THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2012-CP-40-4268
Appellate Case No. 2014-000374

Andrea Person, #00338104,.....Petitioner,

v.

State of South Carolina.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the circuit court err in holding that Petitioner's trial counsel was not ineffective in failing to prepare for and present witnesses and arguments at the pre-trial *Jackson v. Denno* hearing?

2. Did the circuit court err in holding that Petitioner's trial counsel was not ineffective in calling Kimberly Collins, M.D. as an expert witness?

STATEMENT OF THE CASE

On November 16-20, 2009, Petitioner was tried by a Richland County jury on the indictment for the death of Zachary Ulengchong. (App. pp. 1-4.) Petitioner was represented by Douglas Strickler, Esquire, and Fielding Pringle, Esquire, both of the Richland County Public Defender's Office. The State was represented by Solicitor Warren B. Giese, Esquire, Deputy Solicitor John P. Meadors, Esquire, and Assistant Solicitor Johanna McDuffie, Esquire. On November 20, 2009, Petitioner was convicted of homicide by child abuse and was sentenced to 22 years imprisonment. (App. pp. 1148-1159.) On direct appeal, her conviction was affirmed by the South Carolina Court of Appeals. (App. pp. 1216-1219.)

On June 19, 2012, Petitioner brought this action seeking post-conviction relief. (App. pp. 1220-1237.) On September 25, 2013, Petitioner, through the undersigned counsel, filed an Amended Application. (App. pp. 1247-1260.) On October 2, 2013, an evidentiary hearing was held at the Richland County Courthouse. Petitioner alleged that her trial counsel was ineffective in two respects: 1) failing to prepare for and present witnesses and arguments at the pre-trial *Jackson v. Denno* hearing; and 2) choosing to call Kimberly Collins, M.D. as an expert witness. On January 30, 2014, the circuit court denied Petitioner's application. (App. pp. 1585-1622.) On February 27, 2014, a notice of appeal was served on Respondent. (App. pp. 1623-1663.) Petitioner now seeks a writ of certiorari to review this denial.

In April 2007, a child died in the daycare Petitioner ran out of her home. Shortly after the death, law enforcement began investigating two other child deaths that took place in Petitioner's daycare, both of which had previously been deemed the result of

natural causes. (App. p. 80.) At 12:30 PM on April 17, 2007, Petitioner voluntarily went to the Richland County Sheriff's Department with the understanding that law enforcement wanted to discuss the most recent death with her. (App. pp. 1389-1391.) Instead, Petitioner was given an extensive polygraph examination on all 3 deaths, including that of 13-month old Zachary Ulengchong, who died almost 10 years earlier in December 1998. (App. p. 1391.) Zachary's death certificate listed "lobular pneumonia" as the cause of death. (App. p. 365.) Following the polygraph examination, Petitioner was falsely informed that she failed the test with respect to Zachary. (App. p. 1392.) The subsequent lengthy interrogation by law enforcement eventually led to a statement by Petitioner that, in an effort to calm Zachary, she held her hand over his mouth for 15-20 seconds, after which he took a deep breath and went to sleep. (App. p. 93.) Shortly thereafter, Petitioner found Zachary dead in his crib. (App. p. 94.)

Petitioner was eventually indicted on three (3) counts of Homicide by Child Abuse. On August 14, 2008, the trial judge granted the defense's motion for a separate trial for each case. The trial on the indictment for the death of Zachary Ulengchong was scheduled first. In that case, the prosecution's case against the Petitioner was built entirely on the one statement by the Petitioner that she held her hand over Zachary's face for 15-20 seconds.

Leading up to and during the trial, this statement was referred to as a "confession." However, such a label is misleading. Dr. Kimberly Collins, forensic expert for the defense, testified that restricting oxygen for 15-20 seconds would be insufficient to cause death. (App. p. 798.) Dr. William Armstrong, the medical examiner who performed the autopsy on Zachary, also testified that 15-20 seconds was a very short

amount of time. (App. p. 536.) Fielding Pringle testified at the PCR hearing that "it wasn't a confession, it was a statement against interest, I suppose, an admission that she put her hand over the child's mouth and nose for 15 or 20 seconds..." (App. p. 1461.)

Petitioner has always maintained that this statement, which was improperly deemed a confession, was false. There was no physical evidence supporting the conviction. Therefore, effective representation by the Petitioner's trial counsel required a focus on preventing the admission of the statement. Due to trial counsel's ineffectiveness, the jury heard the statement but, due to factors discussed below, was not able to consider all of the facts surrounding Petitioner's interrogation.

At a pre-trial *Jackson v. Denno* hearing to determine the admissibility of the Petitioner's statement, the judge denied the motion. (App. pp. 128-135.) However, the transcript, record, and evidence presented show an inadequate and ineffective effort by trial counsel. (App. pp. 5-135.) Trial counsel's cross-examination of the State's witnesses was cursory and unproductive. They did not call any witnesses to counter the State's version of events. Further, before the judge made her ruling, trial counsel waived his right to make an argument. (App. p. 128.) Trial counsel had an opportunity to present the judge with the defense's version of the "totality of the circumstances" but failed to offer any facts to counter the State's version. Trial counsel was constitutionally ineffective in their effort to prevent the statement from being admitted into evidence, and the Applicant was prejudiced as a result.

Petitioner was further prejudiced by the ineffective use of Kimberly Collins, M.D. as a witness for the defense. (App. pp. 770-825.) Dr. Collins was the defense's forensic

pathologist expert at trial. Her testimony was self-contradictory and served only to bolster the prosecution's case and confirm the conclusion reached by the State's expert.

ARGUMENT

I. COUNSEL WAS INEFFECTIVE IN FAILING TO PREPARE FOR AND PRESENT WITNESSES AND ARGUMENTS AT THE PRE-TRIAL *JACKSON V. DENNO* HEARING.

Pursuant to the United States Supreme Court's decision in *Jackson v. Denno*, a criminal defendant is entitled to a hearing outside the presence of the jury to determine the voluntariness of statements made by the defendant. 378 U.S. 368, 84 S.Ct. 1774 (1964). See also *State v. Miller*, 375 S.C. 370, 382, 652 S.E.2d 444 (Ct. App. 2007). "The test of admissibility of a statement is voluntariness." *State v. Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989). The burden is on the state to prove by a preponderance of the evidence that the statement was voluntary ***and*** taken in compliance with *Miranda*. *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692 (1986).

"The trial judge must determine if under the **totality of the circumstances** a statement was knowingly, intelligibly, and voluntarily made." *Miller*, 375 S.C. at 382 (emphasis added). "It is now axiomatic ... that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary [statement], without regard for the truth or falsity of the [statement]...even though there is ample evidence aside from the [statement] to support the conviction." *Id.* at 380 (citing *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964)).

Several South Carolina cases have "recognized appropriate factors that may be considered [by the judge] in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; ... direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of

the questioning; exertion of improper influence." *State v. Moses*, 390 S.C. 502, 513-514, 702 S.E.2d 395 (Ct. App. 2010). See also *State v. Simmons*, 384 S.C. 145, 163-64, 682 S.E.2d 19 (Ct. App. 2009) (coercion, hunger, promise of leniency); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041 (1973) (length of detention, repeated and prolonged nature of questioning, deprivation of food or sleep); *State v. Parker*, 381 S.C. 68, 85-93, 671 S.E.2d 619 (Ct. App. 2008) (physical and mental state of defendant, misrepresentations of evidence by police, coercion). "This list of factors is not an exclusive list. Moreover, no single factor is dispositive and each case requires careful scrutiny of all surrounding circumstances." *Moses* at 514 (internal citations omitted).

On October 30, 2009, just a few weeks before Petitioner's trial, defense counsel and Petitioner appeared for a *Jackson v. Denno* hearing regarding the statements Petitioner made to law enforcement during her interrogation on April 17, 2007. (App. pp. 5-135.) At this pre-trial hearing, outside the presence of the jury, defense counsel and experts had the opportunity to offer critical testimony and evidence that would not be offered at trial because it was either inadmissible or potentially prejudicial. However, Petitioner's counsel offered no witnesses or evidence and made no argument. Trial counsel was prejudicially ineffective at the *Jackson v. Denno* in several respects.

First, trial counsel should have called Dr. Saul Kassin, the defense's false confessions trial expert, to testify at the *Jackson v. Denno* hearing. At the time of the hearing, just weeks before trial, Dr. Kassin had already been retained and was very familiar with the Petitioner's case. Had he been called to testify, Dr. Kassin would have testified as he did at the PCR hearing and would have discussed the potential risk factors that are often present in false confession cases. (App. pp. 1310-1320.) The purpose of

this testimony is to make the judge, who must use a totality of the circumstances test as discussed above, a much more informed and critical viewer of this confession. See *State v. Moses*, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). Instead, Dr. Kássin testified only at trial, and he was forced to walk very fine lines for fear of opening the door to evidence concerning the other two deaths. (App. p. 1331.) At a pre-trial hearing outside the presence of the jury, however, Dr. Kassin could have given much more effective and helpful testimony.

At the PCR hearing, Dr. Kassin testified about the use of polygraphs, discussed further below, as a prop by law enforcement to set the stage for an interview. (App. pp. 1318-1327.) He also testified to the effect their use can have on suspects, especially when a suspect is falsely told that he or she failed the polygraph exam. (App. pp. 1324-1325.) Next, Dr. Kassin testified as to the effects or risks associated with lengthy interrogations and the effects of questioning about three different incidents spanning ten years. (App. pp. 1326-1328.) Additionally, much of Dr. Kassin's research focuses on personality traits or individual factors which may increase the likelihood that a certain person would give a false confession. (App. pp. 1311-1314.) Petitioner's personality evaluation, also discussed below, indicated a tendency for being passive and meek. Dr. Kassin is not a clinical psychologist and, as a rule, does not interview defendants. However, had trial counsel asked a clinical psychologist to evaluate the Petitioner as PCR counsel did, Dr. Kassin would have been able to testify about those results and issues at the *Jackson v. Denno* hearing as he did at the PCR hearing. (App. pp. 1312-1313.)

At a minimum, trial counsel should have consulted with Dr. Kassin prior to the *Jackson v. Denno* hearing to be better prepared for the cross examination of the law

enforcement witnesses. For instance, Dr. Kassin has done research on the effects of "forensic bias" and how knowledge by law enforcement that a total of three children had died in the Petitioner's daycare could affect their ability to accurately score a polygraph and conduct an unbiased interview.[1] (App. pp. 1325-1326.) Instead, the cross examination by trial counsel was rote and ineffective.

Had the judge determined at the *Jackson v. Denno* hearing that the Petitioner's statement was not a voluntary confession, the prosecution would have been left with no physical evidence, and the pathologists would not have been able to consider it, as will be discussed below. Other than the Petitioner, Dr. Kassin was the only witness on the defense's witness list whose testimony could influence the judge's ruling on whether the statement was made voluntarily. Fielding Pringle testified at the PCR hearing that she was "sure that [Kassin] would have believed that this [statement], based upon everything he knew, should have been suppressed..." (App. p. 1438.) The defense had a retained false confessions expert who was willing to testify about the problems with Petitioner's statement, yet they chose not to call him at the hearing focused on those very issues. (App. p. 1331.) Dr. Kassin's presence at the *Jackson v. Denno* hearing was crucial, and trial counsel's failure to call him was ineffective and prejudicial to the Petitioner.

Second, the *Jackson v. Denno* was the only proceeding where the effects of polygraph testing on the Petitioner could be explored. At a trial, "[g]enerally, the results of polygraph examinations are inadmissible because the reliability of the polygraph is questionable." *State v. Wright*, 322 S.C. 253, 255, 471 S.E.2d 700 (1996) (citing *State v.*

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[1] He also testified at the PCR hearing about forensic bias resulting from medical examiners and pathologists considering unproven, non-medical evidence, which is another issue in this Petition, discussed below. (App. pp. 1330.)

Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982)). However, at a *Jackson v. Denno*, the court is instructed to consider "police misrepresentations." *Id.* See also *State v. Parker*, 381 S.C. 68, 85-93, 671 S.E.2d 619 (Ct. App. 2008). In this case, the use of a polygraph was critically relevant to the Petitioner's statement because the examiner misrepresented the results immediately preceding her alleged confession. The use of the polygraph could have been explored further at a pre-trial hearing but not at the trial.

Because trial counsel knew that testimony related to the polygraph would not be admissible at trial, they should have used that testimony where there was a reasonable probability it would have changed the outcome: at the *Jackson v. Denno* hearing outside the presence of the jury. At that hearing, Dr. Kassin could have testified as he did at the PCR hearing and explained how polygraphs are a powerful tool used by law enforcement to elicit confessions. (App. pp. 1318-1327.) The Petitioner could then have testified as she did at the PCR hearing about how the polygraph examiner misrepresented to her that she failed the questions related to Zachary Ulengchong and how that affected her state of mind. (App. pp. 1324-1325.) Many lay people, including the Petitioner, are unaware that police frequently lie to suspects, which is why police misrepresentations are a factor for the judge to consider when determining the voluntariness of a statement. See *State v. Parker*, 381 S.C. 68, 85-93, 671 S.E.2d 619 (Ct. App. 2008); *State v. Moses*, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

Fielding Pringle admitted at the PCR hearing that the polygraph had a very powerful and devastating effect on the Petitioner. "I think [the polygraph] is what made her become helpless and desperate..." (App. p. 1457.) She also stated that "the statement was elicited very quickly after the polygraph, that is true, and I think it crushed her spirit,

I would agree with that, and I think it is what broke her resolve to maintain her innocence which I believe as well." (App. pp. 1457-1458.) Pringle also admitted that the *Jackson v. Denno* was the only place the polygraph testimony could have been used, but it was not. "[T]hey tell them that science doesn't lie and that's very, very – so I would have like to have been able to do it in front of a jury. I couldn't find a safe way to do it and [Strickler] didn't do it during the *Denno* hearing." (App. p. 1457.) Instead, the polygraph evidence was never presented at all and was effectively lost. Failure to present this testimony was ineffective assistance by trial counsel and caused prejudice to the Petitioner.

Third, defense counsel did not offer any witnesses at the *Jackson v. Denno* who could testify to the effects or risk factors of a long interrogation even though one of the factors a trial court is to consider in the totality of the circumstances test is the "prolonged nature of questioning." *Moses* at 514. At trial, because the three cases had been severed, the jury could hear about the length of time the Petitioner was interrogated about Zachary's death only. The testimony of the Petitioner and the false confessions expert was limited by this shortened interrogation time frame because they did not want to open the door to the other deaths. (App. pp. 1417 and 1331.) At a pre-trial hearing, the defense would have been able to offer testimony about the effects of a lengthy interrogation about multiple deaths.

Fourth, trial counsel should have had Petitioner evaluated by a clinical psychologist before the *Jackson v. Denno* hearing and called that psychologist as a witness. PCR counsel engaged Dr. Mark Harari, a licensed counseling psychologist, to evaluate the Petitioner prior to and testify at the PCR hearing. (App. pp. 1348-1381.) In his report and PCR testimony, Dr. Harari discussed how Petitioner responded candidly

and realistically during her interview, indicating that her answers were truthful and valid. (App. pp. 1510-1517.) He found that she was not a hostile or aggressive person, but instead, had interpersonal characteristics of being meek, passive, unassertive, conforming, and submissive. (App. pp. 1363-1365.) A psychologist should have been hired to testify to factors listed in the totality of the circumstances test, including background, experience, conduct of the accused, maturity, and mental health. See *Moses* at 514.

Fielding Pringle testified at the PCR hearing that she knew the interview was an extraordinarily stressful situation for the Petitioner. (App. p. 1457.) She also admitted that there was no particular reason why a clinical psychologist was not employed and that she does not know why she did not think to engage one. (App. p. 1474.) When asked whether they considered having Petitioner evaluated on suggestibility, Pringle stated, "I don't specifically remember thinking about doing that and I don't know why. But it may be that we would know to do that. I have done that in other cases and I have done it recently and I have done it since this case, so that is something that should have occurred to us and we didn't do it. I can't really speak to that note. I don't have notes about doing that that I recall except at the end." (App. p. 1474.) Pringle has a note indicating that she did speak to one psychologist weeks before the trial. At the PCR hearing, she explained, "But I will say I didn't do that until October of 2009, and I think that's because Andrea comes across – she is educated and smart and I wouldn't – I just didn't think to do a standard psychological workup." (App. p. 1443.) Failure to do so was ineffective assistance of counsel.

Finally, trial counsel was ineffective for not calling the Petitioner as a witness at the *Jackson v. Denno* hearing. As she testified at the PCR hearing, the Petitioner was the **only** other person present during her lengthy non-recorded interrogation. (App. pp. 1388-1389.) Therefore, she was the **only** person who could directly dispute the testimony of the law enforcement officers. Further, the Petitioner was the only person who could testify to the presence of the risk factors that Dr. Kassin would have testified about. For example, the Petitioner was the only person who could testify to how she is a diabetic and at the time of her interrogation, she had not eaten since the night before or taken her diabetes medications. (App. pp. 1389-1390.) As she testified at the PCR hearing, she would have testified to the effects on her body when she has not eaten or taken her medicine, especially when she does not eat the entire day and is in an extremely stressful situation for over 7 hours. (App. p. 1390.) She would have testified to the stress she was under as she went to the sheriff's department that day, including the grief she felt for the child who died and his family. The Petitioner was also under tremendous stress because of her family's financial situation, as she would no longer be able to operate a day care and provide an income. (App. p. 1389.) Additionally, her husband was in the process of taking a paternity test to see if he was the father of the Petitioner's former best friend's teenage son, and she testified about this fact at the PCR hearing. (App. p. 1389.)

As to the actual interrogation, the Petitioner would have testified to how the officers told her they would be questioning her about the most recent baby's death and surprised her with questions relating to the other deaths, creating a confusing shell game. (App. pp. 1391-1395.) She could have testified to how they used the polygraph to intimidate her and told her she failed the test. (App. pp. 1392-1393.) She could have

testified to how they told her that if she did not give them a better story, they would have to dig up the babies' bodies. (App. p. 1395.) All of this came out at the PCR hearing, but much of this testimony could not be used at trial because of the limitations on the evidence the jury could hear, particularly the polygraph and multiple deaths. However, at the *Jackson v. Denno*, the Petitioner could have fully testified as to all of the relevant factors that played into her statement. Additionally, her testimony would have made Dr. Kassin's testimony more relevant and useful. (App. p. 1314.)

Based on all of the above, the Petitioner received ineffective assistance of counsel and was prejudiced by this failure. In some criminal cases, where there may be corroborating eye witness testimony, video evidence, or DNA evidence, such a hearing may not be critical. In the Petitioner's case, however, her statements to law enforcement were the whole case. There was no physical evidence of the Petitioner's guilt. Without the statements, the prosecution would not have had enough evidence to move forward with the Petitioner's trial as it was the foundation upon which all other evidence, including the testimony of the pathologists, was built.

The lower court erred in holding that trial counsel was not ineffective at the *Jackson v. Denno* because Fielding Pringle admitted that the Petitioner's statement was the whole case. "So in the end in Andrea Person's trial the confession was everything, it was the be all, end all, the everything." (App. p. 1461.) Yet Pringle admitted that the defense presented no evidence and made no argument at all. (App. pp. 1475-1476.) She also admitted that "[t]here was no challenge to the voluntariness of the confession at all" and that the trial judge had no choice but to deny the motion (App. pp. 1477-1478.) It is

inexplicable how counsel could acknowledge the importance of the statement yet not make any effort to have that "end all" statement suppressed.

This ineffectiveness was prejudicial to Petitioner. The "trial record does not show that '[the] other evidence of guilt presented at trial ... was substantial to a degree that would negate any possibility of actual prejudice resulting from the admission of [the] inculpatory statement.'" *Lufkins v. Solem*, 716 F.2d 532, 541 (8th Cir. 1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 91, 97 S.Ct. 2497 (1977)). If the Petitioner's statements had been deemed inadmissible, none of the State's other evidence could have come in because it was all dependent on the statements. The only reason the medical examiner changed his opinion regarding the cause of death was because he considered the untested, unproven, and non-sensical "confession." (App. p. 535.) Prejudice is clear in this case because the statement was the only evidence of guilt. Fielding Pringle admitted at the PCR hearing that this case centered on the Applicant's statement and that it was the primary evidence. (App. p. 1461.) The *Jackson v. Denno* hearing was an opportunity to keep the critical piece of evidence out. Trial counsel acknowledged the importance of the statement but failed to pursue that opportunity. Therefore, the lower court erred in holding that trial counsel was not ineffective regarding the *Jackson v. Denno* hearing.

II. COUNSEL WAS INEFFECTIVE IN CALLING KIMBERLY COLLINS, M.D. AS AN EXPERT WITNESS.

The decision by defense counsel to call Kimberly Collins, M.D. as an expert witness was ineffective assistance of counsel because her testimony was consistent with and bolstered the prosecution's case. This Court has held that calling an expert witness whose testimony only bolsters the State's case is ineffective assistance and prejudices the defendant. *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008). At the PCR hearing,

both Fielding Pringle and Doug Strickler testified that they were aware of Dr. Collins' ultimate conclusion, which was the same as the State's experts. (App. pp. 1469 and 1490.) However, neither Pringle nor Strickler gave a valid strategic reason for offering Dr. Collins as a witness in light of that knowledge. Therefore, it was error for the lower court to find that "counsels' decision to call Dr. Collins as an expert was of sound and reasonable strategy." (App. p. 1621.)

At the time of Zachary Ulengchong's death in 1998, Dr. William Armstrong, the medical examiner who performed the autopsy concluded that Zachary had died of pneumonia. (App. p. 365.) However, during the prosecution's case-in-chief, Dr. Armstrong and Dr. Clay Nichols, a forensic pathologist, both testified that they believed Zachary was suffocated. (App. pp. 523 and 570.) They also both testified that in reaching their conclusion, they had considered the statement by Petitioner that she held her hand over Zachary's face for 15-20 seconds. (App. pp. 535 and 581-582.) Dr. Armstrong admitted that the statement was the primary reason for changing his opinion as to the cause of death 9 years later. (App. p. 535.)

Although not directly at issue in this petition, medical expert testimony based on witness statements is controversial. This Court has recognized that, "in certain circumstances, expert medical testimony of this type has the potential to invade the province of the jury." *State v. Commander*, 396 S.C. 254, 268, 721 S.E.2d 413, 420 (2011). "Petitioner urges that the line is crossed where the physician gives an opinion outside of his medical expertise where he is in reality only enhancing the circumstantial evidence available to the jury with the prestige of a forensic pathologist." *Id.* (internal citation omitted). A case factually similar to the instant case was recently decided in

Iowa. *State v. Tyler*, No. 13-0588, 2014 WL 2600228 (Iowa Ct. App. June 11, 2014) (citing *Commander*). The Iowa Court of Appeals held that the medical examiner's opinions regarding a baby's cause of death should not have been admitted because they were based on the defendant's direct statements, which the defendant claimed were the result of coercion. *Id.* at *5. The truth of the defendant's statements was the precise issue before the jury. *Id.* Allowing the medical examiner to testify to opinions based on those statements allowed him to also give his opinion of the defendant's credibility, which the court found to be reversible error. *Id.* at *7.

Given that the opinions of Armstrong and Nichols were based on Petitioner's statement, it was critical that the defense call an expert witness who would testify that based only on the medical evidence, pneumonia was the proper cause of death. Defense counsel called Dr. Kimberly Collins as an expert in forensic pathology. (App. pp. 770-825.) She was paid a total of $10,000 for her time and testimony. On direct examination, Dr. Collins testified that she agreed with the autopsy's conclusion that "lobular pneumonia" was the cause of death. (App. p. 778.) However, on cross examination, she testified that if she considered Petitioner's statement, she too would conclude that Zachary was smothered. (App. p. 822.)

Doug Strickler testified at the PCR hearing that the goal in calling Dr. Collins was to counter the testimony of Dr. Armstrong and Dr. Nichols and he was surprised by how she testified on cross examination. (App. p. 1490.) Interestingly, a review of Strickler's direct examination of Dr. Collins at the trial gives the impression that he not only knew she would consider the statement but was actually eliciting that testimony from her. On direct, Strickler asked Dr. Collins, "Considering statements in addition to the findings of

the autopsy, and your review of the autopsy, would you have a conclusion as to cause and manner of death in this particular case?" (App. p. 777.)

As to Dr. Collins' conclusion that when all of the evidence was considered, asphyxiation was the cause of Zachary's death, the lower court's order finds that both Strickler and Pringle were "surprised with the manner in which she said this, but not the underlying proposition." (App. p. 1621.) This finding misses the point regarding the ineffectiveness of calling Dr. Collins: regardless of whether they were surprised by the "manner" in which she testified, if defense counsel knew Dr. Collins' "underlying proposition" was consistent with the prosecution's case, they should not have called her at all. Instead, defense counsel put her on the stand and then pointed out on direct examination that her conclusion regarding pneumonia would be different if she considered Petitioner's statement.

Trial counsel chose to call a medical expert who bolstered the State's case by testifying that if Petitioner's statement was taken into consideration, the cause of death would be asphyxiation. Any testimony that Dr. Collins had already offered regarding the presence of pneumonia was essentially nullified when her ultimate conclusion was the same as and in agreement with the State's experts: Zachary Ulengchong died of asphyxiation. (App. p. 1468.)

One of the most troubling aspects of Dr. Collins' testimony and the defense counsels' decision to call her is that her own testimony is contradictory on its face. On the one hand, she testified that the act to which the Petitioner "confessed" would not cause death because restricting oxygen for 15-20 seconds would be insufficient to cause

death. (App. p. 798.) On the other hand, she testified that if she considered the Petitioner's statement, Zachary must have been smothered. (App. p. 822.)

These two views are irreconcilable on their face. Petitioner's statement was that she held her hand over Zachary's mouth for 15-20 seconds, and then Zachary took a deep breath. Fielding Pringle acknowledged at the PCR hearing that nowhere in the entire record does the Petitioner state that she held her hand over his mouth for longer than 20 seconds. (App. pp. 1463-1464.) Dr. Collins testified that this time frame would not cause death. (App. p. 798.) Even if this statement was taken into consideration, it does not lead to the conclusion that Zachary was asphyxiated. In order to label Petitioner's statement a "confession," one has to make a judgment call that assumes Petitioner has left details out or is not telling the entire truth. Hiring and calling an expert witness, who not only considers non-medical evidence in determining cause of death but also makes such factual leaps, is prejudicial ineffective assistance of counsel.

The lower court noted that Strickler testified that Collins was "the only witness who could provide the jury with expert testimony that Victim's pneumonia was pervasive and significant enough to be fatal and that the physical symptoms better coincided with death by pneumonia than by smothering." (App. p. 1621.) Collins may have been the only witness on the defense's witness list who could testify regarding the pervasiveness of the pneumonia, but she was surely not the only expert available to them. At the PCR hearing, defense counsel explained that Dr. Collins was chosen because of her excellent reputation. (App. p. 1445.) However, once they became aware that she agreed with the State's experts in considering the Petitioner's statement, they could have and should have found a new expert. An excellent reputation as an expert is moot when the conclusion

hurts the defendant's case. No explanation was given by defense counsel as to why Dr. Collins was the only expert available to them and why they called her knowing the "proposition" she would testify about.

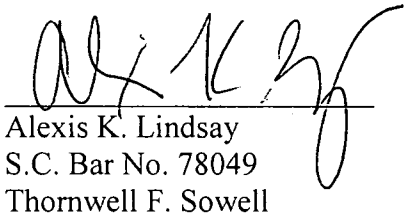
Proper preparation by trial counsel would have revealed Dr. Collins' inadequacy as an expert witness for the defense and that she would help the prosecution. If trial counsel could not find a forensic pathologist to testify that Zachary died of pneumonia, it had the option to just not call one at all. Choosing to call an expert who mimics the State's position was not a proper or reasonable strategic decision, and it caused prejudice to the Petitioner. See *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008). Trial counsel did not adequately justify their decision at the PCR hearing, and the lower court erred in holding that trial counsel was not ineffective for calling Dr. Collins.

CONCLUSION

Petitioner's trial counsel was constitutionally ineffective in their failure to properly prepare for and present evidence and witnesses at the *Jackson v. Denno* hearing and in their failure to call Dr. Kimberly Collins as an expert witness at trial. Petitioner presented evidence of these failures in her application for post-conviction relief, and the lower court erred in denying her application. For the reasons and those stated above, Petitioner asks this Court to grant the petition for writ of certiorari.

[Signature page follows]

Respectfully Submitted,



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Attorneys for the Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2012-CP-40-4268
Appellate Case No. 2014-000374

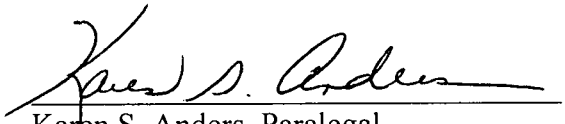
Andrea Person, #00338104,.....Petitioner,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix upon Respondent State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on August 7, 2014, addressed to its attorney of record, Megan Harrigan, Assistant Attorney General, Post Conviction Relief Section, Office of the Attorney General, Post Office Box 11549, Columbia, SC 29211-1549, and also upon Petitioner Andrea Person, Leath Correctional Institution, M2-104, 2809 Airport Road, Greenwood, SC 29649.



Karen S. Anders, Paralegal
Sowell Gray Stepp & Laffitte, LLC

August 7, 2014

SOWELL SG GRAY

ALEXIS K. LINDSAY
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August 7, 2014

VIA HAND-DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

RE: Andrea Person #338104 v. State of South Carolina
Civil Action No.: 2012-CP-40-4268
Appellate Case No. 2014-000374
Our File No.: 0998/1702

Dear Mr. Shearouse:

Attached please find the following:

1. Original (unbound) and 7 copies of Petition for Writ of Certiorari (bound);
2. Three copies of the Appendix (two unbound; one bound);
3. Original and one copy of Proof of Service.

I would appreciate your filing as appropriate and returning a bound copy of the Petition for Writ of Certiorari, an unbound copy of the Appendix and a copy of the Proof of Service to me via our courier. By copy of this letter and as evidenced by the Proof of Service, I am serving same on opposing counsel and Andrea Person.

Thank you for your consideration in this matter. If you have any questions, please do not hesitate to contact me.

Respectfully,

Alexis Lindsay
AKL:ksa
Enclosures
cc: Megan Harrigan, Assistant Attorney General
Andrea Person