



LAW OFFICE OF
JEREMY A. THOMPSON
LLC

August 9, 2016

RECEIVED

AUG 11 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330

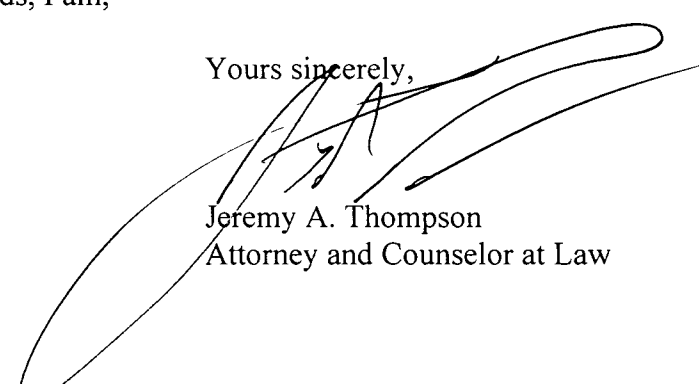
S.C. SUPREME COURT

RE: Justin Ryan Hillerby, #339543 v. State of South Carolina; 2013-CP-08-2121

Dear Mr. Shearouse:

Enclosed please find the original and one copy of my Notice of Appeal in the above-captioned action. I would appreciate your filing the original, clocking the copy, and returning the clocked copy to me in the envelope provided. I will be continuing my representation of the Petitioner on appeal. I would note that Judge Hyman issued a written Order of Dismissal in this case which was filed with the Berkeley County Clerk of Court's Office on January 21, 2016, but which I did not receive until January 27, 2016. A copy of that Order is also enclosed. Additionally, Judge Hyman issued a written Order Denying Applicant's Motion to Alter or Amend which was filed on July 22, 2016, but which I did not receive until July 28, 2016. I have enclosed a copy of that Order as well. Finally, I have already requested the PCR hearing and Rule 59(e) transcripts from the hearings before Judge Hyman. I have received the PCR hearing transcript but I have not yet received the Rule 59(e) transcript. I am enclosing copies of my correspondence with the court reporter for the Rule 59(e) transcript with this letter as well. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,


Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures

cc: J. Rutledge Johnson, Assistant Deputy Attorney General (w/ Notice of Appeal and letter to court reporter)
Desiree Allen, Court Administration (w/ letter to court reporter)
Justin Ryan Hillerby, #339543 (w/ Notice of Appeal)
Vicki Clearman (w/ Notice of Appeal)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Larry B. Hyman, Presiding Judge

2013-CP-08-2121

RECEIVED

AUG 11 2016

S.C. SUPREME COURT

JUSTIN RYAN HILLERBY, #339543,

Petitioner,

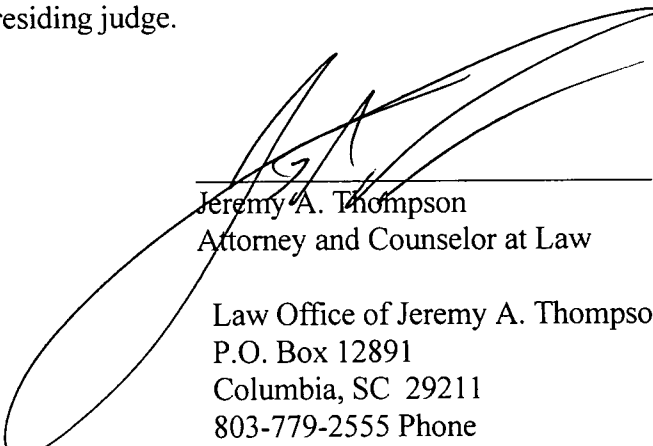
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Justin Ryan Hillerby, #339543, appeals the Order of Dismissal filed on January 21, 2016, and received by counsel on January 27, 2016, as well as the Order Denying Applicant's Motion to Alter or Amend filed on July 22, 2016, and received by counsel on July 28, 2016, both issued by the Honorable Larry B. Hyman, presiding judge.



Jeremy A. Thompson
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555 Phone
803-779-2556 Fax
jeremyatlaw@yahoo.com E-mail

ATTORNEY FOR PETITIONER

This 9th day of August, 2016.

Other Counsel of Record:
J. Rutledge Johnson, Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

AUG 11 2016

Larry B. Hyman, Presiding Judge

S.C. SUPREME COURT

2013-CP-08-2121

JUSTIN RYAN HILLERBY, #339543,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

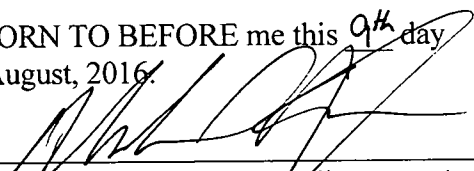
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Rutledge Johnson, Assistant Deputy Attorney General, P.O. Box 11549, Columbia, SC 29211, by mailing in an envelope properly addressed with postage prepaid on this 9th day of August, 2016.


Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE me this 9th day
of August, 2016.


Notary Public for South Carolina
My Commission Expires: 7/10/2022

(L.S.)

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

FILED

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

16 JAN 21 AM 11:39

Justin Ryan Hillerby, #339543,

Applicant,

v.

State of South Carolina,

Respondent.

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2013-CP-08-2121

ORDER OF DISMISSAL

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed September 19, 2013. The State made its Return on December 30, 2014. An evidentiary hearing into this matter was convened on September 8, 2015. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The Respondent was represented by J. Rutledge Johnson, Assistant Deputy Attorney General. At the hearing, the Dr. Michael Baden, Ray Nash, Tricia Blanchette, Esquire, Vickie Williams, and Applicant testified on Applicant's behalf. John Michael Bosnak, Esquire also testified. This Court has before it a transcript of the trial, a copy of the briefs filed on direct appeal, a copy of the Court of Appeals' opinion on direct appeal, a copy of the records of the Berkeley County Clerk of Court regarding the subject conviction, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits introduced by the parties during the evidentiary hearing.

PROCEDURAL HISTORY

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Berkeley County Clerk of Court's orders of commitment. At the December 17, 2008

CC:JR
JAT

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term of General Sessions, the Berkeley County Grand Jury indicted the Applicant for homicide by child abuse (2008-GS-08-2594). On February 22-25, 2010, the Applicant proceeded to trial by jury. John Michael Boznak, Esquire, represented the Applicant at this proceeding. At the conclusion of the trial, the jury convicted the Applicant as indicted. The Honorable Kristi L. Harrington sentenced the Applicant to life imprisonment.

A Notice of Appeal was filed on Applicant's behalf and appeal perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Hillerby, 2013-UP-300 (S.C. Ct. App. filed July 3, 2013). The Remittitur was issued on July 19, 2013.

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel.

In an Amended Application for Post-Conviction Relief filed August 31, 2015, the Applicant submitted the following specific allegations of trial counsel:

1. Trial counsel was ineffective for failing to consult with a forensic pathologist prior to trial and for failing to present the testimony of a forensic pathologist at trial.
2. Trial counsel was ineffective for failing to question the forensic pathologist at trial regarding his qualifications and his lack of experience in conducting autopsies at the time he conducted the victim's autopsy.
3. Trial counsel was ineffective for failing to investigate and to present a defense that an individual other than the Applicant killed the victim.
4. Trial counsel was ineffective for admitting prejudicial photographs of the deceased victim into evidence.

5. Trial counsel was ineffective for failing to object to the trial court's instruction to the jury that they had two options on the verdict form and that both were guilty.
6. Trial counsel was ineffective for failing to renew his objection to the admission of the Applicant's statements into evidence.

At the evidentiary hearing in this matter, the Applicant proceeded on these allegations, and waived any claims of ineffective assistance of appellate counsel. Accordingly, this Court has only considered the allegations raised in the Amended Application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court has also read the trial transcript, all of which assists the Court in judging their credibility. The Court finds the testimony of John Michael Bosnak, Applicant's trial counsel, very credible. This Court finds the Applicant's testimony and Michael Baden's testimony concerning ineffectiveness of trial counsel is not credible.

Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Dr. Michael Baden, who was qualified as an expert in forensic pathology, testified he reviewed the autopsy, photos from the incident scene, x-rays and the trial testimony of Dr. Batalis. Dr. Baden stated the victim died from multiple blunt force injuries to the head and brain. Dr. Baden stated that according to the medical report, the child victim died of small injuries caused by a narrow object, like a toy or stick, but not likely at the hands of an adult. Dr. Baden claimed there were more than 50 small injuries on the child's body and that it was most likely caused by a sibling rivalry death. Dr. Baden also claimed this was not the pattern of an adult.

Dr. Baden then testified he reviewed the autopsy photos and photos of the victim in the crib. Dr. Baden stated his interpretation of the injuries to the right side of the victim's head were from a "poke," not a pinch. Dr. Baden stated the injury to the top of the right foot where bruising was seen was "typical of a poke," and that victim had multiple injuries to his face. Dr. Baden then speculated that these injuries were not consistent with a fist, but rather from a poking object. Dr. Baden then stated that he has seen no injuries like these before which were caused by an adult.

Dr. Baden agreed with Dr. Batalis in that the bruises on the victim were caused by an impact; however, Dr. Baden disputes that there was hemorrhaging under the skin. Dr. Baden then stated Dr. Batalis should have looked at tissue under a microscope, and that he believes the bruises were caused by poking the victim. Dr. Baden then testified that the paint roller handle seen in one of the photos could have caused the injuries to the victim. Dr. Baden then stated he disagreed with Dr. Batalis in that victim died within hours of the fall; Dr. Baden opined that the death would have occurred at a minimum of 8 hours earlier due to the blood that had settled on the front part of victim's body. Dr. Baden stated he would have wanted to compare the objects in the house to the injuries and does not believe that Dr. Batalis or the police did so. Dr. Baden asserted that the nature of the injuries were more likely to be caused by a child than by an adult, and that victim's injuries other than the blunt force trauma to the head were probably not visible until the victim arrived at the medical examiner's office because the victim was clothed at the scene.

On cross-examination, Dr. Baden still asserted that the injuries to the child victim were not likely caused by an adult, but the incident is common with sibling injury. Dr. Baden then admitted he did not perform an autopsy on the child victim, did not read the entire trial transcript and did not speak to Dr. Batalis prior to the PCR hearing. Dr. Baden also admitted that he did not read the

statement given by Applicant that he was alone with the victim the night the child victim died. Dr. Baden further admitted that the paint roller handle seen in the photos could have been used by an adult to cause the child's death. Dr. Baden also agreed with Dr. Batalis in that there was blunt force trauma to the child's head, but stated that could be created by hitting another object.

On redirect examination, Dr. Baden testified that when he first reviewed the autopsy, he did it as a favor to Ray Nash and did not charge a fee. However, once he gave an opinion he did charge \$5,000, but did not change his initial opinion. He lastly stated that victim's injuries are not consistent with being punched, slapped, struck with a knee, or an adult hitting victim's head on a wall.

Upon being questioned by this Court, Dr. Baden stated that the injuries could have been caused by the adult, but he has simply never seen it before. Dr. Baden also testified he agrees with the medical examiner's focus on the head/brain injuries, and that the cause of death was a subdural hematoma. Dr. Baden then opined that the other injuries suffered by the child victim were created at approximately the same time as death.

Ray Nash, a private investigator, was contracted to review this case; specifically to investigate the qualifications of Dr. Batalis. He found that Dr. Batalis was certified by the American Board of pathology, was certified as a forensic pathologist in 2008, was certified in anatomic pathology in 2007, and was certified in clinical pathology.

Applicant then called Tricia Blanchette to the stand as appellate counsel. Ms. Blanchette stated she ordered a number of transcripts and had lots of communication with trial counsel, including obtaining Applicant's file. Ms. Blanchette also testified she wanted to look for additional issues in preliminary transcripts and originally had 8 issues. Counsel also stated she reviewed the evidence and photos in preparation for briefing or appellate issues.

Upon questioning by this Court, Counsel admitted the trial court made a determination as to the voluntariness of Applicant's statement and that the review on appeal is a "clear error" standard. Counsel stated she argued in her brief that the interview itself was coerced and that law enforcement made representations to Applicant in order to entice Applicant to confess. Counsel lastly stated she argued the trial court did not conduct a proper or complete analysis of this issue.

Applicant testified he hired Counsel a couple weeks after his arrest. Applicant stated he met with Counsel four times at the jail, but it was five to six months in between meetings, and that the longest meeting they had was approximately forty-five minutes. Applicant stated he met with Counsel for a total of five hours and tried to contact Counsel numerous times, but was unable to call Counsel from jail. Applicant stated he did not have the discovery materials other than his statement to law enforcement. Applicant admitted he discussed some of victim's injuries with Counsel but did not review the discovery page by page.

Applicant stated he wanted a trial from the beginning and that he rejected a twenty-year plea offer. Applicant stated one of his possible defenses was a third-party guilty claim. He also stated that he wanted experts consulted, including an interrogation expert and a medical expert. Applicant stated Counsel told him that Counsel had consulted an expert, but that Counsel did not like the answer the expert gave him. Applicant stated he wanted to testify at the trial, but Counsel stated it would not be a good idea for Applicant to testify on his own behalf. Applicant then stated that in the last meeting with Counsel, Counsel said they reviewed his testimony and that Counsel advised him he needed to admit to his first statement to law enforcement, which stated the child's death was an accident. Applicant claimed he never hit child victim. Applicant also stated he was not satisfied with Counsel's representation at trial because there was no medical expert or anyone to testify about

interrogation tactics.

Applicant further testified that he was not at the house alone; rather, his girlfriend's daughter, Serena, was also present at the home. Applicant claimed there were times that Serena could have been alone with the victim. Applicant stated he did not hit victim or bump victim with his knee or hit victim's head on the wall. Applicant admitted he came up with the knee theory, but that was while talking to law enforcement; however, he stated this never happened.

On cross-examination Applicant admitted he lied to law enforcement, and told his girlfriend about his statements to law enforcement, in which he stated he smacked victim. Applicant also stated he told his girlfriend that the child victim hit his head on the floor. Applicant testified at trial that he was not drunk, but in his conversation with his girlfriend, contained in the jail audio recording, he admitted he was drunk during the incident.

On redirect examination, Applicant claimed in the jail audio recording, that he was simply trying to explain to his girlfriend what he had put in his statement to law enforcement. Applicant also stated he stuck with what he put in the statement because he did not want his girlfriend to get in trouble. On re-cross examination, Applicant again admitted he lied under oath at the trial.

Vicki Williams, Applicant's mother, testified she was stationed at Guantánamo Bay, Cuba when Applicant was charged with the crime. She also testified she returned to the United States and met with Counsel in person. According to Ms. Williams, she met with Counsel to negotiate payment for his representation and explained that she wanted experts hired in this case. Ms. Williams also stated she met with Counsel twice in person but had a hard time getting in touch with him. She further stated she understood multiple experts would be called this case, and that she told Counsel of character witnesses on Applicant's behalf, but stated Counsel explained these witnesses would not be

helpful.

On cross-examination, Ms. Williams admitted she had no personal knowledge of what occurred inside the house on the night of the incident.

Michael Bosnak, trial counsel, testified he had represented Applicant on a civil possession charge one month before these charges arose. Counsel stated he met with Applicant numerous times and filed numerous motions on Applicant's behalf, including Rule 5, Brady, a motion to compel DNA evidence, Lyle, and a speedy trial motion.

Counsel stated he discussed all of this with Applicant and also conversed with two experts that Counsel consulted. The first expert consulted was Dr. Ronald Orlonsky, a DNA expert used by the public defender's office. Counsel sent Dr. Orlonsky Applicant's case file and SLED sent Dr. Orlonsky the other forensic evidence. This expert came to the same conclusions as SLED.

Counsel then testified he consulted with Dr. Betsy Gibbes, a child abuse expert, who ran the Children's Medical Assessment Center at the Medical University of South Carolina. Counsel stated he would not have called Dr. Gibbs as a witness because she disagreed with the forensic pathologist on some points, but she ultimately concluded that she believed Applicant killed the victim. Counsel testified her conclusion was that if Applicant used a paint roller stick 20+ times as he claimed, Applicant would have sustained injuries on his hands, but had none. Counsel stated the paint rolling stick was never tested for DNA. Counsel then testified that no one could explain how the child was hit; whether it was with a fist or with an object.

Counsel then testified he used the lack of DNA evidence in his defense of Applicant. Counsel also believed law enforcement tampered with the crime scene; however, that was exculpatory to the Applicant. Counsel stated when he first got the case, he thought it was winnable. Counsel stated

Applicant's first statement to law enforcement could not be used against him, but Applicant's second statement was a little worse, in that Applicant wanted to speak with the investigator but did not admit he killed victim; Applicant alluded to some bruising that occurred at the pool earlier in the day. In his third statement, Applicant claimed the victim ran into his knee and then clipped a door frame. Counsel stated there were no witnesses who can explain how victim received the marks on his body. Counsel then stated this is the first time he heard that Applicant was trying to blame the 8-year-old daughter of his girlfriend for the crime.

Counsel testified he and the girlfriend/victim's mother were in constant contact throughout his representation of Applicant. Counsel stated he was in contact with the assistant solicitor concerning the jail tape, of which he received a copy. Counsel testified when he heard the tape, he thought "we're done," because it was confession. Counsel said Applicant stated he hit the victim "and that is when it started." Counsel also testified that nowhere on the tape did Applicant say victim was okay, and this tape was what got Applicant convicted. Counsel stated he played the tape for Applicant's mother and advised that he accept the plea offer; Applicant's mother stated we paid Counsel for trial, not a plea.

As to the jury instruction issue, Counsel stated Applicant was talking in his ear and he could not hear the judge's instructions. Counsel also stated the lack of a not guilty option on the jury form could be a simple scrivener's error.

On cross-examination, Counsel admitted he did not consult with a forensic pathologist; Counsel stated that he did not believe a forensic pathologist could determine where the bruising came from because the victim died of blunt force trauma to the head; the bruises elsewhere were not going to help Applicant's case. Concerning the Jackson v. Denno hearing, Counsel testified he did

not have a reason not to renew his objection, because, in his opinion, the trial court would not change his ruling. Counsel then testified he admitted additional photographs to show bruising and marks, but the most damaging photographs had already been put in evidence by the prosecution. Counsel also testified he did not challenge Dr. Batalis's qualifications as a forensic pathologist because it was Counsel's understanding that he was certified at the time the autopsy and at the trial.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to consult and call a Forensic Pathologist at trial

Applicant's main contention at the PCR hearing was that counsel was ineffective for failing to consult with or call at trial a forensic pathologist on Applicant's behalf. Applicant presented the testimony of Dr. Michael Baden, a renowned forensic pathologist. As stated earlier, Dr. Baden testified that the victim's injuries were most likely caused by a repeated poking motion with a small object, such as the paint roller handle seen in one of the crime scene photos. He also testified that the injuries to the victim's head were caused by the same object. He further stated these injuries were caused by a child, not an adult.

While this Court certainly agrees Dr. Baden is a renowned expert forensic pathologist, this Court finds his account of the events of victim's death not credible considering the evidence in the case. Dr. Batalis, the State's forensic expert at trial, was the physician who performed the autopsy on the victim in this case. He testified the autopsy lasted approximately 3 hours, and he prepared a final report in this case. (TR. P. 136). He also testified victim could have died within hours of when he was found, but could be up to 10 or 12 hours based on the way the body was found. (TR. P. 137). To a reasonable degree of medical certainty, Dr. Batalis testified the cause of death was blunt force trauma to the head. (TR. P. 137). Dr. Batalis also testified victim had bruises on the head and neck area, including two bruises on the back of the scalp. (TR. P. 138). Dr. Batalis further testified there were at least nine different areas of hemorrhaging which would be consistent with impact sites where the victim could have been struck in the spots. (TR. P. 139). Ultimately, Dr. Batalis opined this was a closed head injury which caused no fractures to the skull, but lead to victim's death by blunt force.

trauma. (TR. P. 140; P. 155-156).

This Court finds Dr. Baden's account of events not credible for the following reasons. First, Dr. Baden never performed an autopsy on the victim. He only relied on pictures and accounts from others, years after the autopsy was performed. Second, while Dr. Baden agreed with Dr. Batalis that the cause of death was blunt force trauma to the head, Dr. Baden insisted that all of these injuries were caused by poking with an object by a child. This is simply not plausible based on the evidence in the case. There were nine separate injuries to the victim's head and neck area, which ultimately led to victim's death. This Court does not find the "bruising" found on the victim's body to contribute to his death whatsoever. Third, Dr. Baden opined that these bruises were caused by a small, blunt object, such as the paint roller handle seen in one photograph offered in evidence. This Court finds this part of Dr. Baden's opinion to be based on complete speculation, as no DNA testing was completed on the paint roller, and there were no witnesses that the paint roller was ever used in the child's death. Fourth, while Applicant claims Dr. Baden testified the victim's time of death could not have occurred within the two hours, "as testified to by Dr. Batalis," a review of the record shows Dr. Batalis actually testified that it could have been twelve hours before victim's body was found. Based on the aforementioned, this Court finds counsel was not ineffective for not retaining or calling a forensic expert, such as Dr. Baden, in this case because this Court does not find that victim's death could have been caused by anything other than the blunt force trauma to the head, which both experts agreed upon.

Nevertheless, even assuming *arguendo*, that this Court found counsel was ineffective for not retaining or calling at trial a forensic expert to refute the State's case, Applicant can prove no resulting prejudice in this case. Namely, Applicant has failed to prove that outcome of Applicant's

trial would have been different had Counsel taken different actions. Applicant attempts to allege a third-party guilty claim in his PCR case. Dr. Baden's testimony alluded to the conclusion that these injuries were caused by a small child, not an adult. However, Applicant presented no evidence whatsoever at the PCR hearing that anyone other than Applicant injured the child.

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. 298, 509 S.E.2d 807 (1998).

Further, to establish a third-party guilty claim:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

State v. Cope, 385 S.C. 274, 293, 684 S.E.2d 177, 186-87 (Ct. App. 2009) aff'd, 405 S.C. 317, 748 S.E.2d 194 (2013) (citing State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)).

Evidence of third-party guilt may include: (1) facts that are inconsistent with the defendant's guilt; and (2) evidence raising a reasonable inference as to the accused's innocence. Id.

This Court finds Applicant has failed to meet his burden of proof that counsel's alleged actions prejudiced his case for the following reasons. First, Applicant attempted to show that the only other person in the house besides Applicant and the victim was Applicant's girlfriend's eight-year-old daughter, Serena. However, Applicant failed to produce any witnesses, namely Serena, which tended to show that anyone other than Applicant caused victim's death. Second, Applicant, in his conversation with his girlfriend recorded on the jail tape, admits that he "smacked" the victim on the

night of the victim's death. Additionally, Applicant admitted to law enforcement that he played a role in victim's death, although he later recanted the statement. Therefore, this Court finds Dr. Baden's testimony that these injuries were caused by small child, namely Serena, is not credible as Applicant failed to produce evidence tending to show someone other than Applicant caused the victim's death. Thus, Applicant can prove no prejudice from counsel's failure to retain or consult with a forensic pathologist in this case.

All other allegations

This Court notes that Applicant alleged other allegations, such as failure to question Dr. Batalis regarding his qualification as a forensic pathologist, introduction of photographs, jury verdict instructions, and objection to Applicant's statements. However, this Court finds Applicant either failed to meet his burden of proving Counsel was ineffective or failed to show how Counsel's actions prejudiced Applicant's case. Therefore, these allegations are denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

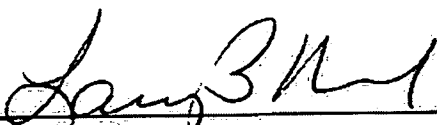
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel

must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!

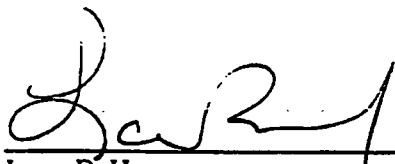

Larry B. Hyman
Presiding Circuit Court Judge
Ninth Judicial Circuit

1-7-, 2016

Georgetown, South Carolina

Order of Dismissal, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Rule 59 Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND IT IS SO ORDERED this 5 day of July, 2016.



Larry B. Hyman
Presiding Judge
Ninth Judicial Circuit

Conway, South Carolina

Law Office of Jeremy A. Thompson
P.O. Box 12891
Columbia, SC 29211

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

