. 387). Additionally, the State maintained the evidence of abuse and neglect established "motive" pursuant to Rule 404(b), SCRE. In its motion, the State pointed out that evidence of head and scalp injuries, in addition to external abrasions, were sustained within the same general timeframe of the fatal injury. Therefore, the State argued the "constellation of injuries [was] relevant and necessary in establishing evidence of child abuse and neglect." (Appx. 387-88). "When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted the injuries." (Appx. 387-88) (quoting *Estelle v. McGuire*, 502 U.S. 62, 68 (1991)). The State additionally cited to various other cases, including *State v. Smith*, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011) (evidence of prior abuse admissible to establish motive and absence of mistake),[2] which was then-recently decided; *State v. Lopez*, 306 S.C. 362, 367, 412 S.E.2d 390, 393 (1991) (battered child evidence "is admissible when given by a properly qualified expert and such testimony may support an inference that a child's injuries were not sustained by accidental means."); and *State v. Holder*, 382 S.C. 278, 294, 676 S.E.2d 690, 699 (2009) (photographic evidence admissible where it established "a pattern of continuous

[2] Subsequently reversed on other grounds by this Court in *State v. Smith*, 406 S.C. 215, 750 S.E.2d 612 (2013).

abuse and neglect, which made it more probable that (child) was a victim of child abuse or neglect rather than mere accident."), to support its argument that evidence of prior injuries to the victim in a child homicide prosecution have probative value and establish extreme indifference.

By written filing dated January 21, 2011, Trial Counsel Matthew Swilley ("Trial Counsel")[3] moved to exclude "evidence of any extraneous injuries to the decedent" on grounds that there was "no nexus" between Victim's asphyxia and Victim's broken ribs, cerebral edema, and galea contusions. (Appx. 389). Counsel also argued "none of these injuries have been attributed to the actions of the Defendant by any source at this time." (Appx. 389). Counsel followed up and expanded on his motion with a "Memorandum in Opposition to Introduce Evidence of Collateral Injuries" dated February 8, 2011. (Appx. 390-91).

Pretrial, the trial court held a *Jackson v. Denno* hearing to determine the admissibility of Rivers' statements. (Appx. 28-86). The trial court determined Rivers freely, voluntarily, and intelligently gave the statements without coercion, duress, threats, or promises and, thus denied Rivers' motion to suppress. (Appx. 86, ll. 1-14).

The trial court then also denied Rivers' motion to suppress evidence of abuse. (Appx. 87, ll. 7-11). The trial court based its decision on the written motions and memoranda each party submitted. (Appx. 86-87). Upon denying the motion, the trial court informed Trial Counsel: "You're protected on the record on that." (Appx. 87, ll. 7-12). He was not. *State v. Rivers*, 411 S.C. 551, 554, 769 S.E.2d 263, 265 (Ct. App. 2015) ("[W]e find this issue unpreserved because Rivers never raised the issue at trial for the trial court to make a final ruling.").

[3] The record reflects that Rivers was represented at trial by two attorneys, but as Swilley examined every witness and presented all arguments, the State singularly refers to him as Trial Counsel.

Consequently, at trial, Dr. Janice Ross testified that she performed the autopsy on Victim and there discovered Victim had suffered several different injuries. (Appx. 148, ll. 9-13). Trial Counsel did not object to Dr. Ross' testimony regarding these injuries.

Dr. Clay Nichols, the deputy chief medical examiner for North Carolina, also testified after reviewing Dr. Ross' autopsy findings and underlying data. (Appx. 177, ll. 4-14; Appx. 181, ll. 11-18). Dr. Nichols, too, testified about the multiple rib fractures, abrasions, and contusions on Victim's body. (Appx. 183, ll. 1-7). Dr. Nichols opined that a person performing CPR, however poorly, could not have caused the multiple bruises, bleeding on the brain, and subdural hematoma that Victim suffered, but rather that Victim suffered "a classic case of Battered Child Syndrome." (Appx. 186, ll. 12-19). Trial Counsel did not object to the admission of Dr. Nichols' testimony regarding the collateral injuries to Victim or specifically to Dr. Nichols' using the phrase "Battered Child Syndrome." Rather, Trial Counsel raised objections on grounds of bolstering, cumulative testimony, and speculation. (Appx. 181-84).

Dr. Ross and Dr. Nichols both testified the rib fractures had to have occurred sometime after June 20, 2005, when Victim had x-rays that did not show any rib fractures. (Appx. 158-59; Appx. 184, ll. 6-15).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

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 that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). 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 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. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. *Id.* Accordingly, courts must be wary of second-guessing counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

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*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*, 466 U.S. 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*, 300 S.C. at 117-18, 386 S.E.2d at 625. 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*, 466 U.S. 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. *Id.* at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

ARGUMENT

On Wednesday, July 12, 2023, the Court of Appeals of South Carolina reversed the PCR court's proper denial of post-conviction relief and held 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.

At its core, the issue before this Court is whether the law permits infant victims to testify to their secluded suffering through their scars and wounds. The Court of Appeals' holding is irreconcilable with the numerous opinions of this Court approving the admissibility evidence of Battered Child Syndrome, or even its own opinion published only two weeks prior in *State v. Cook*, 440 S.C. 308, 891 S.E.2d 35 (Ct. App. 2023).[4] The Court of Appeals opinion erred because it misapprehended the basis for which the evidence was offered, as well as the legal impact of exclusively postmortem medical testimony. Because there is no constitutional obligation upon counsel to raise or renew a meritless objection, the Court of Appeals holding is erroneous. Accordingly, the State must petition this Court for certiorari to vacate the opinion of the Court of Appeals and reinstate the order of dismissal by the PCR court. The State shows as follows:

I. The Court Of Appeals Erred In Its Opinion Because It Misapprehends The Character of Postmortem Medical Testimony, Which Is Generally Admissible As "Battered Child Syndrome" Testimony And As *Res Gestae* Evidence, And Is Distinguished From "Common Scheme Or Plan" Evidence.

The whole of the present matter, though it passes through the prism of *Strickland*, largely falls upon the question of the admissibility of the collateral injury evidence. If the evidence of the collateral injuries and battered child syndrome was properly admissible, there was no

[4] Cook has since filed their own Petition for Writ of Certiorari from this opinion which remains pending before this court. *See State v. Cook*, App. Case No. 2023-001531 (S.C.Sup.Ct. 2023).

prejudice from Trial Counsel's non-objection, as the objection should have failed anyway at trial and again on appeal. If the Court finds the collateral injury and battered child syndrome evidence was not properly admissible, Trial Counsel's reliance upon Judge Burch's admonition may have condemned Rivers, as the other evidence to refute River's "accident" defense is limited.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000).

This Court has unanimously held that testimony and evidence to support a finding of Battered Child 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." *State v. Lopez*, 306 S.C. 362, 367, 412 S.E.2d 390, 393 (1991). This Court reached that conclusion because a finding of Battered Child Syndrome "is made based on *a number of physical findings* which are inconsistent with the history of the injuries given by the parents or caretakers." *Id.* (emphasis added); *see also Estelle v. McGuire*, 502 U.S. 62, 68 (1991) ("The demonstration of battered child syndrome simply indicates that a child found with serious, repeated injuries has not suffered those injuries by accidental means.") (quotation omitted). Therefore, 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. *Cf. State v. Martucci*, 380 S.C. 232, 258, 669 S.E.2d 598, 612 (Ct. App. 2008) ("If the multiple, separately occurring injuries are not admissible in child abuse prosecutions, the crime would be virtually impossible to prove."). The purpose of Battered Child Syndrome testimony is to disprove accident or mistake, not identity, and so the identity of other perpetrators is inconsequential to the admissibility of the testimony. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

As such, the opinion of the Court of Appeals is a straightforward error, and one which runs contrary to the precedent of this Court, the Court of Appeals own precedents, and possibly the precedent of every other jurisdiction to have considered the issue of Battered Child Syndrome evidence. *See State v. Cook*, 440 S.C. 380, 891 S.E.2d 35 (Ct. App. 2023); *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).[5] The State, at Rivers' trial, only offered post-mortem medical testimony

[5] *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 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

and analysis as to the condition of the infant victim at the time of death in support of a judicially recognized medical diagnosis as *res gestae* evidence and for the purposes of disproving accident or mistake, and to show intent and motive: Dr. Ross set out her observations from the autopsy and conclusion as to death, and Dr. Nichols' opined that the injuries reflected a case of "Battered Child Syndrome." The State presented a textbook example of valid Battered Child Syndrome testimony.

The Court of Appeals erred for a few different reasons. First, the Court of Appeals too narrowly focused on one sentence from a case dealing with "common scheme or plan" evidence and incorrectly applied it to any instance of evidence of collateral injuries, irrespective of the purpose for which they would be admitted: "When there is no proof offered to show that a defendant inflicted previous injuries, testimony regarding these injuries is inadmissible." *Rivers v. State*, 2023-UP-261 (S.C. Ct. App. 2023) (citing *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997)).[6] At issue in *Pierce* was testimony by hospital employees that they had previously treated the victim for a split lip and swollen eye, and had previously observed Pierce grab the victim by his arm and jerk him from atop a counter. 326 S.C. at 178, 485 S.E.2d at 914. The State in *Pierce* specifically offered the testimony to show a "common scheme or plan under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)." *Id.* The majority in *Pierce* emphasized, in response to a dissent, that the testimony was *not* offered to prove Battered Child Syndrome. *Pierce*, 326 S.C. at 178 n.2, 485 S.E.2d at 914 n.2. In this case, by contrast, the evidence of Victim's collateral injuries was explicitly offered to support the expert opinion that Victim

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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).

[6] The original sentence the Court of Appeals sliced, diced, and remixed is "[t]he testimony regarding [the victim's] previous injuries is inadmissible absent a conviction or clear and convincing proof that appellant inflicted the injuries."

suffered from Battered Child Syndrome in order to show the absence of mistake or accident, and to show intent.

Rivers' trial is similarly distinguished from the other precedents relied upon by the Court of Appeals. *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 single 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).

Second, in contrast to the authorities relied upon by the Court of Appeals, the testimony in River's case regards injuries and stages of healing which existed and were observed at the time of the post-mortem autopsy, and not testimony of observations made at the time the injuries occurred or were first treated. The whole condition of the victim at the time of the autopsy in a case of homicide by child abuse is unavoidable *res gestae* testimony, as the victim's condition at autopsy is inherently temporally proximate, is always relevant, and is always probative. *See State v. Martucci*, 380 S.C. 232, 258, 669 S.E.2d 598, 612 (Ct. App. 2008) ("The overall view of the acts provides the context in which the crime occurred and demonstrates the culminating impact on the Child."). 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 a victim's autopsy must be fragmented and partially concealed from the jury subject to a judicial finding of a causal link.

Further, homicide by child abuse is a crime which 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 at all, 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.").

The State's argument should not be construed to mean that autopsy evidence is *per se* admissible. However, Rule 404(b), SCRE, both (1) is categorically inapplicable where the

evidence in question is introduced not to establish the character of an unidentified actor[7] but rather to establish a recognized medical condition of the victim, and (2) if nonetheless deemed applicable, specifically excepts testimony introduced to show the absence of mistake or accident or to establish intent. Evidence to establish Battered Child Syndrome, such as autopsy evidence, once its relevance is established, is thus primarily analyzed under Rule 403, SCRE, which in such context is a question of form, not substance (i.e. gruesome pictures versus testimony).

The testimony of 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 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 thus admissible, or at the very least it was not an abuse of discretion by the trial judge to admit it.

II. Even If The Battered Child Syndrome Evidence Was Not Admissible, Rivers Suffered No Prejudice Because The Jury Still Would Have Convicted Him In Light Of His Extreme Indifference As Reflected In Each Of His Statements And His Own Testimony.

Further, even if the Battered Child Syndrome evidence was inadmissible, the Court of Appeals erred by refusing to acknowledge that Rivers was not prejudiced because his own statements and testimony established the extreme indifference sufficient to convict him for homicide by child abuse. A person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . ." S.C. Code

[7] Indeed, evidence of "other bad acts" cannot logically 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.

Ann. §16-3-85(A)(1). "For the purposes of the [homicide by child abuse] statute, 'extreme indifference' has been defined as a 'mental state akin to intent characterized by a deliberate act culminating in death.'" *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 366-67 (Ct. App. 2002)).

Taking all facts as Rivers presented them, *ad arguendo*, and only those facts, Rivers left his helpless child alone immediately after reviving him by CPR. Rivers did not call for follow-up medical attention. Rivers did not wake his wife to monitor or attend to the child, who by his testimony somehow slept through his performing CPR on the Victim. Rivers went outside and stayed outside until his wife woke and found the child dead. Because of the testimony establishing Rivers' extreme indifference, any error in admitting evidence of collateral injuries was harmless, and would not have changed the outcome of the trial.

The Court of Appeals, without precedent in a post-conviction relief matter, concludes "[t]here is a stark difference between failing to act when doing so would prevent certain death, and negligently failing to follow up with additional care after an action which would have prevented death based on a mistaken belief that a child is no longer in danger." *Rivers v. State*, 2023-UP-261 at 4 (S.C. Ct. App. 2023). An infant child demands, and the law requires, affirmative care, and the deliberate refusal to provide that care in circumstances which pass beyond "mere mistaken belief" and into total, inexcusable abandonment violates the law. *McKnight*, 252 S.C. at 647, 576 S.E.2d at 648 (citing S.C. Code Ann. § 20-7-490) (Child abuse or neglect means an act *or omission* by any person which causes "harm" to the child's physical health or welfare, and "harm" includes abandonment of a child resulting in the child's death) (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari, reverse the opinion of the Court of Appeals, and affirm the PCR Court's Order of Dismissal of October 19, 2017. Should this Court grant the petition, the State can more fully brief the issues herein upon request.

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