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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable Kristi F. Curtis, Circuit Court Judge

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HEATHER MARIE LAWSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001806

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# PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether Counsel provided constitutionally deficient assistance for failing to call the coroner, where the coroner's initial determination for cause of Minor 1's death was accident, and evidence existed in the record of multiple accidental strikes to Minor 1's head prior to the date of her death, yet where accident was not charged to the jury?

## STATEMENT

Petitioner Heather Marie Lawson was indicted by the Lexington County grand jury on July 10, 2017, for homicide by child abuse. App. 859—App. 860. The charge stemmed from her alleged conduct on June 26, 2016, towards her infant daughter (Minor 1) at her mobile home in Redbank. App. 862. Specifically, on June 26, 2016, 911 was called at 5:18 pm by two people, including Petitioner, regarding the death of Minor 1. Firefighters and emergency medical services (EMS) arrived at 5:25 pm. App. 164, ln. 19—App. 167, ln. 9; App. 172, ll. 2-17. When first responders entered the home, Minor 1 was on the floor next to her "pack 'n play" play pen. Upon examination, Minor 1 was unresponsive and had no pulse; she was taken to the hospital by ambulance. App. 183, ln. 7—App. 187, ln. 6; App. 197, ll. 19-25. She arrived at the hospital by 5:27 pm, but medical providers were unable to revive her. App. 205, ll. 1-11; App. 254, ll. 19-23; 255, ll. 7-16.

Petitioner was questioned in the emergency room of the hospital by Lexington County Sheriff's Office Detective Adam Creech (Det. Creech). App. 329, ln. 23—App. 331, ln. 24. Coroner Margaret Fisher (Coroner) arrived as well and was present when Petitioner repeated her recollection of events. App. 336, 8-19.

Based upon Petitioner's answers not addressing "the severity" of bruising on Minor 1's head, police sought to question her further at the sheriff's office. App. 340, ln 18—App. 341, ln. 7. Sergeant Traci Barr (Sgt. Barr) arrived at the hospital, and after conferring with Det. Creech took Petitioner with her to the station. App. 341, ll. 7-24; App. 438, ll. 1-16. At the police station, Petitioner provided a statement in writing during her interrogation by Sgt. Barr and Det. Creech that started at 9:21 pm and ended the next morning at 1:25 am, at which time Petitioner was arrested. App. 349, ll. 2-15; App. 352, ln. 19—App. 369, ln. 18; App. 440, ll. 15-25. Sgt.

Barr questioned Petitioner again on June 28th, 2016, at approximately 10:30 am at the sheriff's office. App. 445, ll. 3-20.

An autopsy was performed by Dr. Janice Ross. She determined the cause of death was likely blunt force trauma to the head. However, she could not rule out suffocation. App. 482, ll. 3-14; App. 502, ln. 2—App. 503, ln. 14.

The case proceeded to trial from August 7th through 10th, 2017, before the Honorable R. Knox McMahon and a jury. Petitioner was represented by Theo Williams (Counsel), while the State was represented by Suzanne Mayes and Robbie McNair. App. 1.

During pretrial motions, a hearing was held regarding the prior statements Petitioner made to law enforcement. All three statements were deemed admissible. App. 62, ln. 22—App. 63, ln. 22; App. 122, ln. 9—App. 123, ln. 19.

In his opening to the jury, Counsel acknowledged that Minor 1's head was hit when she fell from a box at the gas station, but conceded "that's not the reason why this child is dead now." App. 160, ll. 17-25. During trial, Petitioner's statements to police were admitted, revealing Minor 1's head was accidentally struck on several occasions through various mishaps leading up to her death. For example, evidence was admitted indicating Minor 1's head was hit on the following occasions from Thursday to Sunday—the date of the incident: (1) when Petitioner accidentally hit Minor 1's head twice on the door frame of the convenience store where Petitioner worked; (2) on the floor of the convenience store when Minor 1 accidentally fell from the box where she was located; (3) when Petitioner accidentally hit Minor 1's head as she put her in the car; (4) when Petitioner accidentally dropped Minor 1 into the pack 'n play as she attempted to lower her in; and (5) when one of Minor 1's siblings pushed her, and she hit her

head on a toy. App. 152, ll. 5-10; App. 359, ll. 4-9; App. 449, ll. 1-24 App. 452, ln. 8—App. 454, ln. 2; App. 462, ln. 1-24; App. 465, ll. 1-12.

Dr. Susan Luberoff also testified at Petitioner's trial on behalf of the State. Her testimony included analysis of a video regarding Minor 1's apparent good health and condition at the gas station, as well as the lack of impact from her fall there. App. 591, ln. 8–App. 595, ln. 5; App. 596, ln. 11-14. However, she also confirmed on cross-examination that the bruising from blunt force trauma on Minor 1 could have been caused by something other than a fist. App. 605, ll. 5-12.

In closing argument, Counsel pointed out that the State failed to call Coroner to testify. App. 7829, ll. 9-11; App. 731, ll. 22-24. Counsel also rejected the theory of accident in his closing argument. Specifically, Counsel asserted the following:

> We're not trying to slide into the death of this child by saying, well, that baby must have bumped his head and knowing mom, she was so slack, she didn't take the child to the doctor, even though he threw up. That's not what this case is about.
>
> Are we saying that? That's not the theory of this case. The theory of this case is somebody pummeled that child with fists.

App. 725, ll. 10-18. He further discounted the pathologist's testimony and report that it could have been suffocation. App. 728, ln. 24—App. 729, ln. 2. The defense of accident was not charged to the jury. App. 737, ln. 12—App. 752, ln. 5. Petitioner was found guilty of homicide by child abuse, and the trial court sentenced her to life without parole. App. 755, ll. 17-21; App. 768, ll. 5-10.

Petitioner appealed. On April 29, 2020, the Court of Appeals dismissed the matter pursuant to Anders v. California, 386 U.S. 738 (1967). Remittitur was sent June 10, 2020. App. 771—App. 773.

On September 14, 2020, Petitioner filed her application for post-conviction relief (PCR). App. 774. The State filed its return on March 1, 2021, and a hearing was held on April 7, 2023, before the Honorable Kristi Curtis. Petitioner was represented by Ashley McMahan, while the State was represented by T. Cruise Mitchell. App. 791—App. 792.

Petitioner testified, and asserted *inter alia* that Counsel never discussed trial strategy with her. App. 796, ll. 19-21; App. 803, ll. 18-22. Counsel also testified, and indicated Petitioner's inconsistent statements "just made her look worse and worse." App. 825, ll. 1-4. Counsel also acknowledged that, although Coroner initially determined Minor 1's cause of death to be an accident, he did not call her as a witness. App. 829, ll. 5-25. His justification was as follows:

> I think when the coroner got up there she was going to fall right in line with the other experts who testified. And she was easily explained—it could easily explain why she originally called it accidental.

App. 830, ll. 1-5. Counsel further agreed that he would have had to impeach his own witness if he called Coroner to testify. App. 830, ll. 6-8.

The PCR Court filed its Order of Dismissal on November 13, 2023. App. 844. As to the issue of whether Counsel provided ineffective assistance of counsel for failing to call Coroner as a witness, the PCR Court held that Counsel articulated a reasonable trial strategy for not calling her. App. 846; App. 850. Specifically, the Court found that "[C]ounsel did not believe the coroner's testimony would have been beneficial to the defense as he believed Coroner would have ultimately testified the death was a homicide." App. 850. The PCR Court further determined Petitioner "failed to meet her burden of establishing prejudice in this regard" because Coroner did not provide testimony at the PCR hearing. App. 850. Accordingly, the PCR Court dismissed Petitioner's application.

This petition for writ of certiorari follows.

## ARGUMENT

**Counsel provided constitutionally deficient assistance for failing to call the coroner as a witness, where the coroner's initial determination for cause of Minor 1's death was accident, and evidence existed in the record of multiple accidental strikes to Minor 1's head prior to the date of her death, yet where accident was not charged to the jury.**

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." State v. Miller, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Post-conviction relief is appropriate where it is shown that: "(1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id. Counsel's performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 117, 385 S.E.2d 624, 625 (1989). Further, "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome of the trial." Miller, 379 S.C. at 115, 665 S.E.2d at 599 (quoting Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

In the present case, Counsel's failure to subpoena Coroner and call her as a witness in order to fully establish the potential defense of accident amounted to constitutionally deficient performance. See, e.g., Lounds v. State, 380 S.C. 454, 462-63, 670 S.C. 646, 650-51 (2008) (holding trial counsel ineffective for failing to subpoena and call a witness to trial whose testimony, in addition to petitioner's, "would have significantly added to the credibility of petitioner's case."). Here, Coroner had already visited the hospital the night of June 26, 2016, and was engaged with investigators regarding Minor 1's death and, as Counsel acknowledged before the PCR Court, Coroner's initial assessment in Petitioner's case was that Minor 1's death was accidental. App. 336, 8-19; App. 829, ll. 5-25. When coupled with the Petitioner's statements to law enforcement recounting multiple instances of Minor 1's head being inadvertently struck in the days leading up to June 26th, such testimony likely would have

supported a jury instruction on the defense of accident under the any evidence standard. See, e.g., State v. Owens, 427 S.C. 325, 330-33, 831 S.E.2d 126, 128-30 (Ct. App. 2019) (discussing the elements and jury instructions for accident); see also Reeves v. State, 415 S.C. 366, 378, 782 S.E.2d 747, 753 (Ct. App. 2015) (finding trial counsel ineffective for failing to procure a witness who could have provided testimony regarding additional ways the victim's injuries occurred—including accident—yet where the additional theories were not presented at trial). Yet Counsel failed to either subpoena Coroner, or call her as a witness after the State refused to do so. Under such circumstances, Counsel's performance was constitutionally deficient. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

Moreover, Counsel's insistence that he still would not have called Coroner was an unreasonable trial strategy. Even if, as Counsel surmised, Coroner subsequently altered her position when called as a witness at trial based upon the opinions of others subsequent to her initial assessment, she would nonetheless still have to acknowledge that her first assessment of Minor 1's cause of death was indeed accident. App. 830, ll. 1-5.

Additionally, the fact that Counsel might have had to impeach his own witness under the Rules of Evidence in order to compel Coroner's testimony regarding her initial assessment is irrelevant. App. 830, ll. 6-8. Simply stated, the Rules of Evidence allow parties to fairly present evidence relevant to their case—including the defense-in-chief—before the jury "to the end that the truth may be ascertained and proceedings justly determined." See, e.g., Rule 102, SCRE ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); Rules 401 & 402, SCRE (defining relevance, and providing that relevant evidence is generally admissible); Rule 613(b), SCRE (permitting extrinsic evidence of prior inconsistent statements if foundation is laid and the

witness denies previously making the statement). In other words, the specter of possible impeachment of one's own witness should not be viewed as an obstacle to the full and complete presentation of a defendant's case; to the contrary, when necessary, the use of rules compelling testimony from critical witnesses are tools to aid in presenting a defendant's full and complete defense to the jury. Accordingly, Counsel's explanation for refusing to call Coroner was objectively unreasonable, and the PCR Court's ruling to the contrary was erroneous. Ingle v. State, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)) (finding trial counsel ineffective where his articulated strategy regarding testimony was objectively unreasonable); see also Ard v. Catoe, 372 S.C. 318, 334, 372 S.E.2d 590, 598 (2007).

Furthermore, the fact that Coroner did not testify at Petitioner's PCR hearing is immaterial to the issue of what Counsel failed to glean from her at trial: Coroner's initial determination of accident. The fact that Coroner initially determined Minor 1's death to be accidental was already known by Counsel prior to trial. Counsel admitted as much at the PCR hearing. App. 829, ll. 5-25; App. 830, ll. 1-5. In other words, this fact was never in question. Rather, the only question for purposes of PCR was whether Counsel effectively used that fact as part of a reasonable trial strategy. As discussed above, Counsel knew Coroner initially determined Minor 1's death to be accidental, yet unreasonably chose not to place this fact before the jury. Accordingly, the PCR Court's finding that Petitioner failed to "meet her burden of establishing prejudice in this regard," because she did not present testimony of "the coroner during the PCR hearing, or credible evidence of the potential testimony" is erroneous.

Finally, Petitioner was prejudiced by Counsel's constitutionally deficient performance, as the defense of accident was neither explored with Petitioner, nor presented to the jury to

consider. To the contrary, Counsel's stated defenses were "SODDIT,"[1] or that "we just don't know how [Minor 1] died." App. 834, ln. 19—App. 835, ln. 8. However, as Petitioner explained, Counsel did not discuss trial strategy with her.[2] App. 796, ll. 19-21; App. 803, ll. 18-22. Thus, even though Petitioner wanted it known that the last adult in the room with Minor 1 prior to death was Minor 1's father, such a position was still not exclusive to the possibility of accident. As such, Petitioner would not have been aware that she could still have asserted the defense of accident for the jury to consider. See Nixon, 543 U.S. at 187, 125 S.Ct. at 560.

Had Counsel consulted with Petitioner and fully explained all possible defense strategies, then the value of asserting an accident defense would have been both evident and compelling given Petitioner's statements to police divulging the litany of inadvertent head injuries Minor 1 received leading up to her death, coupled with Coroner's initial determination of accident. Counsel himself testified at PCR that Petitioner's statements "just made her look worse and worse." App. 825, ll. 1-4. Rather than using them to fuel a defense of accident on Petitioner's behalf, Counsel abandoned that approach, refused to call Coroner in support of it, and instead relied upon the burden of proof and the defense of "[s]ome other dude did it." As a result, an instruction on the defense of accident was neither sought by Counsel nor charged to the jury for consideration. Accordingly, Petitioner was prejudiced. See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L.Ed.2d at 698.

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1 Counsel confirmed on cross-examination by the State that SODITT stood for the "[s]ome other dude did it" defense App. 834, ln. 23—App. 835, ln. 1.

2 "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 560 (2004).

## CONCLUSION

For the foregoing reasons, Petitioner Heather Lawson respectfully requests reversal of the PCR Court's order of dismissal, and that a new trial be granted.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of March, 2024.