STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Honorable Daniel McLeod Coble, Circuit Judge
Appellate Case No. 2024-000060

WILLIAM CRAIG CAUGHMAN, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

Petitioner's Issue in Petition

Did the post-conviction relief court err finding defense counsel was not deficient for failing to retain an independent pathologist where petitioner's defense at trial was that decedent died as a result of negligent care while hospitalized not as a result of injuries sustained in the automobile accident as the state alleged and where petitioner was prejudiced by counsel's deficiency where the jury only considered the opinion of the state's pathologist who testified decedent died as a result of his injuries from the accident?

RESPONDENT'S COUNTER ISSUES PRESENTED

I. Certiorari is not warranted where the PCR Court reasonably found that counsel was not deficient in failing to retain an independent pathologist to assist in the defense where the victim died in hospital after he began recovery and to assist in reviewing the medical records related to the victim's death and counsel was prepared to address the potential contributing risks from the information he had received .

II. Further, 6th Amendment prejudice had not been shown where there is no evidence presented that the cause of death did not arise from injuries related to the hit and run other than what counsel Floyd had presented related to the embolism.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). "[W]e [also] afford great deference to a PCR court's credibility findings." Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018). Foster v. State, No. 2020-000143, 2024 WL 1092329, at *1 (S.C. Ct. App. Mar. 13, 2024). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

"To establish a claim of ineffective assistance of counsel, the [PCR applicant] has the burden of proving '(1) counsel failed to render reasonably effective assistance under prevailing professional norms[ ] and (2) counsel's deficient performance prejudiced the applicant's case.' " Frierson, 423 S.C. at 262, 815 S.E.2d at 436 (quoting McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008)).

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland v. Washington, 466 U.S. 668, 700 (1984). Thus, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

STATEMENT OF THE CASE

This matter comes before this Court from an appeal related to an application for post-conviction relief filed by William Craig Caughman on January 27, 2020. The Petitioner was appointed Ola Johnson to represent him on May 6, 2020. The Respondent's original Return was made June 2020.

The Petitioner made an amended application for post-conviction relief filed by appointed counsel, Ola Johnson, dated October 12, 2023.

Related to the assertions raised in this certiorari proceeding, the Petitioner raised the following:

In his initial application for post-conviction relief, Petitioner alleges he is being held in custody unlawfully based on (verbatim):

1. Ineffective Assistance of Trial Counsel (Wayne Floyd)
    a. "Wayne Floyd went to trial for me but didn't get me an expert witness to challenge the State's."

In his amended application filed by appointed counsel Johnson, he makes the following allegations:

1. Applicant's counsel, Wayne Floyd, failed to subpoena victim's medical records (p. **449, Line 16-19) to determine the cause of death and failed to retain an expert to testify regarding this or review records.**

2. **Applicant's counsel. Richard Breibart and Wayne Floyd, failed to properly investigate the facts of this case.**

On October 24, 2023, the matter was convened for an evidentiary hearing before the Honorable Daniel McLeod Coble. The Petitioner was present and represented by his appointed counsel, Ola Johnson. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. During the hearing, testimony was received from the Petitioner and Deputy Solicitor Suzanne Mayes. On December 19, 2023, Judge Coble signed an order denying PCR. App. 743-794. The PCR court found petitioner "failed in his burden of proof in showing that counsel was deficient or prejudicial in failing to take steps to acquire the additional hospital records beyond the autopsy report or seek a pathologist to independent[ly] review those records." App. 787-88.

This certiorari proceeding follows.

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections. During its May 2013 term, the Lexington County Grand Jury indicted Petitioner for hit and run accident resulting in death (2010-GS-32-02294) and obstruction of justice (2010-GS-32-02842). H. Wayne Floyd, Esquire (Counsel), represented Petitioner.[1] Assistant Solicitors Suzanne Mayes and Robert E. McNair, III, of the Eleventh Circuit Solicitor's Office, prosecuted the case. On May 20, 2013, Petitioner proceeded to a jury trial before the Honorable Clifton Newman.

On May 23, 2013, the jury found Petitioner guilty of hit and run accident resulting in death.[2] Judge Newman sentenced Petitioner to a term of twenty years' imprisonment.

On May 31, 2013, Counsel filed a motion for a new trial and reconsideration of sentence. The court convened a hearing on Petitioner's motion on May 21, 2015. R. pp. 585–633. Judge Newman denied Petitioner's motion by order dated July 25, 2015.

DIRECT APPEAL

Petitioner filed a timely notice of appeal. Appellate Defender John H. Strom initially represented Petitioner on appeal. Appellate Defender Taylor Gilliam represented Petitioner for the pertinent portion of his appellate proceedings. Following briefing and oral argument, the Court of Appeals affirming Petitioner's conviction and sentence in an unpublished *per curiam* opinion. *State v. Caughman*, Op. No. 2020-UP-009 (S.C. Ct. App. filed Jan. 15, 2020). The remittitur was issued on January 31, 2020.

SUMMARY OF EVIDENCE RELEVANT TO THE DEATH AND PATHOLOGY

Officer Marion Green of the Cayce Department of Public Safety was dispatched to the scene of a hit and run at 10:08 p.m. on February 21, 2010. App. pp. 113-14. When he arrived at the scene,

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[1] Wayne Floyd died on August 24, 2021. Petitioner initially retained Richard Breibart to represent him; however, Mr. Breibart was placed on suspension prior to Petitioner's trial. *In Re Breibart*, 398 S.C. 123, 727 S.E.2d 470 (Mem) (2012).

[2] The trial court granted Petitioner's motion for a directed verdict on the obstruction of justice charge. R. pp. 514–38

Officer Green observed a heavily damaged motorcycle and the victim, Frederick "Toby" Morriss, laying in the road. App. p. 114. Officer Green testified the road was littered with parts from Mr. Morriss's motorcycle. APP. p. 116. Mr. Morriss was able to tell Officer Green his name but was unable to recall any details of the accident. APP. pp. 114-15. Kevin Washington, a witness at the scene, told Officer Green he observed a red Ford Ranger driving down 9th Street and he believed that was the vehicle that struck Mr. Morriss's motorcycle. APP. p. 115. Officer Green noted the streetlights could influence someone's perception of color at the scene, as they project an amber color. APP. pp. 124-25.

Jennifer Prather, a friend of Mr. Morriss, received a phone call from Lexington Medical Center around 3:00 a.m. on the evening of the incident informing her that he was in the emergency room. APP. p. 88. Ms. Prather described Mr. Morriss as "pretty beat up," and noted he was treated for body fractures. APP. p. 88-89. Ms. Prather also described Mr. Morriss's condition as, "he had a lot of injuries." APP. p. 92. Ms. Prather continued to visit Mr. Morriss "around the clock" for the next week while he was hospitalized. APP. p. 92. The night before he was due to be discharged, Mr. Morriss passed away. APP. p. 93.

Pathologist Testimony

Dr. Elizabeth Moffatt, a pathologist at Lexington Medical Center, conducted an autopsy on Mr. Morriss. App. 349; R. p. 441. Dr. Moffatt testified there was evidence of trauma to Mr. Morriss's body. App. 360; R p. 452. Mr. Morriss's injuries included bilateral rib fractures, thoracic vertebral fractures in his spinal column, a fracture at the base of his skull, pulmonary contusions, a left wrist fracture, and hematomas. App. 361-362; R. pp. 453-54. Dr. Moffatt testified this litany of injuries would necessitate the patient being at least partially immobile while being treated. App.p. 362; R. p. 454. Dr. Moffatt testified Mr. Morriss's cause of death was a pulmonary embolism. App.p. 364; R. p. 456. Dr. Moffatt explained that a pulmonary embolism is a blood clot that travels through the blood stream until it is stopped somehow. App.p. 364-365; R. pp. 456-57. Dr. Moffett stated the most common cause of a blood clot is immobility. App.p. 365; R. p. 457. Dr. Moffett further stated trauma and surgery relate to

risk factors for a blood clot. App.p. 366; R. p. 458. Dr. Moffatt testified it was her opinion to a reasonable degree of medical certainty that the blood clot that killed Mr. Morriss was a result of trauma sustained in an automobile collision on February 21, 2010. App.p. 366; R. p. 458.

SUMMARY OF PCR TESTIMONY

Petitioner William Caughman's PCR Testimony

The Petitioner, William Caughman was the first witness to testify. App.p. 697-98. He initially claimed that he was never advised of any plea offers from the State by either his initial counsel Richard Breibart or Maura Dawson. He also testified that his trial counsel Wayne Floyd never advised him of any plea offers from the State. Caughman complained that his trial counsel never acquired or subpoenaed hospital records for the victim, which counsel Floyd admitted at trial, citing Tr.p. 449, l. 16-19. App.p. 697-98. He claimed counsel solely relied upon the State's expert (pathologist Dr. Elizabeth Moffat). App.p. 698.

Caughman claimed he was not aware of any private investigator being involved in his case. Mr. Breibart had my parents pay some fees to Leigh Leventis. He was advised at one point that he was told "I have this lady and I'll guarantee you'll walk." However, he told him that he did not have any more money. App.p. 701. Caughman indicated that there were misleading statements in the investigation. He stated he spoke with Maura Dawson about the conversations with Cayce Police Department by Charles Campbell, his ex-wife, and Lawrence Gilbert. App.p. 702.

On cross-examination, Petitioner claimed that knowing evidence they had on him, he would have pled guilty, but admitted that he did not know. App.p. 702. He claimed the evidence against him was strong based upon the statements by his friends given to law enforcement and the admissions. He stated that he did not ask his lawyers to take a plea, but was trusting his lawyers. He claimed he was scared and did not know what to do. App.p. 703-704.

At the PCR hearing, he admitted he was driving the truck that night after he left the café, resulting in accident with Toby Morriss. He admitted that he left the scene for whatever reason. He described it as “the most stupid mistake I made in my life” and he panicked and left. App.p. 704.

The Petitioner stated he did not testify at trial. App.p. 705. He admitted he spoke with counsel Floyd about testifying. Floyd advised them that they had the video and it would be played and that he should not take the stand. He stated he was not going to testify. App.p. 705.

The Petitioner indicated that they wanted the medical records from the hospital to see if there was anything that happened at Lexington hospital that caused or could have prevented his death. App.p. 707-708. He noted there was evidence presented at trial that after the victim got to the hospital, he began to recover. However, a blood clot formed and caused his death. He confirmed that counsel Floyd challenged that blood clots can happen because of other things. He also confirmed the trial judge gave instructions on proximate cause and a lesser included offense instruction on hit and run causing death and causing great bodily injury, and not guilty. App.p. 708-709.

The Petitioner stated that he should have had a medical expert to challenge what said about the blood clots or if given the proper medication to prevent blood clots. He speculated that it could have swayed jury to give me a lesser charge. App.p. 709. He recalled counsel asking the pathologist about whether the victim was on blood thinners. App.p. 710. He claimed the State should have given him the hospital records. He admitted at trial, the State indicated that they did not have the medical records, when counsel Floyd asked for sanctions against them for not providing them to the defense. App.p. 710-711. He admitted the failure to provide the hospital records came up at a subsequent hearing before Judge Newman.

He acknowledged that during that hearing, Judge Newman said if you had hired an independent expert, they would have needed to request those records. App.p. 712. The Petitioner indicated he was aware of the State’s case against him before the trial. App.p. 712-714. He stated that this was his first trial and did not know what to expect. He was aware that the victim seemed to gain coherence and was

confident he was about to be released to some sort of center. He acknowledged this was counsel's understanding also. However, he claimed he did not know about great bodily injury and death, because he was charged with death,

On re-direct, counsel inquired that counsel Floyd had an opportunity to get the hospital records, but did not do so. He speculated it might have resulted in a lesser offense. However, he was aware that neither side got those records. App.p. 716.

Deputy Solicitor Suzanne Mayes PCR Testimony

Deputy Solicitor Suzanne Mayes testified they had provided discovery with counsel Breibart and Maura Dawson and communicated with them. App.p. 718. She stated there was an indication that when Breibart was removed and his materials went to the Court's trustee that Petitioner came and picked the Breibart file and provided file to Wayne Floyd. App.p. 719. She stated she communicated with counsel Floyd and observed files provided to Floyd and asked him to check all materials and DVDs to check that they were working in order. App.p. 719.

Deputy Solicitor Mayes stated that today at this hearing was the first time aware acknowledging he was driver. App.p. 719.

Concerning his complaint about not receiving the hospital records prior to or during the trial, Deputy Solicitor Mayes declared that they did not have the complete hospital records. App.p. 726-727.She stated they just had the autopsy report done by the pathologist at Lexington Medical Center (LMC). She stated she previously had an attorney pull the Solicitor's file records they did a thorough search of that file and concluded we provided everything we had to the extent of the LMC record. App.p. 728.

Mayes testified that she did not remember anything about the records until they started the trial. At that time, when confronted about it during the trial, she stated they didn't have the additional records from the hospital, other than the pathologist materials. App.p. 728. She testified from a strategic perspective; they had an autopsy report which is usually what they relied on when trying to prove a

death of a person who had been hospitalized. App.p. 728-729. She opined that report incorporated findings of doctors and the injuries of body. From strategy purposes she thought this was sufficient to prove death. Because of HIPAA, she declared they did not have a living person to request consent for the records. She stated she learned that counsel Floyd did not request them from the trial court until the trial was underway. In addition, and at that time, either one could have requested it by an order. Further she noted that counsel Breibart could have done a consent order, but in looking back never was an issue for us or for them. App.p. 728-729.

Deputy Solicitor Mayes further testified that the issue came up during the reconsideration hearing. At that time, she again confirmed that they had not acquired the records from the hospital. App.p. 728. She stated that they do not have the additional hospital records because of HIPAA and we have a deceased person that cannot sign. She testified that prior to trial, law enforcement could have pursed a search warrant, or by consent for a court order where both state and defense requested the records, at the outset could have been ordered, but didn't. She further stated Judge Newman could have obtained by end of week. However, Deputy Solicitor Mayes stated that our indictment was hit and run resulting in death, and based upon the findings of pathologist, that is what we were relying on. She stated as to injuries that led to death, she did not know how the medical records could have helped him. App.p. 728-729.

On cross-examination, Deputy Solicitor Mayes stated as to the hospital records, she again confirmed that she never had them. App.p. 731-732. She stated that she cannot say anything other than that the pathologist would have had access to *MyChart* that most hospitals have for patients to use and are able to pull up hospital records. She noted that in her report she was including the diagnosis of those injuries and surgeries, and all part of underlying data in reaching her conclusion. She concluded that she did not know what is in the records.

The Respondent's counsel made specific reference to the pathologist testimony that begins at Tr.p. 438 trial transcript, as well as the records attached to the return. App.p. 733.

Pre-Hearing Motion Hearing Before Judge McFaddin and Order Denying Request for Discovery and Professional Services of an Independent Pathologist.

Prior to the PCR Hearing on the merits, PCR counsel Ola Johnson on November 16, 2020 filed a motion for discovery and motion for professional services. A motion hearing was held before the Honorable George McFaddin on April 11, 2022. [*Respondent requested Petitioner's appellate PCR counsel that a transcript of this motion hearing be included in the Appendix before this Court. However, upon information and belief all records of the PCR hearings held on April 11, 2022 are not available due to error by the assigned court reporters*]. Specifically, Petitioner seeks discovery in the form of the victim's medical records and professional services of an expert in pathology to examine these records. In support of these motions, PCR counsel asserted that trial counsel was ineffective for failing to hire an expert to challenge the pathologist's report and finding as to the victim's cause of death. In denying the request for expert services, Judge McFaddin concluded:

> As aforementioned, PCR counsel asserts the record supports their argument that trial counsel was ineffective for failing to hire an expert to challenge the pathologist's report and finding as to the victim's cause of death. Specifically, he points to Judge Newman's above statement that the records would have been provided to the defendant had he hired an independent pathologist or had an independent autopsy proceeding. PCR counsel stated further argued that trial counsel was caught arguing that the prosecution should have provided records, but he did not have the records lined up for an expert to review them. Therefore, PCR counsel asserted, he needs to obtain these records and assistance from an expert to determine what the records mean.
>
> This Court disagrees and finds that granting Applicant's motions would be a step toward creating a "backdoor" trial. Specifically, this Court finds Applicant has not established that the records are needed, nor has he shown any reason that the pathologist's report should be questioned. At trial, Dr. Moffatt testified the victim died days later from a pulmonary embolism that formed as a result of the injuries sustained in the hit and run. The jury was well-aware of this fact. Further, nothing in the hit and run resulting in death statute requires the victim to be dead at the scene. . . .

Caughman v. State, 2020-CP-32-00388, *Order Denying Applicant's Motion to Authorize Discovery and For Funding For Professional Services*, (McFaddin, filed March 7, 2023).

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

I. Certiorari is not warranted where the PCR Court reasonably found that counsel was not deficient in failing to retain an independent pathologist to assist in the defense where the victim died in hospital after he began recovery and to assist in reviewing the medical records related to the victim's death and counsel was prepared to address the potential contributing causes from the information he had received . Further, 6th Amendment prejudice had not been shown where there is no evidence presented that the cause of death did not arise from injuries related to the hit and run other than what counsel Floyd had presented related to the embolism.

Petitioner contends the PCR Court erred in rejecting the argument that counsel Floyd was ineffective for failing to retain a pathologist to counter the State's expert pathologist regarding the victim's cause of death. The Petitioner suggests that counsel Floyd was deficient in failing to acquire the additional hospital records of Toby Morriss prior to trial to further investigate and determine if there was an intervening failure to the part of the hospital which may have caused the blood clot that was the immediate cause of death. The Applicant speculates asserts that if counsel had been more diligent in acquiring the hospital records beyond what was provided in the autopsy report that he was provided, it could have led to a verdict of hit and run causing great bodily injury rather than hit and run resulting in death. There is a sound basis to support the PCR court's conclusion that the Petitioner has failed to prove deficient performance and prejudice.

How the Issue Presented Itself at Trial

During the trial, the issue of proximate cause of the death because the death resulted from a blood clot was discussed. The State initially proffered the testimony of Dr. Elizabeth J. Moffatt, the pathologist from Lexington Medical Center (LMC) who conducted the autopsy on the victim. This testimony was proffered as a result of trial counsel's objection that any judgment or finding as to injuries, treatment received, or anything concerning the hospital was inadmissible hearsay since Dr. Moffatt did not actually treat the victim. (App.p. 347-351; Trial Tr. 195–97; R. 441–43).

During her *in camera* testimony, trial counsel questioned Dr. Moffatt about whether she used information obtained from the victim's LMC medical records to assist her with the autopsy. In response, Dr. Moffatt explained that, since she is an LMC pathologist, she was able to access any of the victim's LMC records "as needed" to conduct the autopsy and make the medical findings required. App.p. 354 (Trial Tr. 200; R. 446). Trial counsel then asked Dr. Moffatt whether she would have been able to make her final findings without those records. Dr. Moffatt responded that she would have still reached the same conclusion in terms of the diagnosis. App.p. 354-355 (Trial Tr. 200–01; R. 446–47). Finally, he asked if the records were necessary to form her opinion in this case. She explained that the records were necessary in that they exist and are available. She further clarified that it would be malpractice not to review them. App.p. 355 (Trial Tr. 201; R. 447).

After trial counsel concluded his cross-examination, Deputy Solicitor Mayes asserted that Dr. Moffatt's testimony regarding her findings is consistent with Rule 703, SCRE,[3] which allows for an expert to make reference to any information that she had reasonably relied upon as other input and in reaching an informed decision. App.p. 355 (Trial Tr. 201; R. 447). Deputy Solicitor Mayes stated that would be Dr. Moffatt's ultimate opinion not only as to the cause of death but the medical findings in general. App.p. 355 (Trial Tr. 201; R. 447).

In response, trial counsel Floyd asserted that the State was attempting to produce evidence through Dr. Moffatt regarding the victim's medical records that do not provide any sort of connection with the represented cause of death. App.p. 355-356 (Trial Tr. 201–02; R. 447–48). Since the State did not provide trial counsel with the documentation Dr. Moffatt relied upon, other than the autopsy report, trial counsel requested sanctions under Rule 5(C)(2), which would prohibit the State from using the information at trial. App.p. 356-357 (Trial Tr. 202; R. 448). Finally, trial counsel argued the State

[3] Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

was required to prove the cause of death of the victim in a manner that would satisfy the case authorities as to the nexus between the leaving the scene of the accident and the death of the victim. App.p. 356-357 (Trial Tr. 202; R. 448).

The Court ultimately found:

> You have mentioned Rule Five and mentioned hearsay. An expert can rely upon hearsay in forming an expert opinion. The Rule Five issue deals with whether the statute requires the State to provide the defense with records that they are going to use with an expert reviewing medical records; that that must be provided to you, the medical records.
>
> The State says, well, we provided the autopsy report which gives the witness' findings, and that satisfies Rule Five. The autopsy report gives the witness' findings and opinions.
>
> Outside of this position, I don't find the State is required to provide or produce every record that formed the basis of the party's opinion generally, since the autopsy report was provided to the defense. The autopsy report provided her findings and conclusions.
>
> **Had the Defendant attempted to provide some independent autopsy proceeding which alluded to the medical records of the deceased, then they would have been provided to the Defendant. I don't think that that constitutes a Rule Five violation.**
>
> I will allow the question.

App.p. 356-357 (Trial Tr. 202–03; R. 448–49). (emphasis added)

In her court testimony, Dr. Moffatt confirmed that she reviewed medical records related to the hospitalization of Mr. Morris. She testified that she found the victim was admitted to the hospital on February 21. She described the bruising she found on the body, consistent with a motor vehicle accident in addition to the various fractures. App.p. 361-364; R. 453-456. Trial Tr. 207-210. She described the hematoma to the adrenal glands as a "soft tissue bruise or blood clot." App.p. 364; R. 456. Trial Tr. 210. She determined the ultimate cause of death was a pulmonary embolus. She stated it was a blood clot that travels through the blood stream and then breaks free and travels through the vena system and is stopped. It straddled the pulmonary arteries where there was clotting in both the right and left arteries. She started this was caused by a risk factor of immobility, a small percentage is spontaneous. As to the

causes, she declared the immobility of being on bedrest and surgery, trauma, fractures as the top causes, but there are other causes like pregnancy, certain medications, smoking, and emphysema. App.p. 365; R. 457. Trial Tr. 211.

She concluded in the direct testimony that the blood clot was the result of the trauma. She stated:

> Q. All right. Now, if a patient has been hospitalized in a patient 37 years old who has been hospitalized for up to seven days, can you tell us whether or not the injury -- whether that would contribute to inability to withstand the breaking off of the [blood] clot?
>
> A. Yes.
>
> Q. Other factors that you mentioned, would trauma and surgery also relate to risk factors for a blood clot?
>
> A. Yes, the mechanism first of all produced immobility or when you have surgery or trauma the blood clotting system is activated as a sort of mechanism of repair the body's trauma by vascular intervention or trauma to the vessels, and there are, of course, blood vessels all over the body and in all organs, bones included. So when that clotting system is activated, it can propagate clot formation.
>
> Q. Tell us, if any, the significance of multiple fractures as opposed to one fracture?
>
> A. Increased risk.
>
> **Q. Dr. Moffatt, do you have an opinion to a reasonable degree of medical certainty as to whether the blood clot was a result of trauma to Toby Morriss on February 21st of 2010?**
>
> **A. Yes, I do.**
>
> **Q. What is that opinion?**
>
> **A. That it was the result of trauma sustained in that collision.**

App.p. 366; R. 458. Trial Tr.p. 212. (*emphasis added*).

On cross-examination, counsel Floyd pointed out that at the time of his death, Morriss was preparing to be discharged at some future date and was preparing to ambulate. On that date he was walking. Dr. Moffatt stated blood clots vary, but not in all cases where a risk factor can be determined. She confirmed the only surgery done was to the wrist to repair the broken bone. It was done with

anesthesia. Her opinion was that all the injuries were consistent with the motor vehicle accident a few days before the death. She opined that the blood clot was a few days old as opposed to weeks old when it might not be visible. App.p. 368-369; R. 460-461. Trial Tr. 214-15. She admitted that blood thinners can be used. Counsel Floyd asked:

Q. Do you know why they [blood thinners] were not given?

A. I do not.

He inquired that they can be used when there is a risk of a blood clot. She was unclear how many days the victim had been immobile. She stated she thought he had been mobile for a day. This was because he had somewhat of an inability because of a cervical collar at some point but refused to speculate otherwise. App.p. 370; R. 462 Trial Tr. 216.

On re-direct, Solicitor Mayes developed through Dr. Moffatt that she would not expect a person to be mobile with thoracic vertebral fractures. She further opined she did not think to a reasonable degree of medical certainty that this blood clot formed spontaneously. App.p. 370; R. 462. Trial Tr. 216. On re-cross, she confirmed that he was ambulating during part of his admission. Floyd concluded his examination developing possibilities:

> Q. And you can't say with absolute certainty what caused his death?
>
> A. Very few things are a hundred percent but based on the evidence that I have he had those factors, two or three factors for a blood clot.
>
> Q. So, you can't say with absolute certainty, and no one can say with absolute certainty?
>
> . . .
>
> Q. Well, how many of the factors would have to be present before you could say with absolute certainty that a blood clot was not spontaneous?
>
> A. I have confirmed the factors in my autopsy report and in my testimony, but I cannot say with one hundred percent certainty what was responsible for the blood clot.

App.p. 371; R. 463. Tr., p, 217.

In making his later motion for a directed verdict on the hit and run death case, counsel Floyd urged the following:

MR. FLOYD: . . . We would next move for a directed verdict on these two grounds. First of all, Your Honor, the State has failed to prove that the collision is what caused the death of Mr. Morriss.

It has not proven that anything my client did was the actual cause of death. **There was testimony about a blood clot but there is no proof that the blood clot did not occur simultaneously and unrelated to those injuries that were described**.

The State provided no evidence whatsoever that would prove — as to why he died. He survived the collision, was taken to the hospital and was known to be mobile before he died. There is no chain of causation as required between the accident and this man's death.

We asked about the toxicology reports because that would show whether or not he was being given any drugs to — any drug that would have prevented such a thing from occurring such as a blood thinner of some kind. There was no such testimony, and the State has failed to establish causation of death.

THE COURT: Are you saying there was simple negligence or gross negligence?

MR. FLOYD: I would say gross negligence, Your Honor, because it is such a known risk factor.

THE COURT: The South Carolina Code says that all persons driving a vehicle — a driver of vehicle involved in an accident resulting in injury or death of a person must stop their vehicle and — this is South Carolina Code [56-5-1210]. It says a driver involved in an accident resulting in injury to or death of a person shall immediately stop -- no question. That's the code. It says the driver shall immediately stop when involved in an accident.

Now, the South Carolina Code goes to the impact on the victim so it is saying in the immediate sense -- it is required that a death -- charging a person with not stopping immediately, regardless of the chain of causation, so I could not direct a verdict of acquittal on the charge of leaving the scene of a wreck. You can see that when you consider the statute.

The way the word immediately is used — it says resulting in death of a person immediately -- then it says shall stop.

The (inaudible) Code says resulting in injury or death shall immediately stop, rather than resulting in death immediately shall stop. South Carolina says immediately shall stop.

MR. FLOYD: We would suggest that immediately goes to define injury or death of a person -- there is immediate injury or death,

THE COURT: That would mean as long as there is an indication a person is alive there is no indication to stop. There is also mention of leaving the scene with great bodily injury. You may have immediate injury and not have immediate death. How about it, Ms. Mayes?

SOL. MAYES: Yes, sir, Your Honor. The State does not agree with the interpretation

posed by Mr. Floyd. There is absolutely nothing to suggest that that was what was intended by the legislation. The words, immediately shall stop at the scene of the accident, describe the duty of the driver, regardless of whether it resulted in injury or death.

THE COURT: If you look at the Georgia law, it is just the opposite of South Carolina law, so it doesn't do any good to consider that, to look at Georgia law.

MR. FLOYD: I think it would rise to the same interpretation, Your Honor.

THE COURT: All right. Well, under a reasonable interpretation of the. statute, if the State's evidence is correct, the Defendant could be found guilty of leaving the scene of an accident involving injury or death. It is up to the jury to determine whether the death, Mr. Morriss death, was proximately caused by the wreck as claimed by the State. They heard the pathologist.

So, Mr. Floyd, It is the jury's determination to make. I would have to deny that motion.

App.p. 424-427; R. 516-519. Trial Tr. 270-273.

The issue came up again at trial in reference to the instructions on whether there should be a lesser included offense of hit and run with great bodily injury. App.p. 433; R. 525. Trial Tr. 279. Judge Newman decided to leave it to the jury and charge the lesser offense.

THE COURT: Well, there can be great bodily injury not resulting in death. I think it is an issue for the jury, given the fact that you can leave the hospital and start to take therapy with the expectation of recovery from the great bodily injury. The jury would have to determine the proximate cause issue regarding the death. You have brought up the issue of negligence, gross negligence, within the victim's hospital treatment. The great bodily injury could have been the cause of death as well. If there was a charge of great bodily injury, the jury would have to answer the question of whether or not he is guilty of leaving the scene of the accident causing great bodily injury, and not resulting in death.

App.p. 433 – 434; R. 525-526. Trial Tr. 279-280. The closing arguments were not transcribed.

In his jury instructions, after defining the elements of the two crimes instructed "proximate cause" in the following way.

Now, in order to be guilty of the offense — in order to prove the Defendant guilty of hit and run accident that resulted in death, or hit and run accident resulting in great bodily injury, the State must prove that the accident in question was the proximate cause of the great bodily injury to or death of the victim.

> Proximate cause means the direct cause. It is the immediate cause. It is the efficient cause. It is that cause without which the injury to or death of the victim would not have resulted.
>
> There must be a chain of causation from the time of the accident inflicted by the Defendant until the time of the victim's death. Proximate cause does not necessarily mean death occurring immediately following the accident. There may be more than one proximate cause.
>
> In fact, two or more persons may combine together to be the proximate cause of injury to or the death of a person.
>
> The Defendant may be regarded as the proximate cause if it is a contributing cause of injury to or the death of the victim. The fact that more than one probable cause contributed to the injury to, or the death of the victim does not relieve the Defendant of responsibility.
>
> The Defendant's acts need not be the sole cause of the injury or death, but it must be the proximate cause contributing to the injury of or death of the victim.
>
> It is not a defense to show that the victim might have recovered if he had been treated according to the most approved surgical or medical standards, or that if a reasonably prudent doctor would have treated him, or even by showing that the treatment was negligent. If, however, the death was caused not by the wound or injury that the victim had, but was caused by the gross, erroneous, willful, deliberate treatment, the Defendant would not be liable. In other words, negligence on the part of someone else would not relieve the Defendant from liability if the injury was the proximate cause of the victim's death.
>
> However, gross negligent or intentional activity on the part of the practitioner would relieve the Defendant of liability. The propriety of the medical procedure is a critical question to be determined, criminal liability, criminal intent is required.
>
> For example, the negligence may be proven by other things for a particular crime, which might be purpose, intent, knowledge, recklessness or criminal negligence.

App.p. 456-458; R. 548-550. Trial Tr. 302- 304.

In the motion for reconsideration hearing held May 21, 2015, the issue concerning the medical records was presented again as the defense raised an issue complaining that the additional medical records had not been provided. App.p. 494-495; R. 581. Counsel Floyd urged that the pathologist testimony should have been stricken under Rule 5 because the medical records, other than the autopsy report were not provided to them. App.p. 495; R. 581. Floyd acknowledged that the pathologist had testified that the pulmonary embolism was a result of the accident, but she admitted that anybody could

have a pulmonary embolism at any time. App.p. 509; R. 591-92. He complained that since she referred to some hospital records that had not been provided to him or the State, it was a Rule 5 violation. He admitted the additional records were never put in evidence. It was reported that the pathologist had reviewed some records. App.p. 505; R. 593. Floyd asserted, other than the autopsy report, he never saw the additional records and that they were not presented in court. App.p. 505-509.

Suzanne Mayes at the reconsideration hearing described the access that the pathologist had to the records of the Medical Center. App.p. 522; R. p. 619. She stated the pathologist relied upon the records but did not produce the records in her autopsy report or testimony. App.p. 522-23; R. 620. Hearing Tr. 35-36. She discussed with Judge Newman pages two and five of the autopsy report where the pathologist addressed the information she looked at in the patient data base and included her opinion on the cause of death. She stated this information put the State and defense on notice that she had reviewed the records. This was provided to both sides, according to Solicitor Mayes. App.p. 526; R.623. Counsel Floyd argued that this information would have put the State on notice that they needed to provide the additional records to the defense. App.p. 528; R. 625.

At the reconsideration hearing, Judge Newman expressed his recollection concerning the presentation of cause of death:

> With regard to the issue of whether or not there was some intervening negligence which caused the death versus the injuries that he sustained on February 21st, whether that was the cause of death, that's something that I remember distinctly being attune to and to have the jury closely examine that issue and make a decision on that question. Mr. Floyd engaged in a rather rigorous cross-examination of State's witnesses who offered opinions that the death was caused by the wreck and not by any medical malpractice or any other independent or intervening in jury.

App.p. 534; R. 631. Hearing Tr. 47, l. 14-24.[4]

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[4] Prior to the PCR hearing in this case, appointed PCR counsel moved to obtain the victim's medical records and professional services of an expert in pathology for purpose of this PCR hearing. In an order filed by the Honorable George McFadden filed March 7, 2023, the request was denied. Judge Coble confirmed that Judge McFaddin's order precluded the Petitioner from either acquiring the medical records of the victim beyond what counsel and PCR counsel had received or the funding to

The PCR Court found that the Petitioner failed in his burden of proof in showing that counsel was deficient or prejudicial in failing to take steps to acquire the additional hospital records beyond the autopsy report or seek a pathologist to independently review those records. App.p. 787- 792.

Strickland notes that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. *Harrington v. Richter* 562 U.S. at 106 (quoting *Strickland*, 466 U.S. at 689). "It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it." *Harrington*, 562 U.S. at 106. Our Supreme Court has held that counsel's failure to retain or call an expert witness at trial to rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. *Frasier v. State*, 306 S.C. 158, 160–61, 410 S.E.2d 572, 573 (1991).

This Court must find that counsel did not take independent steps prior to trial to obtain additional medical records from Lexington Medical Center other than his Rule 5 request made to the Solicitor's office. He received the autopsy report by Dr. Elizabeth J. Moffatt consisting of five (5) pages,[5] which included the conclusions of the cause of death and the basis of the conclusion. At the PCR Court concluded, the report provided counsel Floyd was awareness that "during his hospitalization he continued to improve. He was ambulating as part of his therapy on 2/28/10, during

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retain an independent pathologist. The general law in collateral proceedings is that an applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809 (1998) (citation omitted). However, based upon PCR counsel's diligence in attempting to acquire potential information, they cannot be held to that condition, to the extent it is considered a condition precedent.

[5] The autopsy report is included in a Supplemental Appendix.

which he was witnessed to become light-headed and reportedly dyspneic, shortly followed by collapse and unresponsiveness. Full code and resuscitative measure were unsuccessful, and he was pronounced dead on 1/28/10." Autopsy Report, p. 5. The PCR Court also found as a fact that counsel was further aware prior to trial that the stated cause of death was "pulmonary thromboembolism." Report, p. 5. Further, counsel was aware from the Report that the examination of the body demonstrated a large pulmonary embolus involving the right and left pulmonary arteries, injuries consistent with the history of trauma were identified, including bilateral rib fractures, bilateral pulmonary contusions, and a hematoma of the right adrenal gland." He was also aware from the report that other findings included pulmonary edema and congestion, congestion of the spleen, and fatty metamorphosis of the liver." Importantly, there was "no evidence of vertebral artery dissection, intercranial hematoma, or brain stem herniation." App.p. 789.

Although trial counsel Floyd was deceased at the time of the hearing, the PCR Court reasonably gleaned that a portion of his strategy was evident from the trial and post-hearing motions. First, counsel Floyd relied upon Rule 5 to acquire records from the State related to the pathologist's testimony. As noted above, Floyd sought to sanction the State and preclude the testimony of the pathologist for the State's alleged failure to provide the defense with the underlying medical records that were reviewed by the pathologist to form her opinion. Although this strategy was unsuccessful when Judge Newman denied the sanction request and determined that Rule 5 had been complied with by providing the autopsy report, it revealed a. design to completely preclude the cause of death testimony.

Counsel Floyd's strategy was also evident from trial counsel's action in trial was that it was his motivation to identify matters that could have shown that the accident may have caused "great bodily injury" but did not cause the death. On that point, the PCR Court concluded that counsel Floyd did not retain an independent pathologist to review the report or assist in receiving additional medical information. This was shown at trial as noted above when Judge Newman stated to counsel that if he had attempted to provide an independent autopsy proceeding that the records would have been

provided. R. 449, Trial Tr. 203.

Due to counsel Floyd's death, did not have evidence of any expressed strategic reason from Floyd why he did not retain a pathologist or take further steps to move before the Court to have the medical records present and available for his review before or during the trial. *See Dempsey v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) ("[C]ounsel's decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy," (citing *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003))) The initial question is normally whether these alleged failures were deficient. Under *Strickland*, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* When counsel's performance falls below this standard, a "defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007).

This Court finds that counsel Floyd was well prepared with the information he had concerning the circumstances of the victim's death from the autopsy report. He utilized the information in his "vigorous" cross-examination. He pointed out that there were other possibilities that could have caused the blood clot, other than the injuries from the accident. He presented information that there may have

been a lack of blood thinners being used on the victim at the hospital. He presented that the victim's medical condition was considered improving by the medical staff. He further presented evidence through the pathologist no one can say with absolute certainty what caused the death. Importantly, he was able to argue for and receive a lesser included charge of hit and run with great bodily injury as well as proximate cause.

Strickland Prejudice Not Shown

The PCR Court also rejected that 6th Amendment prejudice had not be shown. App.p. 791 – 792. *See Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence); *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 410 S.E.2d 572 (1991)). There was a sound basis for this conclusion that Sixth Amendment prejudice had not been shown by the prepared and vigorous cross-examination of the pathologist by counsel Floyd. There is no reasonable probability shown that the result of the proceeding would have been different. What the jury learned from his examination, unlike the State's initial presentation was:

- A pulmonary embolism can have many causes.
- There was no absolute certainty that the accident and injury caused the blood clot.
- The only surgery was on the wrist.
- Immobility can be a cause of blood clots.
- Blood thinners were not used.
- The victim was on the road to recovery and improving when the blood clot occurred.
- The victim was walking when the blood clot caused the death.

In addition to getting the instruction on the lesser offense due to his effective cross-examination, counsel Floyd was able to secure an instruction on "proximate cause". *See State v. Burton*, 302 S.C. 494, 498–99, 397 S.E.2d 90, 92 (1990). It has been held in South Carolina that the negligence of an attending physician is reasonably foreseeable. *State v. Matthews*, 291 S.C. 339, 347,

353 S.E.2d 444, 449 (1986). The proper charge in this context is one on the applicable law of proximate cause regarding medical treatment. *State v. Matthews*, 353 S.E.2d at 449. The trial court charged the jury on proximate cause regarding medical treatment. There has been no indication of gross negligence or intentional activity on the part of the Lexington Medical staff. To the contrary the evidence presented and relied upon by the Petitioner at trial was that the victim was improving and on the road to recovery.

Certiorari must be denied where persuasive evidence in the record supports that the failure to retain an independent pathologist or the failure to obtain additional medical records of the hospitalization does not undermine confidence in the outcome. In light of the examination by Floyd of the pathologist, there is no reasonable probability the result of the proceeding would have been different.[6]

[6] This conclusion is made understanding that PCR counsel was denied funding for an independent pathologist and authorization by the Court to have discovery in this particular area. This decision is not based upon the fact that a pathologist was not called in the PCR action. *See Porter v. State*, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness'[s] testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."); *Dempsey v. State*, 363 S.C. 365, 369, 610 S .E.2d 812, 814 (2005) (holding a PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence). It is based upon the fact that counsel's examination of the pathologist show there was no Sixth Amendment prejudice.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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