STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Chesterfield County

Honorable Roger E. Henderson, Circuit Court Judge

MITCHELL RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002302

BRIEF OF PETITIONER

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ISSUE PRESENTED

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?

STATEMENT

Petitioner was indicted by a Chesterfield County grand jury for homicide by child abuse in October 2010 following the death of a child five years earlier, in August 2005. App. 556 – 557. The state called Petitioner's case to trial before the Honorable Paul M. Burch and a jury on February 8, 2011. App. 1. Suzanne Mayes and Adam Foard served as the assistant solicitors, and Matthew Swilley and Tiffany Gibson represented Petitioner. Id.

Following a multi-day trial, the jury found Petitioner guilty as indicted. App. 373 ll. 4 – 10. Judge Burch sentenced Petitioner to a life sentence. App. 382 ll. 14 – 16.

An Anders[1] brief was filed on Petitioner's behalf on or about August 15, 2012. App. 393 – 416. This Court issued an Order on September 5, 2013 which directed the parties to brief 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?" App. 417. The Brief of Appellant was submitted on December 6, 2013. App. 419 – 430. The state filed its Brief of Respondent on or about February 27, 2014. App. 432 – 455.

This Court issued an opinion affirming Petitioner's conviction on February 11, 2015. App. 457 – 461. Petitioner filed a timely application for post-conviction relief on February 27, 2015. App. 462 – 470. Counsel for Petitioner would later file an amendment to the PCR application on May 31, 2017. App. 471. The state made its Return on December 16, 2016. App. 473 – 478.

An evidentiary hearing was held on July 17, 2017 before the Honorable Roger E. Henderson. App. 480. Lance Boozer represented Petitioner, and Johnny Ellis James, Jr.

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[1] Anders v. California., 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

appeared on behalf of the state. Petitioner, Matthew Swilley, Tiffany Gibson, and Benjamin Tripp testified at the hearing.

Following the evidentiary hearing, the state filed a Memorandum Opposing Post-Conviction Relief on August 9, 2017. App. 539 – 544. By way of a written Order[2], Judge Henderson dismissed Petitioner's claims and denied relief. App. 547 – 557. He found that Petitioner "suffered no prejudice because the evidence was properly admitted to the jury." App. 551.

After an appeal was filed with the South Carolina Supreme Court, the undersigned filed a Petitioner for Writ of Certiorari and the Appendix in this case on June 18, 2018. The state filed its Return on November 5, 2018. The case was transferred to this Court on November 19, 2018. Certiorari was granted on October 28, 2020.

This Brief of Petitioner follows.

[2] The Order of Dismissal contained many similarities, including the same citation errors as well as two identical footnotes, to the State's Memorandum Opposing Post-Conviction Relief. App. 539 – 544.

STANDARD OF REVIEW

The PCR court's findings of fact are entitled to deference and will be upheld when there is any evidence of probative value to support them. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Reversal is warranted where no evidence of probative value supports the PCR court's decision. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999). Questions of law, are reviewed *de novo*, and an appellate court will reverse when the PCR court's decision is controlled by an error of law. Jordan, supra.

ARGUMENT

The PCR court erred 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.

This trial drastically affected two lives: it resulted in a life sentence for Petitioner, and it impacted the career path of a young attorney who was appointed to represent Petitioner and who tried a multi-day jury trial less than one-and-a-half years after being sworn into the South Carolina Bar. At the time of Petitioner's trial, February 2011, counsel had been practicing law for fifteen months. App. 516 l. 21 – App. 517 l. 1. Following the jury verdict and resulting life sentence, counsel expressed regret to Petitioner. In a remarkable admission, counsel testified that Petitioner's case was one of the reasons why he left the public defender's office. App. 517 l. 25 – App. 518 l. 16. As far as criminal cases, counsel characterized Petitioner's matter as *the case* which he looks back on and regrets the most. App. 518 ll. 17 – 20. Counsel acknowledged that the admission of collateral injuries "turn[ed] the case into a case where instead of a one time occurrence of a child dying, it showed a whole pattern of abuse that was allowed to be ... submitted before the jury." App. 519 ll. 1 – 9.

Relevant facts

Petitioner was married to Kimberly Rivers, and the two lived in a house with many other people. App. 196 ll. 16 – 25; App. 260 l. 8 – App. 261 l. 4. The duo began caring for a child after Kimberly's sister was deemed unfit to have custody of the child she birthed. App. 107 l. 8 – App. 112 l. 6; App. 261 ll. 12 – 19. The South Carolina Department of Social Services performed a home study and found no problems with Petitioner's home. App. 114 l. 18 – App.

116 l. 9. Tragically, the child developed breathing problems and was diagnosed with bronchitis. App. 262 l. 16 – App. 263 l. 23. The child was taken to the doctor's office and spent three days in the hospital with Petitioner and Kimberly. App. 263 ll. 20 – 25.

On the night of August 6, 2005, Kimberly bathed the child, and Petitioner picked out some clothes for him to sleep in. App. 265 l. 1 – App. 267 l. 8. The three played for a while before going to sleep in the same bed. Id. Petitioner awoke to the child's face under his armpit and began performing CPR. App. 267 ll. 9 – 22. The child began breathing again, and Petitioner laid him in the playpen. Id.

Later that morning, Kimberly approached Petitioner and informed him that the child had stopped breathing. App. 268 l. 4 – App. 270 l. 21. Petitioner began performing CPR a second time, and he directed Kimberly to call 911. Id.; App. 300 ll. 10 – 14. Petitioner and three family members rushed to the hospital behind the ambulance that came to pick up the child. App. 268 l. 15 – App. 269 l. 14. Sadly, the child passed away. App. 270 ll. 4 – 21. Petitioner lost his faith as a result of this death, and he struggled to pay for the child's funeral expenses. Id.; App. 274 ll. 8 – 19.

Petitioner was arrested on September 19, 2005 after giving a statement to law enforcement. App. 221 ll. 14 – 22. Trial counsel was appointed to Petitioner's case. App. 487 ll. 5 – 7. The two met three or four times before Petitioner's plea-turned-trial. App. 487 ll. 8 – 10. Counsel began representation of Petitioner in 2010 or 2011, five to six years after Petitioner's arrest. App. 487 l. 11 – App. 488 l. 3. Petitioner confided in counsel and explained all the facts in his case. App. 493 ll. 5 – 7. Petitioner was adamant that he wanted a trial. App. 493 l. 21 – App. 496 l. 13; App. 507 ll. 16 – 24.

The state brought in Suzanne Mayes of the Prosecution Commission to try the case. App. 378 ll. 2 – 14. Following the selection of a jury, Petitioner began the process of entering a guilty plea. App. 51 l. 3 – App. 55 l. 22. Immediately after hearing the allegations, Petitioner indicated that he was unable to plead guilty:

> Court: Mr. Rivers, I may [have] caused some confusion in there. That's what the State's alleging, and I fully understand that you're pleading under Alford. You're not pleading guilty straight up. But that's what the allegation in the indictment alleges.
>
> Does that clarify it for you a little bit?
>
> Petitioner: Yes, sir, that clarifies it, **but I can't do that**. **I'm sorry. I'm sorry. I can't do that. Over my heart, now, I'm sorry, I can't, I can't plead guilty to that. I'm sorry Mr. Man. I'm, I'm just sorry. I can't do that.**

App. 54 l. 17 – App. 55 l. 2. (emphasis added). The trial court reminded Petitioner that he could possibly be facing a life sentence, and the pre-trial hearings resumed. App. 55 ll. 3 – 22.

Counsel moved pre-trial to suppress evidence of collateral injuries. App. 86 l. 16 – App. 87 l. 12. The brief exchange between the trial court and counsel would become a major point of contention during the direct appeal and post-conviction relief stages of Petitioner's case:

> Counsel: Your Honor, we may have already given Ms. Mayes a copy of this as far as the motion. I think we made cross-motions to keep out certain aspects of the collateral evidence that was observed during the autopsy.
>
> …
>
> Court: I'm going to have to deny that motion too based especially on the recent case. These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases.
>
> All right. You're protected on the record on that.

App. 86 l. 16 – App. 87 l. 12; App. 385 – 392; App. 509 l. 25 – App. 511 l. 12. It was unclear which of the cross motions that the trial judge was referencing.

The state's opening statement began with the following statement: "Ladies and gentlemen, what this case is about is child abuse, and you're [going to] be hearing the testimony about this case that might be difficult to listen to." App. 95 ll. 20 – 23. The state introduced the concept of prior, collateral injuries, mentioned abuse half a dozen times in the opening sentences of the trial, and promised that "[t]he medical evidence suggests something" other than an accident. App. 95 l. 21 – App. 99 l. 9.

Trial counsel countered this contention in opening statements, and the below ideas are the ones that have carried this case through both the direct appeal and the post-conviction relief process:

> [Petitioner] loved Child. He would never do anything to harm Child, and it will -- it's [going to] come into evidence that there were injuries discovered on this child. Pay attention. **Not one shred of evidence will link anything bad that happened to that child to my client at all. Not through testimony. Not through medical evidence. No[t] through anything. Mitchell Rivers never intentionally, or under circumstances that exhibit great indifference to human life, ever harmed this child and you're [going to] see this.**

App. 102 l. 17 – App. 103 l. 1. (emphasis added).

Ron Martin, the paramedic who arrived at Petitioner's home and transported the child to the hospital, was the state's first witness to discuss the collateral injuries to the child. App. 137 l. 16 – App. 139 l. 8. Counsel did not object to this line of questioning. On cross-examination, Martin admitted that he was unable to form a link between the prior injuries and the child's death. App. 142 ll. 10 – 14.

The state's next witness was Dr. Janice Ross, an admitted "arm of the prosecution in this matter." App. 166 ll. 12 – 15. Dr. Ross was qualified as an expert witness in the field of

forensic pathology, and she was the next witness to testify about collateral injuries to the child. App. 146 ll. 4 – 8; App. 148 l. 7 – App. 152 l. 6. The state elicited testimony that contusions that Dr. Ross observed were consistent with "trauma such as a knuckle or a fist" and that there was no other pattern to explain them. App. 152 ll. 3 – 7. Dr. Ross also testified about "old rib fractures" and indicated that they were likely caused by "squeezing of the chest cavity" in the front or side to side. App. 157 ll. 7 – 18.

Trial counsel objected on the grounds of speculation and cumulative testimony under Rule 403, SCRE, but did not object subject to the prior motion to exclude evidence of the collateral injuries. App. 149 l. 5 – App. 151 l. 21. On cross-examination, Dr. Ross conceded that she changed the manner of death after receiving a call from Suzanne Mayes. App. 164 l. 22 – App. 165 l. 10.

Clay Nichols, a forensic pathologist, was the next witness during the state's case-in-chief to remark on "the physical abuse resulting in multiple rib fractures as well as multiple abrasions and contusions" on the child's body. App. 182 l. 5 – App. 183 l. 7. Once more, counsel objected on the grounds that the testimony was cumulative and speculative but did not refer to the pre-trial motion. Id.; App. 184 ll. 21 – 24. On cross examination, Dr. Nichols admitted that nothing he viewed connected the alleged abuse to Petitioner. App. 187 ll. 6 – 9.

At the PCR evidentiary hearing, trial counsel testified he did not object because he believed the matter had already been decided and further argument would have been superfluous. App. 512 l. 16 – App. 513 l. 1. He admitted that such an understanding was incorrect and that he made a mistake in assuming as such. App. 513 ll. 2 – 6. Counsel indicated at the evidentiary hearing that he still believed he was protected when each of the state's witnesses testified. App. 513 ll. 7 – 15.

The state rested following the testimony of Rick Charles, and counsel moved for a directed verdict. App. 254 l. 16 – App. 256 l. 15. Trial counsel then put up a defense consisting of five witnesses, including Petitioner.

Petitioner was asked during cross-examination where the various injuries to Child came from. App. 287 l. 13 – App. 288 l. 5. Each time he was asked about a particular injury, he responded with some variation of "I have no idea." Id.

After the conclusion of the defense's case, counsel for both parties discussed jury charges with the trial court. App. 326 l. 1 – App. 330 l. 16. In particular, the state sought a charge under S.C. Code Ann. § 16-3-85(A)(2) for aiding and abetting, even though Petitioner was only charged under (A)(1). Id.; App. 556 – 557. The state relied on State v. Smith, 391 S.C. 352, 705 S.E.2d 491 (Ct. App. 2011).[3] The state related alleged abuse from Smith to the child's injuries in Petitioner case, even though none of the witnesses were able to connect the two. App. 329 ll. 4 – 25.[4] The trial court indicated that it would charge the jury accordingly and did so. App. 330 ll. 9 – 15; App. 361 l. 24 – App. 363 l. 5.

Defense counsel had the first closing argument after the State waived. App. 330 ll. 24 – 25. Counsel attempted to distance the evidence of the child's prior injuries from Petitioner:

> Well, I am telling you what I am denying, and what I submit to you is that Mitchell Rivers did not cause any injuries to the child. He would not have allowed any of those injuries to be caused to that child. And there is no evidence in the record of that.

App. 333 ll. 18 – 22.

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[3] This Court's opinion would later be reversed by the South Carolina Supreme Court in State v. Smith, 406 S.C. 215, 750 S.E.2d 612 (2013).

[4] The undersigned believes the transcript contains a scrivener's error at line 22 on page 329. It is believed that Mr. Swilley was responding to Ms. Mayes by arguing that Petitioner never placed the blame on anybody else. App. 329 ll. 4 – 25.

The state would later concede that the child's bruises were unrelated to his death. App. 345 ll. 18 – 19. However, towards the end of the State's closing argument, the following improper remarks (curiously in the passive voice at times), which not only instructed the jury to speak the truth but also linked the prior injuries to Petitioner, were offered:

> You have before you the most noble of opportunities. The chance to strike back against injustice, and deliver a verdict that speaks the truth.
>
> In this case, the truth is that Child was battered. Child was beaten. That Child was smothered to death. Mitchell is guilty as charged with failure to act with the omission and omissions that lead to the death of Child.

App. 351 ll. 1 – 17.

During deliberations, the jury sent a note requesting "a better definition of aiding and abetting." App. 369 l. 3 – App. 370 l. 3. The jury found Petitioner guilty of homicide by child abuse, and the trial judge sentenced him to life in prison. App. 373 ll. 4 – 10; App. 382 ll. 14 – 16. During the sentencing phase, Petitioner maintained his innocence. App. 379 l. 23 – App. 380 l. 24; App. 382 ll. 17 – 22.

Following the conclusion of Petitioner's trial, counsel sent Petitioner a letter indicating that the day the jury read the guilty verdict was the worst day of his career. App. 499 ll. 17 – 24.

Petitioner's appeal to the South Carolina Court of Appeals began with a two-issue brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). App. 393 – 416. Interestingly, the Anders brief contained a rather prescient footnote: "In the event the Court deems the matter unpreserved for direct appeal for failure to timely object contemporaneously when the testimony was elicited, then the issue may be proper for post-conviction relief." App. 404. The Court of Appeals issued an order on September 5, 2013 directing the parties to file briefs regarding the trial court's admission of collateral injuries. App. 417.

Briefs were filed by both parties. App. 419 – 456. The state devoted a portion of its brief to addressing the preservation issue. App. 446 – 448. This Court affirmed Petitioner's conviction by way of a published opinion. State v. Rivers, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015); App. 457 – 461. This Court noted that the trial court never ruled on the issue of admission of collateral injuries. Id. at 554, 769 S.E.2d at 265. Notably, this Court found the issue unpreserved and remarked that the state admitted its strongest argument was the issue was unpreserved: "During oral argument, the State admitted its strongest argument was the issue presented is unpreserved. We remind the bar that our appellate courts have 'consistently refused to apply the plain error rule' and 'it is the responsibility of counsel to preserve issues for appellate review.'" Id. at 555, 769 S.E.2d 266, n. 2 (internal citations omitted).

Discussion

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

As pointed out by both the state's Memorandum Opposing Post-Conviction Relief and the Order of Dismissal, "[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 Ann. § 16-3-85(A)(1); App. 542; App. 554. Both documents similarly concluded that any error in admitting evidence of collateral injuries was harmless. Id. Although the Order of Dismissal indicated that it "passed upon [the] credibility" of defense counsel and Petitioner, no credibility findings were mentioned. App. 549.

Counsel admitted that the admission of prior injuries to Child "substantially hindered" his defense of Petitioner. App. 509 ll. 20 – 24. Counsel conceded that his failure to object to the admission of the collateral injuries negatively affected Petitioner's trial and subsequent appeal. App. 516 ll. 12 – 20. Although he was unfamiliar with the law at the time, he admitted at the evidentiary hearing that he knows now that in similar circumstances he would need to object again in order to preserve the record. App. 517 ll. 5 – 8. Interestingly, when asked whether he believe the trial judge would have changed his previous ruling regarding the admission of the collateral injuries had he objected in a timely manner, counsel replied that he was unable to say what the judge would have done. App. 520 ll. 18 – 22.

At the conclusion of the evidentiary hearing, counsel for the state requested the opportunity to submit written memoranda. App. 531 l. 22 – App. 532 l. 11. Before the hearing ended, the PCR court heard closing remarks from counsel for both sides. App. 532 l. 19 – App. 537 l. 8. The state suggested that counsel reasonably relied upon the statements of the trial judge and that the evidence was properly admitted. Id. PCR counsel distinguished a case offered by the state, State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008), from the matter *sub judice*:

> In Martucci, specifically, what's so important about [Petitioner's] case is this evidence that the State was seeking to admit[,] there was … nothing done to link that to [Petitioner]. In Martucci there [was] linking evidence that applies directly to Martucci that "the evidence was Martucci's hostility, cruelty and abuse toward the child could be established by evidence that during the weeks before he died [ ] Martucci the defendant abuse[d] the child by slapping him in the face, taping his mouth shut and dunking his head in the bathtub until he choked to stop him from crying." All we have in [Petitioner's] case are some injuries to the ribs that [are] supposedly healing that we have no idea where they came from. So that's completely different than these cases that are being cited by the State.

App. 535 l. 5 – App. 537 l. 8. PCR counsel made a similar point in response to the state's Memorandum Opposing Post-Conviction Relief. App. 545 - 546.

In Martucci, this Court held that alleged prior abuse of a child was admissible to show intent, identity, a common scheme or plan of abuse, and the *res gestae*. 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008). The similarities between Martucci and Petitioner are few and far between: both individuals received life sentences, and both appeared at emergency rooms with minor children who had prior injuries. For the reasons below, however, Martucci is inapplicable to Petitioner's case, and the evidence of collateral injuries should not have been admitted.

In Martucci, a witness named John Parker testified at length about the prior abuse the minor child faced at the hands of Martucci:

> There was an incident where we were in his living room and [Child] was crying. And Mr. Martucci had told him on numerous occasions to … He was asked—Mr. Martucci asked him—or told him on numerous occasions to stop crying. And [Child] did not do so. He then proceeded to tape his mouth shut with tape.
>
> …
>
> There were episodes where he would be in the bathroom and Mr. Martucci would be giving him a bath. I would hear [Child] crying. And I would walk in to see what he was crying about and Mark would be pouring water over his head. And [Child] would continue to keep crying. He would tell him that crying is for pussys. And he would dunk his head under water. He did that on numerous occasions.
>
> …

> He would swallow water almost like he was choking on the water. And then he would pull him up. And then no sooner—he would barely even catch his breath and he would do it again.
>
> …
>
> We were outside sometimes and then there was a couple of occasions in the inside of his house where he would be crying and Mr. Martucci would slap him in the face on both sides of his face.
>
> …
>
> I've seen him grab his face like that when he wouldn't stop crying and try to tell him to be quiet.
>
> …
>
> I did notice the bruises on his face from the way he was grabbing him. And I believe I did notice the bite on his wrist. They—it did seem that they went out of their way to make sure he kept his clothes on. I very rarely seen him without clothes, except for the incidents in the bathroom.

Martucci, 380 S.C. at 241-2, 669 S.E.2d at 603-4. This Court held that "Martucci's hostility, cruelty, and abuse toward Child could be established by evidence that, during the weeks before he died, Martucci abused Child by slapping his face, taping his mouth shut, and dunking his head in the bathtub until he choked to stop him from crying." Id. at 252-3, 669 S.E.2d at 609. "The presence of bite marks and bruises, and the fact that Martucci kept Child's skin covered and rarely let him out of the house in the apparent attempt to conceal the abuse, is further evidence of Martucci's state of mind to inflict the fatal injuries." Id.

Petitioner's family members, on the other hand, indicated the situation with Child was quite the opposite. Four witnesses took the stand in Petitioner's defense and told the jury how they had never witnessed Petitioner hurt or mistreat his own child.

Charles Rivers, Petitioner's father, spoke about how Petitioner "really loved" the Child and worked tirelessly to support his family. App. 291 ll. 10 – 21. He never observed Petitioner

mistreat the child. Id. Terry Johnson, Petitioner's older brother who was living at the house with Petitioner and Child, similarly never saw Petitioner "do anything wrong to the child." App. 297 ll. 8 – 23. He stated under oath that he never saw Petitioner be careless with Child or harm Child, either intentionally or unintentionally. Id. Petitioner also testified about his full-time job which required him to work weekends as well. App. 264 ll. 1 – 11.

Petitioner's niece, who was living at the house at the time Petitioner and his wife cared for Child, never saw Petitioner mistreat the baby. App. 306 l. 12 – App. 307 l. 15. She never recalled seeing the child injured. Id. Petitioner's younger brother, who was also living at the house in 2005, never saw Petitioner mistreat the baby. App. 312 l. 5 – App. 313 l. 18. He never saw the baby get hurt. Id. He opined that Petitioner treated the baby well. Id.

The actions taken by Martucci are incongruent to the facts in Petitioner's case. As pointed out repeatedly by trial counsel, appellate counsel, and PCR counsel, there was no evidence linking the child's injuries to Petitioner. The testimony from Petitioner's family members about how well he cared for the child is a stark contrast to face slapping, mouth taping, and head dunking.

In Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), the South Carolina Supreme Court held that counsel was deficient for failing to adequately preserve an issue of whether the petitioner was observed in shackles. Although a similar determination could have been made in the present case, the Order of Dismissal contained no such language. The PCR court's sole focus was on prejudice, without a mention of deficiency. The Order of Dismissal only contains a finding that "it is undeniable that Applicant's failure to object failed to preserve the issue for appellate review." App. 551.

The Order of Dismissal then discussed in great detail the PCR court's conclusion that the evidence was admissible at trial as a means of eliminating prejudice from Petitioner's case. The PCR court erred outright when it concluded that "Applicant suffered no prejudice from [the admission of the evidence regarding prior injuries] to the jury or the failure to preserve the issue of its admissibility for appeal." App. 553. There is no evidence in the record to support such a contention.

The PCR court also found that "Applicant's own statements and testimony established the extreme indifference to convict him for homicide by child abuse." App. 553. In State v. Fletcher, the South Carolina Supreme Court held, in a homicide by child abuse case where the identity of the perpetrator was the essential issue at trial, that a statement by Fletcher that he wrestled with the child, hit him with his elbows, and even punched him, did not make the admission of improper witness testimony harmless beyond a reasonable doubt. 379 S.C. 17, 25-26, 664 S.E.2d 480, 484 (2008). Therefore, the statement was not deemed to have overcome the error in admitting witness testimony. Much like Fletcher's statement to police did not excuse the error such that no other conclusion could be reached, neither Petitioner's statements nor his testimony preclude a finding of prejudice.

Mr. Rivers was denied the opportunity to have the trial judge rule make a final determination on the admissibility of this evidence. Moreover, and as a result, he never received appellate review on that matter. The state's attempts at suggesting that the evidence was properly admitted fail to account for the ever-changing landscape in this area of the law. It is nearly impossible to speculate, with any degree of accuracy, what the outcome of a direct appeal would have been. As it stands, however, Mr. Rivers was not afforded that opportunity based on trial counsel's failure to preserve the issue.

The prior injuries were referred to *ad nauseam* by the state, through Suzanne Mayes in opening and closing arguments, through a lay witness, and through two expert witnesses. Petitioner continuously denied the allegations against him. App. 488 ll. 12 – 19. The prejudice in this case manifested itself at every turn. There is a reasonable probability that the outcome of Petitioner's case would have been different had counsel objected to the admission of the evidence relied on so heavily by the state.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse the PCR court and grant him post-conviction relief.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of March, 2021.