

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-001666
Lower Court Case No. 2013-CP-08-2121

RECEIVED

JAN 30 2017

S.C. SUPREME COURT

JUSTIN R. HILLERBY, #339543,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether the PCR court erred in concluding that defense counsel was not ineffective for failing to consult with a forensic pathologist and present the testimony of a forensic pathologist at trial inasmuch as such testimony would have shown that the Petitioner did not kill the victim?

II.

Whether the PCR court erred in concluding that defense counsel was not ineffective for introducing inflammatory autopsy photographs of the victim at trial?

STATEMENT OF THE CASE

The Petitioner, Justin R. Hillerby, was charged in Berkeley County for homicide by child abuse. On February 20-25, 2010, the Petitioner proceeded to trial on this charge. The Petitioner was represented at this proceeding by J. Michael Bosnak, Esquire.¹ At the conclusion of the trial, the jury found the Petitioner guilty as charged. The Honorable Kristi L. Harrington, presiding circuit judge, sentenced the Petitioner to life imprisonment.

The Petitioner timely appealed his conviction and sentence to the South Carolina Court of Appeals. He was represented on appeal by Tricia A. Blanchette, Esquire. In an unpublished opinion, the Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Hillerby, 2013-UP-300 (S.C. Ct. App. filed July 3, 2013). The Petitioner did not pursue a further appeal in this Court.

On September 19, 2013, the Petitioner filed an Application for Post-Conviction Relief with the Berkeley County Clerk of Court. An evidentiary hearing into the matter was convened on September 8, 2015, before the Honorable Larry B. Hyman, Jr., presiding circuit judge. On January 21, 2016, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims.

The Petitioner filed a Rule 59(e), SCRCP, motion to alter or amend the Order of Dismissal on February 1, 2016. A hearing was convened on this motion on June 13, 2016, before Judge Hyman. On July 16, 2016, the PCR court filed an Order Denying Applicant's Motion to Alter or Amend. The Petitioner served his Notice of Appeal from both of the PCR court's orders on August 9, 2016, and this Court received the notice on August 11, 2016.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

¹ On February 2, 2016, this Court issued an order placing defense counsel on interim suspension. In re Bosnak, 415 S.C. 332, 782 S.E.2d 123 (2016).

STATEMENT OF FACTS PRESENTED AT TRIAL

In September 2008, the Petitioner lived with his girlfriend Jennifer in her home and with her two children: an eight-year-old daughter named Serena, and an almost two-year-old son (“the victim”). There were two other roommates who lived in Jennifer’s home: Brandi Mihill and Eric Riggins. The charge in this case arose out of Jennifer’s son’s death.

On September 14, 2008, the Petitioner, Jennifer, and Jennifer’s children went to the pool for several hours.² Jennifer testified that they returned to her home between 6:00 and 6:30 P.M., and that she went out after 7:00 P.M. with a friend named Jennifer Angel for several hours. App. p. 301, lines 2-21. When she returned, she woke up the Petitioner, who was sleeping on the couch. App. p. 302, line 22-p. 303, line 2. She checked on the victim’s baby monitor but did not go into his room. App. p. 303, lines 2-13. After checking on the victim’s baby monitor, she got into an argument with Brandi and Eric and then went to bed. App. p. 303, lines 14-18.

At approximately 10:00 A.M. the following morning, Jennifer checked on the victim for the first time. She found that he was cold and stiff and that there was blood on his nose and on his crib mattress. App. p. 304, line 3-p. 305, line 25. The Petitioner then called 9-1-1. App. p. 306, lines 8-22.

Dr. Nicholas Batalis conducted the autopsy of the victim on September 16, 2008. He concluded that the victim died of blunt force trauma to his head. App. p. 523, lines 20-25. Specifically, he testified that the victim had at least nine specific points of impact to his head that caused hemorrhaging, in addition to several other bruises to his face. App. p. 524, line 14-p. 525,

² The State presented testimony from several witnesses that the Petitioner yelled at and berated the victim while at the pool, and that neither the Petitioner nor Jennifer were paying attention to the victim at the pool. As a result, the victim fell into the pool repeatedly. See generally App. p. 230, line 6-p. 232, line 25; p. 238, line 6-p. 239, line 19. These actions did not cause the victim’s death; however, they did result in a charge of unlawful neglect of a child against Jennifer.

line 8. Dr. Batalis further testified that the injuries could have been caused by “a book, ... a fist ... or, alternatively, the child could have been pushed against something that the head could have struck against a doorway, a desk, many different ways.” App. p. 525, lines 16-20. The victim also had numerous markings over his entire body, but Dr. Batalis testified that these markings were not bruises but were likely caused by placing the victim’s body in a cooler or due to the victim’s eczema. App. p. 556, line 3-p. 558, line 8. Finally, Dr. Batalis testified that the victim died between two to twelve hours prior to the time when he was found. App. p. 523, lines 2-16.

The Petitioner gave varying accounts of his actions the night of the victim’s death. Initially, while at the scene, the Petitioner told the authorities that he noticed a bruise on the victim’s face after they left the pool and that the victim acted drowsy that evening, but he did not admit to striking the victim. App. p. 472, lines 4-14. Two days later, on September 17, 2008, the Petitioner told police that he struck the victim’s head with his knee by accident and that he may have also accidentally “clipped his head on the way to his crib and maybe again on his crib.” App. p. 478, line 22-p. 479, line 2. After he gave this second statement, the Petitioner was arrested for homicide by child abuse. App. 483, lines 14-20. The following day, after his bond hearing, the Petitioner gave a third statement where he admitted to striking the victim openhanded twice, with one of the blows knocking the victim to the floor. App. p. 484, lines 6-13; p. 490, lines 4-13. In a recorded jail phone call the Petitioner made to Jennifer on September 26, 2008, the Petitioner told Jennifer

Baby, I smacked him, I didn’t smack him that hard, but when he hit the floor is when, I guess, it started. And, I didn’t notice it because I was drunk, I guess. And, I put him on the futon.

App. p. 1136, lines 2-6. At trial, the Petitioner testified that he did accidentally hit the victim's head with his leg.³ App. p. 635, line 25-p. 637, line 15. The Petitioner denied hurting the victim. App. p. 672, lines 4-24.

There was little to no forensic evidence recovered at Jennifer's home. However, of note, a paint roller handle was recovered from the floor in front of the victim's crib. App. p. 364, line 23-p. 365, line 14. The paint roller handle was tested for the presence of blood, but the test was negative. App. p. 412, line 4-p. 414, line 21. The paint roller handle was not tested for the presence of any other DNA. App. p. 424, lines 8-18.

The Petitioner's testimony was the focal point of the defense, as the only other witnesses that were called by the defense were John Williams, the Petitioner's stepfather and Roy Shoup, a friend of the Petitioner. The Petitioner's stepfather testified that the Petitioner was in off-and-on-again relationships with Jennifer and Melissa Georgoulis, who is the mother of the Petitioner's children. App. p. 606, line 18-p. 607, line 23. Shoup testified that he was present at the pool until approximately 3:15 P.M. and that the Petitioner appeared to be in a good mood that afternoon. App. p. 594, line 3-p. 595, line 6.

³ The Petitioner also gave another version of events during the PCR hearing. During that hearing, the Petitioner testified that the testimony he had given at the trial was false in part in that he did not strike the victim in any way the night of the victim's death. The Petitioner further testified that defense counsel convinced him to admit to striking the victim with his knee so his testimony would match at least one of the statements that he gave to police.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

- I. The PCR court erred in concluding that defense counsel was not ineffective in failing to investigate and present the testimony of a forensic pathologist inasmuch as the testimony of such an expert would have shown that the Petitioner did not kill the victim.**

A. How the Issue Arose Below

As noted above, Dr. Batalis, the forensic pathologist who conducted the autopsy of the victim, testified at trial that the victim died as a result of repeated blunt force trauma to his head and that these injuries could have been caused by a large object or a fist. App. p. 525, lines 16-20. He also testified that the additional markings all over the victim's body were not bruises but resulted either from placing the victim's body in a cooler or due to the victim's eczema. App. p.

556, line 3-p. 558, line 8. Dr. Batalis conducted the autopsy on September 16, 2008. App. p. 521, lines 23-25. He was board certified in forensic pathology on September 4, 2008, only twelve days prior to the autopsy. App. p. 1105.

In the Petitioner's Amended Application for Post-Conviction Relief, he argued that defense counsel was ineffective for failing to consult with a forensic pathologist prior to trial and for failing to investigate a defense that someone other than the Petitioner killed the victim. App. p. 962. At the PCR hearing, the Petitioner presented the testimony of Dr. Michael Baden, a renowned forensic pathologist.⁴ Dr. Baden's ultimate conclusion was that the victim was not killed by an adult, but rather by a child:

[I]t is not likely that any adult caused the death of the child and, in my opinion, and my experience, it is typical for a sibling or for another child to injure a child in this fashion and it is not at all the pattern of injuries that I have seen in 50 years caused by an adult.

App. p. 999, lines 19-24. Dr. Baden testified that instead of being struck by a fist or a large object, the victim's injuries were caused by a narrow object that struck the victim more than fifty times. App. p. 977, line 12-p. 978, line 6. These injuries were most consistent with an older child striking the victim repeatedly, "based on hundreds of child abuse cases I've investigated." App. p. 978, lines 11-14. He testified that a paint roller handle found near the victim's crib would have been the type of object that could have caused those injuries, and that he felt that Dr. Batalis should have compared the paint roller handle to the victim's injuries. App. p. 996, line 8-p. 997, line 15. Dr. Baden also testified that the injuries to the victim were inconsistent with the various accounts given by the Petitioner in his statements and in his testimony at trial; namely, that the injuries to the

⁴ Dr. Baden is the former chief medical examiner for New York City and has held many prestigious posts, including appointment as Chairman of the Forensic Pathology Panel of the U.S. Congress Select Committee on Assassinations, which reinvestigated the deaths of President John F. Kennedy and Dr. Martin Luther King, Jr., in the 1970s. He has conducted over 20,000 autopsies. See App. pp. 1078-1101.

victim were not caused by any of the following: (1) an open strike with a palm; (2) a fist; (3) a blow from a large object such as a door; or (4) a strike by an adult's knee. App. p. 1007, lines 2-15. Finally, Dr. Baden testified that Dr. Batalis' conclusion that the markings on the victim's body were not caused by settling in a cooler, as such markings would be much larger and would not result in "local circular bruises." App. p. 998, line 23-p. 999, line 7.

Both the Petitioner and his mother Vicki Williams testified that they believed that defense counsel was going to retain a medical expert to challenge Dr. Batalis' conclusions, and that they thought this would be an essential aspect of their defense. App. p. 1031, line 17-p. 1032, line 10 (Petitioner); p. 1044, line 18-p. 1045, line 20 (Williams). Defense counsel testified that he did not consult with a forensic pathologist prior to trial. App. p. 1067, lines 17-20. He further testified that he consulted with a pediatrician, Dr. Betsy Gibbs, who told him that she believed that the markings on the victim's body were bruises, but that she believed that the Petitioner caused the bruising. App. p. 1054, line 20-p. 1056, line 11. Defense counsel testified that he was convinced after he heard the Petitioner's recorded phone call with Jennifer that the Petitioner would be convicted if he proceeded to trial. App. p. 1062, line 17-p. 1063, line 12.

The PCR court denied relief on the Petitioner's allegations, concluding that Dr. Baden's "account of the events of victim's death [was] not credible considering the evidence in the case." App. p. 1165. The PCR court then detailed Dr. Batalis' findings before stating that Dr. Baden's findings were "simply not plausible based on the evidence" detailed by Dr. Batalis. App. pp. 1165-1166. The PCR court also found that the Petitioner could not demonstrate prejudice because Dr. Baden's testimony only "alluded to the conclusion that these injuries were caused by a small child, not an adult" and "Applicant presented no evidence whatsoever at the PCR hearing that anyone

other than Applicant injured the child.” App. p. 1167. The Petitioner now claims that these findings are clearly erroneous and that certiorari is warranted to review the PCR court’s order.

B. Discussion

As a general rule, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, *supra*, 446 U.S. at 691. Both this Court and the Court of Appeals have recognized that the failure to investigate and to present favorable expert witness testimony at trial constitutes ineffective assistance of counsel. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008); Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

The Petitioner submits that the PCR court’s findings on this issue are unsupported by any probative evidence. Beginning with Strickland’s performance prong,⁵ the Petitioner contends that defense counsel was under a duty to investigate through consulting with a forensic pathologist for several reasons. First, this case involved a homicide where there were several potential individuals—at least four adults and one child—in the home who could have killed the victim that night. Consultation with a forensic pathologist would have been necessary to confirm or deny Dr. Batalis’ findings. This is particularly important given the nature of the offense charged, as any offense that carries a life sentence obviously imposes significant obligations on defense counsel. Second, defense counsel was aware that the Applicant’s statements regarding the injuries that he caused to the victim were inconsistent with Dr. Batalis’ findings. Defense counsel should have consulted with a forensic pathologist to determine if there was any defensive avenue available to show that the Petitioner gave a false confession, particularly since arguing that the Petitioner gave a false confession was part and parcel of defense counsel’s defense strategy. See App. p. 783, lines

⁵ The PCR court’s findings appear to concentrate largely on Strickland’s prejudice prong inasmuch as they focus on Dr. Baden’s findings and whether or not they would have benefitted the defense.

9-12 (“And then we’ve got these bits and pieces of these false confessions that are all over the place, you’ll convict him. That’s what this case is based on from the State. That’s all.”) Third, defense counsel should have known that the autopsy report would be central to the State’s case, given that the State needed to prove that the victim died from blunt force trauma committed by the Petitioner. It is axiomatic that an attorney is under a duty to investigate matters that form the heart of the State’s case. See generally Rompilla v. Beard, 545 U.S. 374, 394 (2005) (O’Connor, J., concurring) (concluding that the defense attorneys’ performance was deficient for failing to investigate a matter that “would be at the very heart of the *prosecution’s* case”) (emphasis in original).

Defense counsel failed to meet this critical obligation. As he admitted before the PCR court, he never spoke to a forensic pathologist prior to trial. See App. p. 1067, lines 17-20. While defense counsel did consult with a pediatrician—Dr. Gibbs—prior to trial, a pediatrician is not a forensic pathologist. Forensic pathologists are specifically trained to determine how injuries occurred in a way that other medical practitioners, such as pediatricians, are not. Furthermore, the necessity for consultation with a forensic pathologist was only heightened, not lessened, by what Dr. Gibbs told defense counsel. Defense counsel testified that Dr. Gibbs disagreed with Dr. Batalis’ opinion that the injuries to the victim’s body were not bruises. App. p. 1056, lines 1-4. Once he was armed with that information, it was imperative for defense counsel to investigate how further to discredit Dr. Batalis’ opinions. Instead of doing so, and instead of consulting with an expert in Dr. Batalis’ field, defense counsel did nothing. Defense counsel’s lack of action and investigation constituted deficient performance. Consequently, to the extent that the PCR court concluded that defense counsel was not deficient for failing to consult with a forensic pathologist prior to trial, this conclusion is unsupported by any probative evidence.

Turning to Strickland's prejudice prong, the Petitioner contends that the PCR court's findings are both controlled by an error of law and unsupported by any probative evidence. The PCR court essentially concluded that the Petitioner could not demonstrate prejudice because Dr. Baden's testimony was different from Dr. Batalis' findings, and the PCR court believed Dr. Batalis over Dr. Baden. That, however, was not the PCR court's role in evaluating prejudice. Instead, the PCR court was to determine whether or not there was a reasonable probability that the result of the trial would have been different had Dr. Baden testified. See McKnight, 378 S.C. at 43-46, 661 S.E.2d at 359-360 (finding prejudice where a defense expert refuted the cause of the victim's death for homicide by child abuse but was not called by the defense). This inquiry requires a review of Dr. Baden's testimony in the context of the State's case at trial. By substituting its opinion of the medical evidence for Dr. Baden's, the PCR court abdicated its role in properly applying Strickland's prejudice prong.

Reviewing Dr. Baden's testimony in the context of the case, the Petitioner would note that the State's case against the Petitioner was based on the theory that he beat the victim to death. Dr. Baden's testimony refutes that allegation completely in two ways. First, according to Dr. Baden, all of the injuries to the victim are consistent with an individual repeatedly poking the victim with a blunt object. Moreover, he concluded that the individual who poked the victim was most likely a small child, given his vast experience dealing with such injuries. There was a small child—Serena, the victim's sister—who lived in the home with the victim. Second, according to Dr. Baden, none of the injuries the Petitioner confessed to inflicting were consistent with the injuries to the victim. App. p. 1007, lines 2-15. This testimony would have refuted the heart of the State's case: that the Petitioner admitted to killing the victim.

The Petitioner would also note that this Court's jurisprudence on circumstantial evidence marshals in favor of prejudice. As this Court has explained, "circumstantial evidence carries the same weight as direct evidence." State v. Logan, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013); see also State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). Moreover, circumstantial evidence requires that the jury conduct the following critical inquiry:

We have previously observed that this process requires two steps: "After concluding that a particular fact is true, the individual juror is called upon to ask: First, can I infer guilt from that fact? Second, if so, is there any reasonable explanation other than guilt?"

Logan, 405 S.C. at 98, 747 S.E.2d at 451 (quoting Grippon, 327 S.C. at 87-88, 489 S.E.2d at 466). Here, the only explanation provided at trial to the jury for the victim's death was the Petitioner's actions. There were no other explanations that the jury could have seized upon to conclude that there was "any reasonable explanation other than guilt" for the injury. Id. By contrast, Dr. Baden's testimony would have provided a readily available alternative explanation for the jury: that the Petitioner was innocent of the charges against him.

Finally, several of the PCR court's findings regarding prejudice and third-party guilt are directly refuted by the record. The PCR court held that the Petitioner could not show prejudice because he did not present Serena's testimony "to show that anyone other than Applicant caused victim's death." App. p. 1167. This finding is incorrect, as Dr. Baden's testimony shows that a child caused the victim's death. It is not necessary to present Serena's testimony on this point since "circumstantial evidence carries the same weight as direct evidence." Logan, 405 S.C. at 97, 747 S.E.2d at 451. Similarly, the PCR court concluded that "Applicant presented no evidence whatsoever at the PCR hearing that anyone other than Applicant injured the child." App. p. 1167. Again, this finding is directly contradicted by Dr. Baden's testimony that "it is not likely that any adult caused the death of the child." App. p. 999, lines 19-20. Since the Petitioner was an adult at

the time of the victim's death, Dr. Baden's testimony is clearly evidence that the Applicant did not injure the victim. Lastly, the PCR court concluded that "Dr. Baden's testimony that these injuries were caused by a 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." App. p. 1168. Here, the PCR court actually included the information that directly refuted its conclusion within its finding, as Dr. Baden's testimony is the evidence that tended "to show someone other than Applicant caused the victim's death."

In summary, it is Dr. Baden's expert opinion that the Petitioner is innocent of the offense he is charged with committing. The importance of Dr. Baden's testimony to a jury cannot be understated. He is perhaps the world's foremost forensic pathologist and he believes that the Petitioner did not harm the victim. There is certainly a reasonable probability that the jury would have acquitted the Petitioner instead of convicting him had the jury heard that an expert of Dr. Baden's renown found that the Petitioner did not kill the victim. This is especially true given that Dr. Batalis had been board-certified in forensic pathology for only twelve days prior to conducting the autopsy of the victim. Instead of reaching this conclusion, the PCR court substituted its own disbelief of Dr. Baden's testimony for a proper Strickland prejudice analysis, and chose to ignore Dr. Baden's testimony when considering whether or not the Petitioner presented evidence that he did not kill the victim. These findings were erroneous. Consequently, the PCR court's conclusions are controlled by an error of law, unsupported by any probative evidence, and should be reviewed by this Court.

II. The PCR court erred in concluding that defense counsel was not ineffective for introducing prejudicial and inflammatory photographs at trial.

A. How the Issue Arose Below

At trial, the State presented four photographs of the victim's face and neck to show the injuries to the victim during its direct examination of Dr. Batalis. See App. p. 531, lines 13-14 ("These [pictures] show all of the injuries, that we saw in the head and neck area, on the surface of the skin.") During cross-examination, defense counsel introduced ten additional photographs taken during the autopsy that showed the victim's entire naked body. See App. p. 543, line 14-p. 544, line 25. These photographs were far more graphic than those introduced by the State. Dr. Batalis testified that the markings found on the victim's body in those photographs were not bruises. App. 552, lines 10-23. The Petitioner did not present any medical testimony at trial to demonstrate that Dr. Batalis' conclusion that the markings were not bruises was incorrect.

In his Amended Application for Post-Conviction Relief, the Petitioner argued that "[t]rial counsel was ineffective for admitting prejudicial photographs of the deceased victim into evidence." App. p. 962. When asked about his reasoning for admitting those photographs, defense counsel testified

All of the bad photos had been brought in through the prosecution, through the forensic pathologist, because he has to show what the cause of death was. So all of the bad photos had been brought in. They were used to seeing those. I think the ones I brought in were asking about bruising and fingernail marks and things like that.

But, I mean, everybody had been horrified by those photos that the prosecution brought in.

App. p. 1072, lines 1-10.

In its Order of Dismissal, the PCR court found that

Applicant alleged other allegations, such as ... introduction of photographs 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.

App. p. 1168. The Petitioner filed a Rule 59(e), SCRCF, motion, arguing that the PCR court's order "makes no findings of fact, and summary conclusions of law, with regard to [this issue.]"

App. p. 1173. At the hearing held on the Rule 59(e) motion, the PCR court found that its order was sufficient because it "says that he essentially failed to make his—met his burden." App. p. 1182, lines 17-18. The State agreed that the order was sufficiently detailed to preserve the claims for appellate review. App. p. 1182, lines 10-15. The PCR court then issued an order denying the motion, concluding that "this Court finds that no basis [sic] for altering or amending is [sic] prior ruling." App. p. 1185. The Petitioner now asserts that the PCR court's rulings on this issue are erroneous and should be reviewed by this Court.

B. Discussion

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." Id.

Defense counsel was deficient in introducing the autopsy photographs at trial. Defense counsel's stated purpose for introducing the photographs—to show bruising on the victim's body—was directly refuted by Dr. Batalis' testimony because Dr. Batalis testified that the markings were not bruises. While this strategy may have been defensible had defense counsel had any follow-up on this contention, such as by presenting the testimony of an expert who would testify that the markings were bruises, the strategy becomes indefensible after defense counsel

presented nothing to dispute Dr. Batalis' testimony. The only conclusions the jury could have reached following this cross-examination were that either Dr. Batalis was even more credible in his testimony, since nothing was presented to refute it, or that the Petitioner actually beat the victim worse than Dr. Batalis realized.

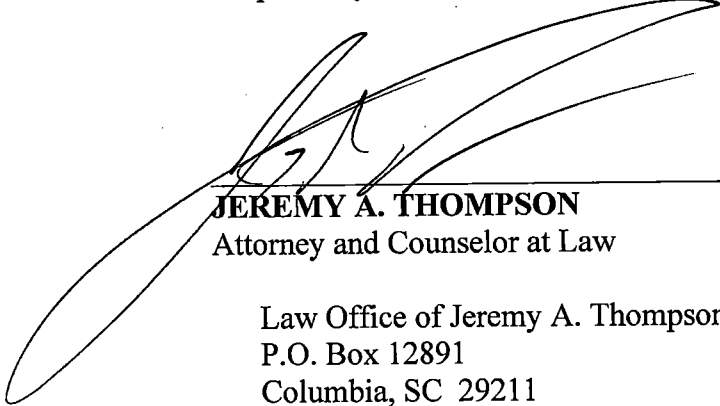
Moreover, defense counsel was simply incorrect in his testimony at the PCR hearing that the damaging photographs had already been introduced by the State. While the State did introduce autopsy photographs, these photographs were limited to the face and neck of the victim. Defense counsel, by contrast, introduced photographs of the victim's entire naked body. They are markedly different from the photographs introduced by the State, and are far more inflammatory.

The Petitioner submits that had the State attempted to introduce these photographs and had they been admitted over defense counsel's objection, then that would have been reversible error due to their inflammatory nature and the fact that they would not have added to Dr. Batalis' testimony. The fact that defense counsel introduced these photographs, consequently, defies reasonable explanation. Accordingly, the Petitioner submits that defense counsel was deficient for admitting these highly prejudicial photographs into evidence at trial and that there is a reasonable probability that had the photographs not been admitted that the result at trial would have been different. The Petitioner respectfully requests that this Court grant certiorari to review the PCR court's findings on this issue.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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ATTORNEY FOR PETITIONER.

This 30th day of January, 2017.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-001666
Lower Court Case No. 2013-CP-08-2121

JUSTIN R. HILLERBY, #339543,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

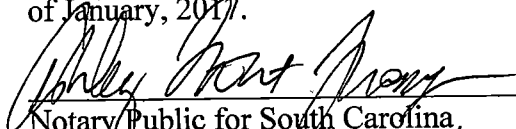
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petition for Writ of Certiorari and one copy of the Appendix in the above-entitled case have been served upon opposing counsel, Alicia Olive, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, via hand-delivery this 30th day of January, 2017.



JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 30th day
of January, 2017.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/22/18



LAW OFFICE OF
JEREMY A. THOMPSON
LLC

January 30, 2017

VIA HAND-DELIVERY

RECEIVED

JAN 30 2017

S.C. SUPREME COURT

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

RE: Justin R. Hillerby, #339543 v. State of South Carolina; 2016-001666

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Petition for Writ of Certiorari and the three copies of the Appendix, one of which is unbound. I would appreciate your filing the originals and six copies of the certiorari petition, one unbound copy and one bound copy of the Appendix, clocking the extra copies, and returning the clocked copies to me. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,


Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures

cc: Alicia Olive, Assistant Attorney General (via hand-delivery) (w/ enclosures)
Justin R. Hillerby, #339543 (via U.S. mail) (w/ enclosures)
Vicki Clearman (via U.S. mail) (w/ enclosures)