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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Appeal from Chesterfield County
The Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2023-001757

MITCHELL RIVERS,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

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ORDER DENYING PETITION FOR REHEARING DATED OCT. 12, 202320

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Mitchell Rivers, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002302

Appeal From Chesterfield County
Roger E. Henderson, Circuit Court Judge

Unpublished Opinion No. 2023-UP-261
Heard December 5, 2022 – Filed July 12, 2023

REVERSED AND REMANDED

Appellate Defender Taylor Davis Gilliam and Appellate
Defender Jessica M. Saxon, both of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson, Senior
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all of Columbia, for Respondent.

PER CURIAM: In this post-conviction relief (PCR) action, Appellant Mitchell Rivers (Rivers) seeks review of an order dismissing his claim of ineffective

assistance of counsel. Rivers argues that the PCR court erred in finding that Rivers's trial counsel was not ineffective in failing to object to evidence related to the victim's injuries. We reverse and remand.

FACTS

On August 7, 2005, around 6:00 a.m., Rivers woke up to find his four-month-old adopted son (Victim) asphyxiated underneath his armpit. In his initial interview with the police, Rivers stated that he successfully performed CPR on Victim, laid him down in the play pen, and went outside to mow the grass. Later that morning, Kimberly Rivers, his wife and Victim's adoptive mother, found that Victim was no longer breathing and dialed 9-1-1. Tragically, Victim died.

On September 19, 2005, after the autopsy report was filed, Rivers was re-interviewed by SLED officers, who found some inconsistencies in his prior statement. After giving this new statement, Rivers was arrested and charged with homicide by child abuse (HCA).

At the pretrial hearing, trial counsel for Rivers moved to suppress evidence of collateral injuries. The circuit court denied the motion, stating that "[t]hese child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases." However, the court clarified that counsel was protected on the record on that motion.

At trial, the State called Dr. Janice Ross, a forensic pathologist, to testify to Victim's collateral injuries. She stated that she found abrasions and bruises on Victim's scalp, abrasions on the back of Victim's head, and several rib fractures that were in the process of healing. She indicated that some of the abrasions occurred contemporaneously with the asphyxiation but answered in the affirmative when asked whether these abrasions could have been the result of an overweight individual rolling over on a child. Ron Martin, a paramedic on the scene of the incident, and Dr. Clay Nichols also testified to Victim's collateral injuries. Counsel objected to the testimony of Dr. Nichols and Dr. Ross on the ground that their testimony was cumulative and speculative. However, he never raised the grounds set forth in his pretrial motion to suppress evidence of the collateral injuries. Also, four of Rivers's family members, who were living at the house¹ at the time of the incident, testified

¹ It is unclear exactly how many people were living in the house at the time of the incident. However, Wayne Jordan, the lead investigator of this incident, estimated that there were "somewhere of five to seven folks living in that home."

that Rivers never mistreated Victim. At the trial's conclusion, the jury found Rivers guilty of HCA, and the circuit court sentenced Rivers to life imprisonment.

Rivers appealed to this court, which subsequently affirmed his conviction. *State v. Rivers*, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015). The court found the issue of the admission of collateral injuries unpreserved. *Id.* at 553, 769 S.E.2d at 265.² Rivers later filed a PCR application for ineffective assistance of counsel. The PCR court dismissed Rivers's PCR application. This appeal followed.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "However, the [appeals c]ourt will reverse the lower court's decision if it is controlled by an error of law." *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018). "We review questions of law de novo, with no deference to trial courts." *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839 (footnote omitted).

LAW/ANALYSIS

Rivers alleges that his trial counsel was ineffective by failing to object to evidence of the Victim's collateral injuries. We agree.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013); *see also* U.S. Const. amend. VI. "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

I. Prejudice

² When this case was first heard before this court, "the State admitted its strongest argument was the issue presented is unpreserved." *Rivers*, 411 S.C. at 555 n.2, 769 S.E.2d at 266 n.2.

Rivers argues that he was prejudiced through evidence of prior bad acts presented to the jury. We agree.

To prove prejudice, an appellant must show a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting *Strickland*, 466 U.S. at 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing *Strickland*, 466 U.S. at 694). In making the determination of whether a PCR applicant met their burden, "we must consider the totality of the evidence before the jury." *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (footnote omitted). "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.

A. Prior Bad Acts

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; *see also State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923) (indicating that the admission of prior bad acts creates propensity evidence that has "the inevitable tendency . . . to raise a legally spurious presumption of guilt in the minds of the jurors"). "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b). "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *Id.* at 24, 664 S.E.2d at 483. "Further, even though the evidence falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

When there is no proof offered to show that a defendant inflicted previous injuries, "testimony regarding [these] injuries is inadmissible[.]" *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997). However, "[w]hen a child is brought to an emergency room with injuries in various stages of healing, there is evidence of

recurring child abuse." *State v. Martucci*, 380 S.C. 232, 254, 669 S.E.2d 598, 609 (Ct. App. 2008). This court in *Martucci* warned that "[i]f the multiple, separately occurring injuries are not admissible in child abuse prosecutions, the crime would be virtually impossible to prove." *Id.*

While we appreciate the unique set of difficulties that encumber HCA prosecutions, this case is distinguishable from *Martucci*. In that case, the defendant sought to exclude testimony related to prior bad acts. *See id.* at 251, 669 S.E.2d at 608. A witness testified that the victim was abused "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 241–42, 252–53, 669 S.E.2d at 603, 609. The court found that this testimony, combined with efforts to conceal the abuse, established the intent necessary for admissibility under Rule 404(b) and *Lyle*. *See id.* at 253, 669 S.E.2d at 609.

In the present case, we find it more difficult to establish a nexus between the collateral evidence and the circumstances surrounding Victim's death such that logical relevance may be established to prove intent. *See Lyle*, 125 S.C. at 417, 118 S.E. at 807 ("[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."). We acknowledge the evidence of concurrent injuries but reiterate that Victim's injuries related to asphyxia are separate and chronologically distinct from other collateral injuries. Further—unlike the eyewitness testimony presented in *Martucci*—the only type of evidence regarding the cause of Victim's injuries is postmortem medical testimony. The weak chronological nexus between the prior injuries and Victim's death creates a high degree of unfair prejudice that requires excluding evidence of the [prior][collateral] injuries. *See Pierce*, 326 S.C. at 178, 485 S.E.2d 914 (finding evidence of prior child abuse inadmissible where there was negligible evidence that defendant inflicted the collateral injuries); *see also State v. Cutro*, 332 S.C. 100, 106, 504 S.E.2d 324, 327 (1998) (finding evidence of prior infant death and diagnosis of a second infant's Shaken Baby Syndrome inadmissible where there was insignificant evidence that defendant inflicted the injuries). Considering the entirety of the evidence in the record on appeal, there is a reasonable probability that a jury could find that the evidence of these prior bad acts was not clear and convincing. *See Fletcher*, 379 S.C. at 25, 664 S.E.2d at 483–84 (evidence for prior bad act testimony was inadmissible when there was no evidence connecting defendant to the prior bad act).

B. Sufficiency of the Remaining Evidence

The State argues that even if the collateral evidence is inadmissible, Rivers is still not prejudiced because counsel's failure to object did not affect the trial proceedings and the admission of this evidence amounted to harmless error. We disagree.

Section 16-3-85(A)(1) of the South Carolina Code (2015) (HCA statute) states in pertinent part:

(A) A person is guilty of homicide by child abuse if the person:

(1) 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 (emphasis added).

"For the purposes of the HCA 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, 367 (Ct. App. 2002)). The State argues that the following establishes the "extreme indifference" sufficient to sustain an HCA claim:

[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 slept through his performing CPR on the Victim[; and Rivers] went outside and stayed outside until his wife woke and found the child dead.

(record citations omitted).

This court has found "extreme indifference to human life" in the HCA context when a defendant displays sheer apathy in the face of a life-threatening situation to a child. *See State v. Thompson*, 420 S.C. 192, 209, 802 S.E.2d 623, 631 (Ct. App. 2017) (finding extreme indifference where a mother failed to help her child bleeding

out through a shirt); *see also Jarrell*, 350 S.C. at 99, 564 S.E.2d 362 at 367 (finding extreme indifference when a mother left her child at her residence knowing that he would be killed). There 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.³ Thus, in the absence of the prior-bad-acts evidence, there is a reasonable probability⁴ that a jury could have had a reasonable doubt that Rivers exhibited an "extreme indifference to human life," integral to a finding of HCA.⁵

Therefore, the connection between the prior-bad-acts evidence and Victim's asphyxiation is tenuous and raises a "legally spurious presumption of guilt" that our supreme court cautioned against. *Lyle*, 125 S.C. at 417, 118 S.E. at 807; *see also Brooks*, 341 S.C. at 62, 533 S.E.2d at 328 ("When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."). Accordingly, the admission of the prior-bad-acts evidence was prejudicial such that it undermines confidence in the outcome of the trial.

II. Deficient Performance

"To prove trial counsel's performance was deficient, an applicant must show 'counsel's representation fell below an objective standard of reasonableness.'" *Smalls*, 422 S.C. at 181, 810 S.E.2d at 840 (quoting *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). "[C]ounsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy." *Stone v. State*, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). "Under certain circumstances, [] counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion—if counsel reasonably perceives

³ Rivers testified on cross-examination that "I made sure that [Victim] was breathing, breathing first, and when I saw he could breath[e] and his complexion came back, I thought he was okay, that's when I put him in the play pen, and then I left the room."

⁴ Evidence of the contemporaneous injuries, while admissible, was not strong enough to offset the reasonable probability that those injuries could have happened accidentally.

⁵ We note that our inquiry cannot supplant the jury's role as the finder of fact; instead we adduce that but for the prior-bad-acts evidence, there is a reasonable probability that a rational fact finder "would have had a reasonable doubt respecting guilt." *Catoe*, 372 S.C. at 331, 642 S.E.2d at 596.

the benefits of doing so are outweighed by some other consideration." *Id.* at 383, 798 S.E.2d at 568. "The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound." *Id.* at 384, 798 S.E.2d at 569.

In the present case, counsel for Rivers failed to renew his pretrial motion when the evidence of prior bad acts was presented. Because no valid trial strategy was articulated by counsel, this mistake is sufficient to support a finding of deficient performance. Furthermore, a finding of deficient performance is also supported by trial counsel's failure to object on the ground that the evidence that Rivers committed the prior bad acts was not clear and convincing. *See Smalls*, 422 S.C. at 186, 810 S.E.2d at 842 (finding counsel deficient when not objecting to evidence that was not clear and convincing). Therefore, counsel was deficient in failing to raise the grounds set forth in the pre-trial motion to suppress.

For those reasons, we reverse and remand for a new trial.

REVERSED AND REMANDED.

GEATHERS and MCDONALD, JJ., and HILL, A.J., concur.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2017-002302

Mitchell Rivers,

Petitioner,

v.

State of South Carolina,

Respondent.

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

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

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

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

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

In *Cook*, the three-year-old victim was reported as not breathing to law enforcement, who responded and rushed her to the hospital where she was pronounced dead after more than 90 minutes of effort to resuscitate her failed. *Cook* at 56. Law enforcement interviewed Cook at length, and she gave inconsistent descriptions of what occurred in the lead up to the three-year-old victim’s death, but which primarily offered that Cook found the three-year-old victim lying in the tub face up and thought she had fallen in the tub. *Id.* at 56-57. Dr. Janice Ross³ testified that the three-year-old victim perished from a blunt force injury to her head that could not have been caused by a fall in the bathtub, “as her whole brain was swollen.” *Id.* at 58.

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

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

³ The same Dr. Ross as testified in Rivers’ trial.

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

On appeal, this Court summarily applied the reasoning as set forth in *State v. Martucci*, 380 S.C. 232, 246, 669 S.E.2d 598, 605 (Ct. App. 2008), and unanimously⁵ concluded that the evidence of the three-year-old victim's broken arm "showed that Cook hid her failure to obtain medical treatment for Minor's arm injury." *Cook* at 63. As an additional ground, this Court noted that Cook's disclosure to the neighbor that the three-year-old victim blamed Cook for the injury identified Cook as its perpetrator by clear and convincing evidence. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The State's argument should not be construed to mean that autopsy evidence of a minor victim is *per se* admissible. However, Rule 404(b), SCRE, is categorically inapplicable where the evidence in question is introduced not to establish the character of an unidentified actor⁸ but rather to establish a recognized medical condition of the victim. Additionally, even if Rule 404(b) is nonetheless deemed applicable, testimony introduced to show the absence of mistake or accident or to establish intent is specifically excepted from the prohibitive rule. Evidence to establish Battered Child Syndrome, such as autopsy evidence, once its relevance is established, is thus primarily analyzed under Rule 403, SCRE, which is a question of form, not substance (i.e. gruesome pictures versus testimony).

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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By: 
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10 Aug., 2023

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2017-002302

Mitchell Rivers,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

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

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



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The South Carolina Court of Appeals

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October 12, 2023

Mr. Johnny Ellis James, Jr., Esquire
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Re: Mitchell Rivers v. State
Appellate Case No. 2017-002302

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,


CLERK

cc: Alan McCrory Wilson, Esquire
William M. Blich, Jr., Esquire

The South Carolina Court of Appeals

Mitchell Rivers, Petitioner,

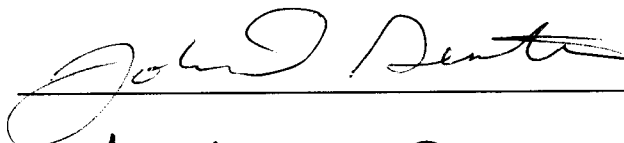
v.


State of South Carolina, Respondent.


Appellate Case No. 2017-002302

ORDER

After careful consideration of the petition for rehearing, this court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Johnny Ellis James, Jr., Esquire
Alan McCrory Wilson, Esquire
Jessica M Saxon, Esquire
William M. Blicht, Jr., Esquire
Christy Gaddy

FILED
Oct 12 2023
