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S.C. Supreme Court

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge  
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MARK ANTHONY MARTUCCI,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000178  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## ISSUE PRESENTED

Whether trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel by failing to call witnesses who would have testified that petitioner was not present at the home on the day of the minor's death, showed that petitioner's co-defendant had a fight with the minor the night before his death, and contradicted the State's key witness at trial?

## STATEMENT

On February 25, 2003, a Greenville County grand jury indicted petitioner for homicide by child abuse. App. 823. On February 6 – 9, 2006, petitioner was tried *in absentia* before the Honorable C. Victor Pyle, Jr., and a jury. App. 1. Petitioner was tried along with the victim's mother, Brandi Lynn Turner Holder. App. 1. Bryna S. Seay represented the State. App. 1. Steven W. Sumner and Thomas J. Quinn represented petitioner. App. 1. Bruce A. Byrholdt and David E. Phillips represented the co-defendant. App. 1. The jury convicted petitioner and his sentence was sealed. App. 700, l. 22 – 701, l. 1. On March 6, 2006, Judge Pyle sentenced petitioner to life imprisonment. App. 708, ll. 3 – 5. The conviction and sentence were affirmed by the Court of Appeals. State v. Martucci, 280 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008).

On September 24, 2010, petitioner filed a PCR application. App. 710. On November 1, 2012, a hearing was held before the Honorable Markley Dennis. App. 735. Joseph G. Armstrong represented petitioner. App. 812. Karen Ratigan represented the State. App. 735. On December 17, 2012, Judge Dennis denied petitioner's application. App. 803. On December 27, 2012, petitioner filed a Rule 59(e) motion. App. 811. On January 8, 2013, Judge Dennis denied petitioner's motion. App. 821. This petition follows.

## ARGUMENT

Trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel by failing to call witnesses who would have testified that petitioner was not present at the home on the day of the minor's death, showed that petitioner's co-defendant had a fight with the minor the night before his death, and contradicted the State's key witness at trial.

### **Relevant Facts**

#### *a. The Evidence at Trial.*

The State's pathologist, Dr. Michael Ward, testified that the minor victim died "as a result of blunt force trauma of the abdomen." App. 226, ll. 1 – 11. Minor had a tear in the small intestine, trauma to the pancreas, and bleeding into the abdominal cavity. App. 226, ll. 1 – 11. This caused his body to "begin to shut itself down." App. 226, ll. 1 – 11. Importantly, Dr. Ward testified that the signs of these kinds of injuries would not be "fairly obvious to detect by a layperson." App. 226, ll. 12 – 23. Dr. Ward said that minor's symptoms would be similar to a stomach ailment or a virus. App. 230, ll. 18 – 21.

Dr. Ward was not able to give an exact time when minor received the fatal blow to his abdomen. Dr. Ward testified that the trauma showed some signs of healing which led him to believe that the blow occurred "greater than 12 hours" before his death "and probably greater than a day." App. 233, ll. 17 – 21. Dr. Ward also testified that minor could have received the blow as late as three-and-a-half or four days before his death. App. 234, l. 16 – 235, l. 16.

Minor's mother was Brandi Lynn Holder ("Holder"). Holder testified that minor's father was not involved in his life. App. 541, ll. 6 – 10. She lived with petitioner. Petitioner bathed and dressed minor. App. 570, ll. 4 – 10. Holder testified that on the morning of minor's death,

she woke up at approximately 8:00 AM. App. 543, l. 16 – 544, l. 4. Holder did not see minor that morning. App. 544, ll. 5 – 6.

Holder saw petitioner that morning walking to the kitchen and holding a comforter. App. 544, ll. 9 – 12. Petitioner said that minor had “thrown up all over the place.” App. 544, ll. 16 – 20. Petitioner told her that he would take care of it. App. 544, ll. 16 – 20. She left for work. At trial, Holder denied that any abuse had ever taken place. App. 547, ll. 22 – 25. Holder had no concerns about her child’s safety around petitioner. App. 550, ll. 12 – 15.

However, Holder had given drastically different statements to the police immediately after minor’s death. Holder said the police officers coerced her into giving a statement by telling her that would be able to leave and could see her parents. App. 546, l. 11 – 556, l. 10. The State confronted Holder with her prior statements during cross-examination. App. 578, l. 2 – 591, l. 4. In these statements, Holder claimed that she had seen bruises on minor’s face, had seen the child vomit, that she had noticed injuries beginning several weeks before the child’s death, and that she had seen petitioner hitting the child. App. 578, l. 2 – 591, l. 4. Holder denied that these events occurred at trial. App. 578, l. 2 – 591, l. 4.

The key witness against petitioner at trial was John Parker (“Parker”). Parker was a twenty-five year-old diesel mechanic whose parents lived next door to petitioner. App. 353, ll. 1 – 23. Parker was charged with homicide by child abuse as a codefendant with petitioner and Holder. App. 374, ll. 21 – 24. He pled guilty to aiding and abetting homicide by child abuse. App. 374, l. 25 – 375, l. 2. At the time of his testimony, Parker was still awaiting sentencing. App. 375, ll. 3 – 8.

Parker claimed that he was frequently in petitioners’ residence. App. 354, l. 25 – 355, l. 4. Parker described several incidents in which he claimed petitioner abused minor. Parker told

the jury that petitioner taped minor's mouth shut with tape, would pour water over minor's head and dunk minors head under the water and hold it for several seconds. App. 358, l. 18 – 359, l. 10. Parker saw petitioner slap minor on both sides of his face. App. 359, l. 17 – 22.

On the evening before minor's death, Parker went with Holder and petitioner to Walmart. App. 363, ll. 6 – 21. Minor appeared sick. App. 363, l. 24 – 364, l. 10. Minor threw up in the bathroom at dinner. App. 364, ll. 1 – 16. Petitioner was the one who cleaned up the child. App. 364, ll. 11 – 20.

Parker spent the night before the child's death at petitioner's house. App. 367, l. 16 – 368, l. 10. He "played on the computer most of the night." App. 367, ll. 16 – 368, l. 18. He went to bed at approximately 6:00 AM. App. 378, ll. 13 – 14. Parker denied hearing anything unusual during the night. App. 368, ll. 1 – 3. He did hear minor vomit and heard petitioner take minor into the bathroom, clean the child, then take him back to the bedroom. App. 368, ll. 4 – 10. When Parker woke up the next morning he heard petitioner "yelling and carrying on just babbling, 'he's throwing up everywhere.'" App. 368, ll. 19 – 24. Parker went to the bathroom and saw the child with "a lot of bruises on his face." App. 369, ll. 2 – 7. Parker went outside to smoke a cigarette and when he returned, petitioner was administering CPR to minor. App. 369, ll. 2 – 11. Petitioner called Holder. App. 370, ll. 7 – 14. Parker told petitioner to call an ambulance. App. 369, l. 24 – 371, l. 2. Petitioner and Parker took the child to the hospital, where the child ultimately died. App. 371, ll. 3 – 11. Parker told the jury that petitioner was "more worried about himself" than the child. App. 388, ll. 14 – 16. At no point did Parker testify that petitioner left the residence that morning.

Once they got to the hospital, petitioner told medical personnel that the child had been in a four-wheeler accident. App. 373, ll. 7 – 10. Holder also claimed that the child had been in a

four-wheeler accident in her first statement to law enforcement. App. 575, ll. 9 – 576, l. 13. Holder denied at trial that a four-wheeler accident had occurred and claimed that she had been told this story by petitioner. App. 570, ll. 3 – 13. Dr. Ward testified that minor’s injuries were inconsistent with a four-wheeler accident. App. to 22, l. 23 – 223, l. 21.

*b. The Evidence at the PCR Hearing.*

Ann Pruit (“Pruit”) testified the PCR hearing. She knew petitioner, Holder, and Parker. App. 766, ll. 5 – 12. On the morning of minor’s death, she spoke with Parker on the telephone. App. 766, l. 23 – 755, l. 2. Parker called Pruit. App. 767, ll. 3 – 4. Parker invited Pruit to come swimming at their pool. App. 767, ll. 5 – 11. Parker was alone with the child, so Pruit called petitioner to see if she could go swimming. App. 767, ll. 12 – 21. Petitioner was not at his house. App. 767, ll. 22 – 23. Pruit did not want to go to petitioner's house unless he was there. App. 767, ll. 18 – 23. Pruit did not go to the house because of petitioner's absence. App. 767, ll. 22 – 25. Trial counsel did not call Pruit as a witness and the jury never heard her testimony.

Petitioner's brother, Michael Martucci, testified at the PCR hearing that the night before the child died, he called the house and spoke with Holder. App. 772, ll. 1 – 24. Holder “was pretty irate and using some serious profanity.” App. 772, ll. 14 – 24. He could overhear what he described as “a knock down drag out brawl” between Holder and the child. App. 773, ll. 1 – 6. Michael Martucci testified that he overheard Holder tell the child, “if he came out [of his room] she was going to tear his you know what up.” App. 773, ll. 1 – 6. Petitioner was not present during this phone call. App. 761, ll. 1 – 11.

Michael Martucci provided petitioner’s attorneys with receipts showing that on the morning of the child's death, petitioner had not been at home. App. 773, ll. 12 – 24. The

receipts showed that petitioner had purchased gasoline, eaten at Waffle House, and gone to Walmart and Home Depot. App. 773, ll. 17 – 24. Petitioner's attorneys failed to notify Michael Martucci of the trial and the jury never heard his testimony. App. 773, l. 25 – 762, l. 2.

### **Discussion**

The PCR court erred in discounting the testimony of Pruit and Michael Martucci. In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. See Strickland v. Washington, 466, U.S. 668 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different. See Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997).

The PCR court concluded that "[w]hether or not the Applicant was with the victim on the morning of his death is not exculpatory." App. 808. The basis for this holding was that the medical evidence showed that numerous injuries occurred over a period of time. App. 808, However, this analysis overlooks the important fact that the importance of Michael Martucci and Pruit's testimony was not simply whether petitioner was present. The importance was that it contradicted Parker's testimony.<sup>1</sup> Parker was the State's key witness and told the jury that petitioner was the one who abused the child. Had the jury heard the PCR witnesses' testimony,

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<sup>1</sup> Petitioner filed a Rule 59(e) motion bringing this error to the PCR court's attention, but this motion was denied. App. 811-12. App. 821.

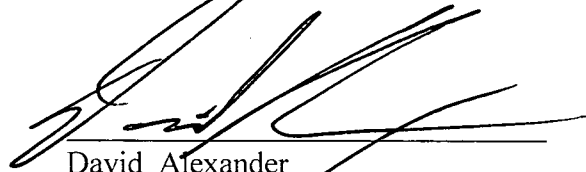
it would have shown that Parker lied about what happened the morning of the child's death. Exposing this lie to the jury would have severely damaged Parker's credibility. Michael Martucci's testimony would have shown that Holder was having a fight with the child within the window given by Dr. Ward for the fatal blow.

Had the jury heard these witnesses and, consequently, disbelieved, Parker the result of the trial would have been different. The failure to investigate and present these witnesses constituted deficient performance. This Court has recognized the importance of trial counsel investigating and locating favorable fact witnesses. In Martinez v. State, 304 S.C. 39, 41, 403 S.E.2d 113, 113-14 (1991), this court held trial counsel ineffective for failing to subpoena a witness who could have testified favorably for the defense. In Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998), trial counsel was held ineffective for failing to call a triage nurse in a rape case. Just as in these cases, trial counsel failed to investigate and call Pruitt and Michael Martucci who would have shown that Parker's version of events was self-serving and inaccurate. This failure prejudiced petitioner and he should be granted a new trial.

CONCLUSION

For the reasons stated above, the Court should grant the petition with the ultimate relief of a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of October, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
R. Markley Dennis, Jr., Circuit Court Judge

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MARK ANTHONY MARTUCCI,

PETITIONER,

v.

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RESPONDENT

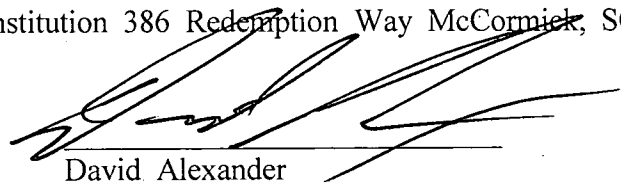
APPELLATE CASE NO. 2013-000178

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CERTIFICATE OF SERVICE

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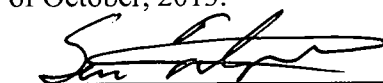
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Mark Anthony Martucci #314148 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899 this 21st day of October, 2013.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day  
of October, 2013.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.