

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

James R. Barber, III, Circuit Court Judge

RECEIVED

APR 3 2015

S.C. Supreme Court

MELVIN DANIEL,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-000922

RETURN TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
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There was evidence to support the post-conviction relief court’s ruling that defense counsel was ineffective for failing to obtain the services of a medical expert where the trial court found an expert was “necessary for [petitioner’s] defense,” allocated fifteen thousand dollars for an expert, and where trial counsel did not even utilize available medical research left for him by prior trial counsel for impeachment of the state’s experts at trial, and where forensic pathologist, Dr. Mark Shuman, testified at the PCR hearing that to a reasonable degree of medical certainty the child’s head trauma was the result of an accident as respondent had told the police. 17

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QUESTION PRESENTED

Whether the post-conviction relief court erred by finding trial counsel was ineffective for failing to obtain an expert witness to testify at trial when counsel vigorously cross-examined the State's expert witnesses and attached the State's medical evidence without the use of an expert witness and the lower court's prejudice finding was based solely on counsel's hindsight testimony?

COUNTER-QUESTION PRESENTED

Whether there was any evidence to support the post-conviction relief court's ruling that defense counsel was ineffective for failing to obtain the services of a medical expert where the trial court found an expert was "necessary for [petitioner's] defense," allocated fifteen thousand dollars for an expert, and where trial counsel did not even utilize available medical research left for him by prior trial counsel for impeachment of the state's experts at trial, and where forensic pathologist, Dr. Mark Shuman, testified at the PCR hearing that to a reasonable degree of medical certainty the child's head trauma was the result of an accident as respondent had told the police?

STATEMENT OF FACTS

Respondent, Melvin Daniel, was indicted by the Colleton County Grand Jury for the offense of homicide by child abuse. App. 8, ll. 7-9. The indictment alleged that respondent “under circumstances manifesting an extreme indifference to human life, to wit: Melvin Daniel, II did cause severe head trauma to [the child], consisting of retinal damage, swelling of the brain, also known as ‘Shaken Baby Syndrome’ then delayed contacting medical or law enforcement assistance for approximately two hours.” App. 350.

Respondent was originally represented by Andrew Grimes. Counsel Grimes stated that he believed the head trauma “was an accident, it was caused by a short fall and [he] researched a lot of medical journals, talked to Dr. Presnell [the state’s pathologist], went down and met with her at MUSC, and was put in contact with Dr. John Plunkett who had done a lot of research and published in this area in preparation for trial.” Grimes remembered: “I think even Dr. Presnell agreed it wasn’t Shaken Baby” App. 422, l. 3 – 423, l. 8. Grimes left the Colleton County Public Defender’s Office for the Charleston County Public Defender’s Office prior to respondent’s case being called to trial. App. 420, ll. 5-25.

When respondent’s case was called to trial on July 16-18, 2007 before the Honorable Perry M. Buckner and a jury, respondent was represented by Colleton County Public Defender Harris Beach. Steve Knight was the solicitor. App. 1.

Beach acknowledged that prior counsel Grimes had “done a considerable amount of research, and he contacted the Listserve to see if other people had other ideas about the case, and he did computer research on finding articles about the particular charge, and so I would say he probably did at least fifty percent of the work on the case I inherited a pretty complete file.”

App. 375, ll. 1-12. Beach also told the PCR judge that he had “ample time” to prepare for trial.

App. 375, ll. 22-25.

At the PCR hearing, the following occurred on direct examination of Beach:

Q. Some of the things that you mentioned that Mr. Grimes had done prior to you assuming responsibility of the case, do you recall him obtaining an order of the Court for expert funding?

A. I do not.

Q. You don't recall him obtaining that order?

A. He may have, but off the top of my head I don't recall it. I know that is probably something he would have done but –

Q. That sounds like something he would have done.

A. Yes.

Q. You're familiar with working beside him, that's something he normally he would have done?

A. Yes. He's very thorough, and I enjoyed working with him.

Q. If I showed you a copy of that order, would it refresh your memory?

A. It may very well.

MR. MAREE: May I approach, Your Honor?

THE COURT: You may.

THE WITNESS: I do recall seeing this order.

Q. And it indicates that you all had obtained \$15,000 to apply towards expert funding fees, correct?

A. Yes.

Q. And it was signed by Judge Daniel Pieper?

A. Judge Pieper, yes.

App. 376, ll. 4 – 377, ll. 1-4.

The order signed by Judge Pieper stated that “counsel [Grimes] for the defendant believes that these funds are absolutely necessary to ensure the proper investigation and preparation of this defense in this matter.” Judge Pieper ruled that the “\$15,000 for obtaining the services of a medical expert were “reasonable and necessary” for his defense. App. 475 – 476.

Beach acknowledged that he did not hire an expert despite the existence of the funding order. Beach said he talked to his own doctor about the case, and the defense of accident. The following occurred under direct examination of Beach at the PCR hearing in this regard:

Q. And he [Beach’s own doctor] could not help you or point you in the right direction any kind of way?

A. He was very discouraging. He said he did not feel that what I was arguing fit the facts of the case.

Q. Did you attempt to speak to anybody who was a forensic pathologist?

A. No, I did not.

Q. In the file that you inherited from Andrew Grimes were there any communications that you were able to review where Mr. Grimes had communicated with forensic pathologists?

A. There may have been. I don’t recall any right offhand.

Q. But you did get a chance to review the file?

A. Yes.

Q. Do you remember the name of Dr. John Plunkett at all?

A. That name is familiar but I don’t – I don’t specifically remember him, but I do remember the name.

Q. Do you remember reviewing any literature written by Dr. John Plunkett that was left in the file when you inherited it?

A. I may have. There was a pile of different articles. I read all of them.

Q. If you read it, do you recall the substance of the article?

A. No.

Q. If I would give you a copy of that article today, would it refresh your memory?

A. Probably not. There was so many of them and – there were so many medical articles on that particular charge, I doubt very seriously – I'd have to go back through and reread the whole thing.

Q. Well, would it, do you recall whether any of the material you read in the articles was helpful to my client's position?

A. I don't think any of them were.

Q. So do you remember the substance of the articles?

A. No.

Q. You just don't remember today or you just – what are you telling me? You don't remember it today as we speak?

A. I don't remember what was in the individual articles.

Q. But there were a lot of articles?

A. A lot of articles, yes.

Q. Do you have any kind of notes today –

A. No.

Q. -- of anything that you may have kept on the file?

A. No.

Q. No handwritten notes?

A. No.

Q. So you can't tell us today any substance of the articles that Andrew Grimes left for you to review?

A. That's correct.

App. 378, l. 25 – 380, l. 24.

Beach also testified that he did not recall any of the research left by Andrew Grimes that dealt with “the specific issue of short-fall and traumatic injury.” App. 381, ll. 13 – 20.

Beach said he thought there was an order allowing him to visit the “crime scene,” which was the house where the injury to the fifteen month old child occurred, but Beach said he chose not to visit the house reasoning his photographs of it were good enough. App. 354; 382, l. 12 – 383, l. 7.

Beach also opined at the PCR hearing that he did not think any of the medical research in the file left to him by Grimes was contrary to anything the state's experts said during the trial. Beach also offered that he was well aware that the state was going to call a forensic pathologist, another expert in “pediatric abuse,” and a neurosurgeon from MUSC. App. 384, l. 14 – 385, l. 11. Beach said he did not think any of the medical research left to him by Grimes had conclusions or research contrary to the testimony of the state's experts, and could have been used to impeach them. App. 385, ll. 12 – 20.

Beach said he was not familiar with an article published by Dr. John Plunkett. “I remember the name, but I can't tell you today that I am familiar with it.” App. 385, ll. 17 – 20. In fact, Grimes had conversed with Dr. Plunkett by email, and he also met personally with pathologist Dr. Presnell in Charleston about respondent's case. App. 423, l. 6 – 426, l. 8.

Dr. Plunkett's article, Fatal Pediatric Head Injuries Caused by Short-Distance Falls, noted that Dr. Plunkett had obtained records from law enforcement, EMS, and determined that eighteen of one hundred and fourteen deaths “in the clearinghouse database were actually from head injuries

due to a fall. The eighteen case studies referred to short falls from a “porch swing,” a “see-saw,” a “baby carrier-type swing,” and described other short falls that resulted in death. App. 478–483.

The fifteen month old in this case, Respondent told the police in his May 10, 2004 statement introduced at the PCR hearing, fell while he was babysitting him. The child was “running around the house when he tripped over the cable between the hallway and his sister’s room.” Respondent picked the child up and put ice on him. While the child cried initially, he eventually stopped crying and watched cartoons while lying on the couch. The child fell asleep watching cartoons, but when respondent went to wake him, the child did not react. Respondent tried to wake the child up by giving him a cold bath, and when that did not work, respondent called his sister for assistance. They called 9-1-1 for EMS to respond. App. 491 – 492.

The article concluded, inter alia, that a short fall for an infant or child “may cause fatal head injury and may not cause immediate symptoms. The injury may also be associated with retinal hemorrhages and subdural hematoma.” The article concluded, “a history by the caretaker that the child may have fallen cannot be dismissed.” App. 486.

During the trial, the pathologist, Dr. Erin Presnell, opined that the cause of death was “abuse of inflicted head trauma.” App. 171, ll. 20 – 25. At the beginning of the cross-examination, Dr. Presnell confirmed to Beach that she did not think the injury was the type that would happen from a trip and fall. App. 172, ll. 5 - 21. The following occurred on cross-examination of Dr. Presnell:

Q. If the child had been involved in falls immediately prior to this within two days of this injury. Could that not have a cumulative effect that would give you the same effect as you have here?

A. No. It still wouldn’t be a sheer injury. I would think it more a something like a motor vehicle crash or something a lot more severe. **I know there are some studies on the literature that have looked at kids on swings or see-saws that again have motion before they fall but aren’t**

necessarily falling from a really high height but a lower height but again, other circumstances that go along with the description of how the injury actually happened.

App. 173, ll. 5 – 17. (emphasis added)

At the PCR hearing, Beach said he remembered this exchange and he said he did not know why he did not cross-examine Dr. Presnell with the medical literature in his possession that was contrary to her position. App. 387, ll. 10 – 388, l. 2. Beach acknowledged such cross-examination would have been reasonable, responsible, and that it could have helped Respondent’s defense. It seems apparent that Dr. Presnell was prepared to be challenged with the article because of her discussions with prior trial counsel Grimes, but trial counsel Beach was not prepared to follow-up on the opening Dr. Presnell gave him. App. 387, ll. 20 – 388, l. 10.

Dr. Sara Shuh was retired from the Medical University of South Carolina Department of Pediatrics at the time of trial, but she still worked there part time. When the solicitor went to qualify her as an expert in pediatric child abuse, Defense Counsel Beach refused the judge’s invitation to “cross-examination as to the qualifications.” Instead of cross-examining Dr. Shuh, Beach simply offered that it was up to the state to present her qualifications. After several questions by the solicitor, Defense Counsel Beach did not object to Dr. Shuh’s qualification. App. 131, l. 14 – 133, l. 24. Dr. Shuh testified she did not believe the child’s injuries “came from a simple fall on the carpet.” App. 138, ll. 14-18.

The cross-examination of Dr. Shuh was only two full transcript pages long, it was very generic, and elicited that while Dr. Shuh testified more often for the prosecution that she had also testified “for defense attorneys and for plaintiff attorneys who are not associated with the state.” App. 139, l. 20 – 141, l. 18.

At the PCR hearing former counsel Grimes testified he would have impeached Dr. Shuh with a transcript of a speech she had given to effectively show her bias “against defense attorneys.” Grimes remembered he had used this transcript in a prior PCR hearing in Dorchester County before Judge Goodstein in a criminal sexual conduct with a minor case. Grimes said he was intending to use the transcript of the speech about her bias against the defense to impeach Dr. Shuh at trial. He he could not say with absolute certainty that the transcript of the speech was in the case file. Regardless, Dr. Shuh was not impeached by Beach about her bias at trial. App. 429, l. 16 – 431, l. 13.

At respondent’s trial, the state presented two other medical experts. Dr. Joel Cochran was qualified without objection as an expert in pediatric critical care medicine. He worked at Medical University of South Carolina. App. 119, l. 12 – 120, l. 22. Dr. Cochran also opined that the injury was not consistent with a simple “trip and fall over a cord.” App. 123, ll. 13-15.

Finally, the state presented the testimony of Dr. Alex Vandergrift who also worked for the Medical University of South Carolina. App. 142, l. 23 – 143, l. 10. Dr. Vandergrift testified the child suffered a “severe injury.” Dr. Vandergrift was not qualified as an expert before giving his opinion. App. 147, ll. 6-7. The cross-examination of Dr. Vandergrift by Defense Counsel Beach was barely one page long. See App. 150, l. 23 – 151, l. 25.

During the PCR hearing Beach admitted that he did not talk to the state’s experts prior to trial. He offered that he reviewed their reports, and “I knew their reputation, and I knew what they were going to bring to trial... .” App. 406, ll. 5-13.

On cross-examination by the assistant attorney general, Beach opined that he thought his cross-examination of the state’s experts at trial “was sufficient.” He added: “The state’s expert

witnesses were really primed.” Beach also testified the state’s witnesses were “very arrogant,” and he thought this may have come across to the jury. App. 407, l. 10 – 408, l. 4.

Defense Counsel Beach also claimed that he had discussed the case with prior counsel Grimes at the Public Defender’s Conference, and at the meeting of the South Carolina Bar Association, at that separate conference. App. 415, l. 18 – 416, l. 3. The following occurred on direct examination of Andrew Grimes:

Q. [T]he testimony of Attorney Beach indicated that he spoke to you at least on two occasions concerning this case with Melvin Daniel after you left the public defender’s office. Do you recall talking with him about Mr. Daniel’s case?

A. I heard the last part, what he said about at the public defenders’ conference and criminal law update by the bar, and **I may have asked or touched base with him at the public defender conference. You know, I can’t recall any specific conversation with him about Mr. Daniel’s case. And I’m probably 100 percent sure I never talked to him at the bar criminal law update because I stopped going to those since I get all CLE credits through the public defender conference.**

Q. Did he ever communicate with you in any way to confirm with you as far as strategy on Mr. Daniel’s case?

A. No, sir.

App. 431, l. 14 – 432, l. 5. (emphasis added).

Dr. Mark Shuman was the associate medical examiner for Miami-Dade County. He was a medical doctor having graduated from the University of Pittsburgh Medical School in 1993, and he did a general surgical residency at Washington Hospital in Washington, D.C. After he moved to Miami he did four years of anatomic and clinical pathology at Jackson Memorial Hospital, and then did a 1-year forensic pathology fellowship in the Miami-Dade County Medical Examiner

Department. He was board certified in anatomic, clinical and forensic pathology. App. 534, l. 18 – 436, l. 9. He was qualified as an expert in forensic pathology without objection during the PCR hearing. App. 436, l. 22 – 437, l. 9.

Dr. Shuman explained that “in forensic pathology basically what we do in every case is we examine bodies, and we have to look at what we see in the body and correlate it to what we’re told happened. That’s the only thing we can do. We can’t look at the body and make something up about something happened, and we look at the body and we see what the findings are, we can say it is or is not consistent with the story that we’re given” App. 439, ll. 4-17.

Dr. Shuman estimated he had testified as an expert about sixty times, and he testified more for the prosecution than he had for the defense. App. 440, ll. 20-25. Dr. Shuman had also testified for the prosecution in other districts in Florida, in California, and the Cayman Islands. App. 440, l. 23 – 441, l. 6. Dr. Shuman testified after reading respondent’s statement to the police about the child tripping over a cable, falling, and hitting his head, that he found the autopsy findings consistent with respondent’s statement of what actually happened. App. 439, l. 18 – 440, l. 9.

Dr. Shuman said he was aware of Dr. Presnell’s opinion, and he testified that did not agree with her trial opinion that the injuries to the child were the result of abuse. App. 441, ll. 7-21.

Dr. Shuman offered that some short falls “maybe less than five feet or so had caused serious injury and even death.” Dr. Shuman referred back to the research of Dr. Plunkett, referenced above. Dr. Shuman noted that fact that some of deaths referenced in that article referred to “swings and see-saws **is irrelevant** other than, you know, the height of the actual fall.” App. 441, l. 15 – 444, l. 5. (emphasis added). Defense counsel Beach earlier sought to dismiss the Dr. Plunkett article on cross-examination, at the invitation of counsel for Petitioner, because the child fell from an object such as a swing. App. 409.

Dr. Shuman explained to the PCR Court that “what matters is the velocity at which you strike the ground, which is mostly based on the height in a fall like that, and what part of your body hits the ground and what the ground is like, so if you hit something hard, it’s worse than obviously hitting something soft. So in a fall like this where a child’s running, I mean, the child was only about two, two and a half feet tall, so for him to fall straight down onto his head, it would be just over a two-foot fall, which is a fairly significant fall.” Dr. Shuman explained that the child’s injuries were consistent with tripping and falling and that the fact he had injuries “subarachnoid hemorrhaging, retinal hemorrhaging, and I think subdural hemorrhaging” . . . “all those things are what you get with head injuries” . . . “they’re not specific for being abuse or accidental.” App. 441, l. 22 – 443, l. 25. Dr. Shuman said such injuries were more common in adults where they fall, hit their heads and died from the injuries. App. 444, ll. 6-13.

Dr. Shuman also said a thin carpet with concrete or wood underneath it, as here, is going to be a hard surface for a child to hit his head on after tripping. Dr. Shuman told the PCR judge that given the evidence he found respondent’s statement to the Waltherboro Police Department to be very credible. App. 444, l. 14 – 445, l. 12.

Dr. Shuman testified that Dr. Presnell was incorrect in finding *abusive* head trauma in this case, and he attributed her conclusions to be “based on dogma and not science. She’s basing it on years of what people think happens, and what they say happens is not actual science.” Dr. Shuman also explained that mistakes were made in forensic pathology, and that forensic pathologists should first determine if the claim of what happened matched the autopsy, and “if it doesn’t fit, then we need to figure out what happened.” App. 449, l. 22 – 450, l. 13.

Dr. Shuman repeatedly testified during the PCR hearing that he would have testified at respondent’s trial that as a forensic pathologist he determined the injuries were accidental, and not

the result of intentional abuse. App. 443, l. 14 – 446, l. 24. “The cause of death is a head injury. The abusive part doesn’t need to be there. It is not abusive. It’s accidental.” App. 446, ll. 21-24; App. 449, l. 22 – 451, l. 21.

Dr. Shuman stressed that his testimony at the PCR hearing would have been the same as if he was retained by the defense in July of 2007 when he was also a forensic pathologist. App. 445, l. 17 – 446, l. 2. Dr. Shuman opined what happened in this case was a tragedy but that the hematoma in the deceased child was consistent with the child falling forward, hitting his head, and suffering the fatal injury. App. 452, l. 16 – 453, l. 23. After brief questioning by the PCR judge of Dr. Shuman, the petitioner recalled Defense Counsel Harris Beach as a reply witness. App. 455, l. 1-458, l. 5. The following was the reply testimony of Defense Counsel Beach:

Q. Mr. Beach, you were here listening to Dr. Shuman’s testimony today, is that correct?

A. Yes.

Q. Based on his demeanor and testimony today, would you have wanted to call him in the applicant’s trial in South Carolina?

A. I don’t understand the question.

Q. Would you have wanted to call Dr. Shuman at Mr. Daniel’s trial?

A. Well, seeing as I didn’t have an expert at all, yes, I would have.

MS. WILSON: Thank you.

THE COURT: Anything else?

CROSS-EXAMINATION BY MR. MAREE:

Q. Do you believe that the testimony given by Dr. Shuman

would have been helpful to the applicant at trial?

A. Yes.

MR. MAREE: Thank you.

App. 458, l. 7 – 459, l. 3.

The order granting relief

In his order granting post-conviction relief, PCR judge noted that defense counsel Beach admitted the testimony “given by the applicant’s expert would have been beneficial to the applicant’s criminal trial.” App. p. 497. The judge also wrote:

Dr. Mark Shuman, a board certified forensic pathologist, rendered expert testimony in the field of forensic pathology that was favorable to the Applicant. Dr. Shuman testified that in preparation of his testimony he reviewed the autopsy and coroner’s reports; examined forensic slides pertaining to the autopsy; examined post mortem photographs of the deceased; examined autopsy photographs; reviewed the voluntary statement given by the Applicant prior to arrest; and reviewed portions of the trial transcript. He testified that there were several medical studies in existence prior to the Applicant’s criminal trial in July, 2007 that demonstrated children could have fatal accidental falls from short distances. He testified that according to these studies several children who suffered accidental fatal short distance falls sustained very similar head injuries as the child in this case. He further testified that the Applicant’s statement given to law enforcement was consistent with the nature of the injuries sustained by the child. He testified to a reasonable degree of medical certainty that accidental head trauma, not abusive head trauma, was the cause of death of the child in this case. He stated that he was court certified as an expert in forensic pathology at the time Applicant was tried in 2007, and that the testimony he gave at this hearing would have been substantially the same if he had been retained as an expert during Applicant’s criminal trial.

App. 497 – 498.

The PCR Court concluded that defense counsel, was deficient and his deficient performance prejudiced Respondent pursuant to Strickland v. Washington, 466 U.S. 688 (1984). App. 498 – 499. The PCR judge therefore granted Respondent a new trial. App. 499.

ARGUMENT

There was evidence to support the post-conviction relief court's ruling that defense counsel was ineffective for failing to obtain the services of a medical expert where the trial court found an expert was "necessary for [petitioner's] defense," allocated fifteen thousand dollars for an expert, and where trial counsel did not even utilize available medical research left for him by prior trial counsel for impeachment of the state's experts at trial, and where forensic pathologist, Dr. Mark Shuman, testified at the PCR hearing that to a reasonable degree of medical certainty the child's head trauma was the result of an accident as respondent had told the police.

Petitioner seems to base much of its argument on its own opinion regarding the credibility of Dr. Shuman. Petition for Writ of Certiorari at 12-14. However, as seen not even defense counsel took that bait in his reply testimony when he testified that the expert evidence would have assisted the defense at trial. Regardless, the PCR court found Dr. Shuman credible, and the PCR judge's findings must be upheld if there is "any evidence of probative value to support them." Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984); Griffin v. Warden, 277 S.C. 288, 286 S.E.2d 145 (1982).

Here, there was ample evidence to support the PCR judge's ruling that trial counsel provided ineffective assistance of counsel. Prior trial counsel had obtained a funding order for an expert medical witness in the amount of \$15,000. The trial court found that the services of a medical expert were "necessary and reasonable" in this case. Prior trial counsel obtained the funding order by informing the trial judge that having a medical expert in this case was "absolutely necessary."

Dr. Shuman's PCR testimony was compelling expert evidence in respondent's favor. However, this Court's standard of review is only that there was "any evidence" to support the

PCR court's ruling, and there certainly was here. See, Cherry v. State, 300 S.C. 115, 119, 386 S.E. 2d 624, 626 (1989).

Dr. Shuman had examined the evidence in this case, he had read respondent's statement to the police, and he found that the finding of child abuse rather than accident to explain the injuries to be based more on "dogma" than science. Dr. Shuman was a state medical examiner, and he testified more often for the prosecution in Miami, elsewhere in the State of Florida, and in other jurisdictions.

Given the state's experts in this case, it should have been readily apparent to Defense Counsel Beach that an expert was necessary in this case. However, the fair reading of the PCR record leads to the conclusion that Counsel was not prepared for trial in this case by way of retaining an expert, or even prepared to cross-examine the state's expert witnesses.

Respondent takes no pleasure in asserting that but Counsel was not familiar with the extensive research done by prior trial counsel Grimes. In addition, Grimes testified under oath, and he disputed defense counsel's assertion that they met at the South Carolina Bar Conference about respondent's case. He further disputed that any kind of meaningful discussion was held at the Public Defender's Convention about Respondent's case prior to trial. There were no strategy discussions between them despite the extension work done by Grimes.

The state's argument that defense counsel effectively cross-examined the state's experts was effectively refuted by the trial record itself, and it was totally destroyed by the PCR record. Importantly, Beach himself acknowledged that he should have had an expert, and that this expert testimony would have been very beneficial to Respondent at trial.

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), this Court held that defense counsel rendered ineffective assistance of counsel even though he did seek out an expert where

he did not retain Avery as an expert on the critical gunshot residue analysis issue. As seen in above, Beach said he had ample time to prepare this case for trial, and therefore ample evidence to retain an expert. The majority of this Court in Ard v. Catoe found that while defense counsel “expeditiously retained an expert” that the retained expert was not the proper expert to retain.

In Ard v. Catoe, the defense was that the gun discharged accidentally killing the victim and her unborn child. It was therefore critical for the jury to understand that there was gunshot residue evidence consistent with the victim have touched or handled the gun.

Similarly, in this case, respondent told police that the child was running, that he tripped over a cable, and he fell on his head. This caused the fatal injury. Without the expert testimony -- the trial court had approved the money for -- to counter the state’s experts, and put forth expert opinion testimony that the child died from an accident, respondent’s conviction for homicide by child abuse was a foregone conclusion. As this Court found in Ard v. Catoe, defense counsel here should have further investigated, and more thoroughly prepared to challenge the testimony of the state’s witnesses that the injuries were intentionally inflicted. Defense counsel’s PCR testimony revealed he had a fatalistic attitude about the outcome of the trial even though there was an abundance of ammunition on the defense side that he never used because of his ineptitude in preparing for trial.

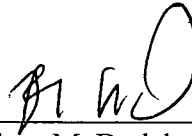
In Hinton v. Alabama, ___ U.S. ___, 134 S.Ct. 1081 (2014), the United States Supreme Court held that defense counsel’s failure to request additional funds to replace an inadequate expert constituted deficient performance. In Hinton, the Court held that it was unreasonable for Hinton’s lawyer to fail to seek additional funds from the court, hire an expert, and that such failure was not based on any strategic decision. Rather, the failure was based on the mistaken belief that available funding was capped at \$1,000.

Here, again, defense counsel had \$15,000 approved in advance to find a medical expert the trial court had already found was “reasonable” and “necessary.” There was an abundance of evidence to support the ruling of the PCR judge that defense counsel provided ineffective assistance of counsel in this case, and it respectfully should be affirmed under the “any evidence” standard. See, Cherry v. State, 300 S.C. 115, 119, 386 S.E. 2d 624, 626 (1989).

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should have been denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 2nd day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

James R. Barber, III, Circuit Court Judge

MELVIN DANIEL,

RESPONDENT,

V.

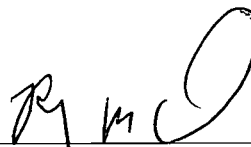
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-000922

CERTIFICATE OF SERVICE

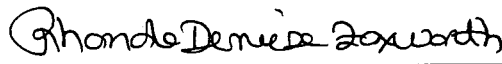
I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Ashleigh R. Wilson, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, by depositing it in the U.S. Mail, in an envelope with sufficient proper postage affixed, on this 2nd day of April, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 2nd day
of April, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 17, 2021