STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-001666

JUSTIN R. HILLERBY, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

I. **Is there evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish trial counsel was ineffective for failing to investigate and present the testimony of forensic pathologist.**

II. **Is there evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish trial counsel was ineffective for introducing "prejudicial and inflammatory photographs" at trial.**

STATEMENT OF THE CASE

Summary of Procedural History

In September of 2008, Petitioner Justin R. Hillerby was arrested following an investigation into the death of a twenty-two-month-old child. In December of 2008, the Berkeley County Grand Jury indicted Petitioner for one count of homicide by child abuse. J. Michael Bosnack, Esquire, represented Petitioner. On February 22, 2010, a jury trial was commenced in the Berkeley County Court of General Sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. At the conclusion of trial, the jury convicted Petitioner as indicted and the trial judge sentenced Petitioner to life imprisonment without the possibility of parole. On February 26, 2010, Petitioner filed a motion seeking reconsideration of his sentence, and a hearing was conducted on the motion on April 27, 2010, with Judge Harrington again presiding. Thereafter, the trial judge issued an order affirming Petitioner's sentence.

Subsequently, Petitioner filed a timely notice of appeal. He was represented by Tricia A. Blanchette, Esquire. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Hillerby, 2103-UP-300 (Ct. App. Filed July 3, 2013). The Court of Appeals issued its Remittitur on July 19, 2013.

On September 19, 2013, Petitioner, through retained counsel Jeremy A. Thompson, filed an application for post-conviction relief, alleging he was being held in custody unlawfully based on allegations of ineffective assistance of trial and appellate counsel. The State made its return on December 30, 2014, requesting an evidentiary hearing. Thereafter, on August 27, 2015, Petitioner filed an amended application alleging the following additional grounds for relief:

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.

On September 8, 2015, an evidentiary hearing was commenced in the Berkeley County Court of Common Pleas with the Honorable Larry B. Hyman, Jr., circuit court judge, presiding. At the start of the hearing, Petitioner expressly waived any and all allegations of ineffective assistance of appellate counsel and proceeded forward exclusively on the allegations of ineffective assistance of trial counsel as set forth in his amended application. In support of his application, Petitioner testified on his own behalf and presented testimony from: Dr. Michael Baden, who was admitted as an expert in forensic pathology; Ray William Nash, Jr., a private investigator; appellate counsel Tricia Blanchette; and his mother Vicky Clearman. The State presented testimony from trial counsel J. Michael Bosnak, Esquire. At the conclusion of the hearing, the post-conviction relief court requested proposed orders from both parties. Following a review of both parties' orders, the court denied and dismissed Petitioner's application by written order filed January 16, 2016. Petitioner filed a Rule 59(e), SCRCP motion to alter or amend, which was denied by written order following a hearing. Thereafter, Petitioner filed a notice of appeal.

Summary of Facts Adduced at Trial

In September of 2008, Mother and her twenty-two-month-old son ("Victim") lived in Summerville, South Carolina, with Mother's eight-year-old daughter, Mother's roommates (Eric Riggins and Brandi Mihill) and Petitioner, who had been dating Mother for approximately one year. (App. pp. 253-54; p. 276; pp. 295-96; p. 316; p. 572). Around 6:15 a.m. on the morning of September 15, 2008, Mother got up, left Petitioner in bed, sent her daughter to school, and then returned to bed and went back to sleep. (App. p. 303). At approximately 10:45 a.m., Mother got back out of bed and went to check on Victim because she had not yet heard him awaken for the day, and Petitioner followed her to Victim's bedroom. (App. p. 224; p. 304). When Mother opened Victim's bedroom door, Petitioner stated Victim was still asleep and advised her to let Victim keep doing so but to leave the door open so he could wake up naturally. (App. p. 304). Mother started to close the door but noticed something on Victim's face. (App. p. 304). She walked over to Victim's crib, discovered he was cold to the touch, rolled him over, and observed blood coming from his mouth and nose. (App. pp. 304-05).

After discovering Victim's condition, Mother became hysterical. (App. p. 224; p. 306). Petitioner then called 911 and reported: "He's bleeding. His face is bleeding. He's not moving. He's hard as a rock. He's fucking dead." (App. p. 224; p. 888[1]). Shortly thereafter, Grandfather, Mother's father and Victim's grandfather, responded to the scene after his wife received a call from Mother about Victim and found Mother sitting outside of the house crying. (App. pp. 211-

[1] Throughout this factual recitation, Respondent cites to the Final Brief of Respondent, which is included in this Appendix, because the Record on Appeal and accompanying exhibits were not included in this Appendix, but were properly before the Court of Appeals during Petitioner's direct appeal, are not in dispute, and are ripe for judicial notice as adjudicated facts. Rule 201, SCRE. Moreover, the Record on Appeal is readily accessible as a public record on the South Carolina Appellate Court Public Index. Appellate Records for State v. Justin Hillerby, South Carolina Appellate Court Public Index, http://ctrack.sccourts.org/public/caseView.do?csIID=28149.

12; p. 306). After speaking with Mother, Grandfather ran into the house, went to check on Victim, and discovered he was not breathing. (App. p. 212; p. 306). Grandfather picked up Victim to try and resuscitate him but immediately realized Victim was deceased because Victim was stiff and cold to the touch. (App. pp. 212-13). A few minutes later, firefighters and paramedics from the Summerville Fire Department arrived at the residence, but they also were unable to revive Victim and confirmed he was deceased. (App. p. 306; p. 396; pp. 399-401).

Thereafter, law enforcement officers began arriving on the scene and secured the residence while Petitioner, Mother, Mother's parents, Mihill, and Riggins waited outside. (App. p. 213; pp. 339-40; p. 342; pp. 345-46). While they did so, Petitioner did not exhibit any outward signs of an emotional response but repeatedly told Mother he was sorry. (App. p. 213; p. 397; pp. 402-03). As they waited, Petitioner approached Captain George Ploth of the Summerville Fire Department and asked when they would know what had happened.[2] (App. p. 403).

Subsequently, Mother, Petitioner, Mihill, and Riggins were taken to the police department and separately interviewed. (App. pp. 282-83; p. 307). During his interview, Petitioner spoke with Detective Shannon Sharp and Sergeant Cassandra Williams of the Summerville Police Department in an open area for approximately two hours. (App. pp. 10-11; p. 25; pp. 28-29; p. 459-61). At the outset of the interview, Detective Sharp noted Petitioner appeared to be suffering from a hangover and smelled slightly of alcohol, but Petitioner did not appear to be intoxicated. (App. p. 31; p. 462). Prior to any questioning, Petitioner was advised of his constitutional rights, indicated he understood those rights, and signed a waiver form indicating he wished to waive his rights. (App. p. 30; p. 462; pp. 464-67). Petitioner was then verbally interviewed by Detective Sharp before taking a cigarette break when he stated he did

[2] During trial, Captain Ploth testified he perceived Petitioner's question and demeanor to be unusual. (App. p. 407).

not feel well.[3] (App. p. 468). When he returned, Petitioner stated he felt fine and wrote the following statement:

> Went to pick up Rory stopped by Melissas first to see my son me and her argued a little went to Rorys picked him up came home first grabbed blaise to go to the pool I drove Jenn walked stayed at the pool all day about 2 or 3 noticed a bruze on his face figured he hit his head on the pool some how came home I started to feed the kids fed blaise first the Serena I told Serena to go to bed I let blaise stay up with me he spilt my drink on the table I grabbed him and pointed to the corner for 10 minutes I let him out he played for awhile still. I didnt have any milk so I gave him some corn dog bites he started to bob his head. I tried to get him to stand up but he wouldnt so I put him to bed. he was fine then. We woke up this morning to check on him and it looked like he was sleeping Jenn tried to shake him but he didnt move she rolled him over and he was already gone. I called 911 and tried to keep her away

(App. p. 468; pp. 471-72; 890). After Petitioner wrote his statement, he said he felt dizzy and was having chest pains, and he terminated the interview. (App. pp. 29-31; p. 42; pp. 472-73). Petitioner was then examined by paramedics and medically cleared, and he left the police department. (App. p. 29; p. 473).

After leaving the police department, Petitioner and Mother stopped by Mother's parents' house and then returned home. (App. p. 218; p. 249; p. 264; p. 307). After arriving home, Petitioner behaved in a nervous manner, appeared to be angry instead of upset, and researched secondary drowning with Mother as the possible cause of Victim's death. (App. pp. 249-50; p. 264; p. 283; p. 307). Additionally, he informed his roommates he was waiting for law enforcement officers to come arrest him because he believed boyfriends were always blamed in situations like Victim's death. (App. p. 264; p. 283).

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[3] Earlier, Petitioner had stated he was feeling sick and dizzy while he was waiting with the others outside of Mother's residence, and he fell to his knees while standing in the driveway. (App. pp. 213-14; pp. 248-49). However, afterwards, he indicated he did not need any medical assistance. (App. pp. 213-14).

On September 16, 2008, Dr. Nicholas Batalis, a forensic pathologist and an expert in forensic pathology, performed an autopsy on Victim. (App. p. 518; p. 521). During the autopsy, he discovered Victim had suffered fourteen facial injuries, including numerous fresh bruises, along with nine skull injuries. (App. p. 524; p. 528; p. 548). Additionally, he located subdural hemorrhages and subarachnoid hemorrhages in Victim's brain, a bruise inside of Victim's ear cavity, and retinal hemorrhages in Victim's eyes. (App. p. 533; pp. 538-39). Due to the severity and number of the injuries, he determined Victim's injuries were caused by a significant amount of force and were not consistent with an accident. (App. p. 524; pp. 526-27; p. 530; p. 533). Based on his findings, he concluded Victim would have displayed immediate symptoms after sustaining the injuries, would likely have appeared unsteady or groggy, and died at some point between 9:00 p.m. on September 14, 2008, and 9:00 a.m. on September 15, 2008.[4] (App. p. 524; pp. 542-43; pp. 564-65). Ultimately, Dr. Batalis determined Victim's death was a non-accidental homicide resulting from blunt head trauma. (App. pp. 523-24).

On the following morning, Petitioner, Mother, Mihill, and Riggins drove themselves to the Dorchester County Sheriff's Office in order to take polygraph examinations in regard to Victim's death. (App. pp. 32-34; p. 45; p. 473; p. 496). After they arrived, Sergeant Raymond Dixson, a polygraph examiner with the Dorchester County Sheriff's Office, met with Petitioner and discussed the polygraph examination with him. (App. pp. 87-88; p. 495). At the outset of the interview, he questioned Petitioner to ensure he was not under the influence of alcohol or drugs. (App. p. 88; pp. 496-97; p. 505). In response to his questions, Petitioner informed the officer he

[4] Consistent with Dr. Batalis' findings, Dr. Michelle Amaya, an expert in forensic pediatrics, testified during trial that Victim's brain injuries would have prevented him from speaking, yelling, walking, or holding his head up, and she opined he would not have been able to function normally after the brain injury was inflicted. (App. pp. 566-67; p. 571; pp. 581-83).

drank a few beers and took sleeping pills on the preceding night but was not still under the influence of alcohol. (App. p. 88; pp. 596-97; p. 505). Sergeant Dixson then advised Petitioner of his rights, and Petitioner signed a waiver form indicating he understood his rights and wanted to make a statement without the assistance of an attorney. (App. pp. 89-92; pp. 497-501; pp. 503-04; p. 892). Sergeant Dixson then conducted a pre-polygraph examination interview and asked Petitioner if he inflicted any injury to Victim that would have caused his death. (App. pp. 92-94; pp. 506-07). Upon hearing the question, Petitioner declined to take the polygraph examination and indicated he only wished to speak with the officer.[5] (App. p. 34; p. 94; p. 96; pp. 506-07; p. 510). Petitioner then informed Sergeant Dixson he hit Victim with his knee and also admitted he may have grabbed Victim and shaken him a little. (App. p. 94; p. 511).

Thereafter, Petitioner asked to speak with Detective Sharp and was transported to the Summerville Police Department for another interview. (App. pp. 34-35; p. 60). At the outset of the interview, Petitioner was advised of his rights and again waived his rights by signing a waiver form. (App. p. 35; p. 59; p. 474; p. 892). Petitioner was then interviewed for approximately an hour and a half to an hour and forty-five minutes and wrote the following statement:

> I ran out of my Room and he was running towards me I caught his head with my knee he was a little groggy and I was getting tired I tried to feed him but he kept nodding off I may have clipped his head on the way to his crib and maybe again on his crib I believe he hit his head at the pool early that day and probably the corner where I caught him all these together I believe is what caused it.
>
> I was in my bedroom I grab the door jam to swing out into the hallway quicker and he was running into the hallway I caught the top of his head hard enough to throw his head dow and his feet up. He moved slowly so I helped him up and went back into the room when I came out he was on the futon so I tried to feed him but he got more tired on the way to the bedroom I believe I clipped his head

[5] Unlike Petitioner, Mother and her roommates took polygraph examinations. (App. p. 33; p. 46).

> in the hallway and maybe the crib too I was intoxicated and tried to memory that everything that happened when I put him to sleep and the last time I saw him alive.

(App. pp. 892-93). After Petitioner wrote his statement, Detective Sharp asked Petitioner several follow-up questions, and Petitioner admitted he grabbed Victim's shoulder and neck after Victim spilled a drink. (App. pp. 478-80; p. 893). Following his admissions, Petitioner was arrested for homicide by child abuse and incarcerated. (App. p. 53; p. 483).

On the following day, Petitioner was transported back to the Summerville Police Department for a bond hearing and was denied bond. (App. pp. 483-84; p. 501; 893). After the hearing, Officer Richard Darling of the Dorchester County Sherriff's Office transported Petitioner to the Berkeley County Detention Center. (App. pp. 62-63). During the drive, Petitioner initiated a conversation with the officer, began discussing his case, claimed Victim ran into his knee, and indicated he believed he should have been charged with a less serious offense. (App. pp. 63-64; p. 72; p. 76). In response, Officer Darling reminded Petitioner of his right to remain silent, and Petitioner stated he was aware of that right. (App. p. 64). Officer Darling then indicated to Petitioner the autopsy results and physical evidence would reveal if he had been truthful. (App. pp. 72-73). Thereafter, Petitioner asked the officer what he thought would happen to him, and Officer Darling told him he did not know but that God and the criminal justice system generally help people who help themselves. (App. pp. 76-77). Petitioner then told him he wanted to speak to the detectives again. (App. p. 77).

After arriving at the detention center, Officer Darling dropped Petitioner off and contacted one of the detectives with the Summerville Police Department to let them know Petitioner wished to speak with them again. (App. pp. 78). The detective then asked Officer

Darling to bring Petitioner back, so he went to retrieve Petitioner. (App. p. 66). When he did so, he discovered Petitioner had encountered a public defender at the detention center, and he verified with Petitioner that he still wanted to go back and speak with the detectives. (App. pp. 66-67; pp. 78-79). Petitioner confirmed that he did, so Officer Darling transported him back to the police department. (App. p. 63; pp. 65-66; p. 485).

Once back at the police department, Petitioner met with Detective Sharp again, and Detective Sharp advised Petitioner of his rights one more time. (App. p. 484). Detective Sharp also asked Petitioner if he wanted to make a statement even though he had spoken with a public defender, and Petitioner confirmed that he did. (App. pp. 484-85). Thereafter, Petitioner indicated he wished to tell the truth and stated he wanted to get his side of the story out because he believed he was being portrayed unfairly by the media. (App. pp. 487-88). Petitioner then wrote the following statement after signing a waiver form:

> He split my drink I called him in the kitchen I knelt down and said what is wrong with you I smacked him open handed a couple of times the last time his head hit the floor I went and cleaned up the mess when I came back he was still laying there with his eyes open. I put him on the futon and made another glass of tea. When I looked at him he looked like he was falling asleep. I then put him to bed.

(App. p. 894). Following the statement, Detective Sharp asked Petitioner a series of questions about the incident, and Petitioner indicated he hit Victim all over the head. (App. p. 894). Petitioner further confirmed his previous statements were untruthful and wrote he was sorry he waited so long to tell the truth. (App. p. 894).

Subsequently, Petitioner was indicted for homicide by child abuse, and he proceeded to trial. (App. pp. 129-130). At the outset of trial, defense counsel requested a hearing on the admissibility of Petitioner's statements, and the trial judge conducted a pre-trial hearing on the

matter. (App. p. 6; p. 10). During the hearing, Detective Sharp testified he took three statements from Petitioner. (App. p. 11). At the time those statements were given, Detective Sharp confirmed Petitioner had not been threatened, coerced, or promised anything, Petitioner was not handcuffed, Petitioner did not appear to be under the influence of alcohol or drugs, Petitioner had been advised of his rights, and Petitioner voluntarily waived his rights and agreed to make the statements. (App. pp. 13-14; pp. 17-21; pp. 30-31; p. 35; p. 60). Additionally, Officer Darling testified Petitioner initiated a conversation with him while he was transporting Petitioner to the detention center, indicated he knew he had a right not to speak to him, and requested to speak with the detectives investigating his case. (App. pp. 63-66; p. 77; pp. 78-79). Finally, Sergeant Dixson testified he interviewed Petitioner and attempted to conduct a polygraph examination of Petitioner after Petitioner agreed to submit to the test. (App. pp. 84-85). Sergeant Dixson noted Petitioner was not handcuffed, did not appear to be under the influence of alcohol or drugs, was advised of his rights, and waived his rights. (App. pp. 86-92). He further stated Petitioner chose to stop the polygraph examination but indicated he still wished to speak with him. (App. pp. 94-96). Following the officers' testimony, Petitioner did not testify and did not offer any evidence in regard to his statements. (App. p. 101).

Thereafter, the solicitor argued each of Petitioner's statements was knowingly, voluntarily, and intelligently made. (App. pp. 101-102). In support of that position, the solicitor asserted Petitioner was repeatedly advised of his rights, waived those rights, and never requested to speak with an attorney. (App. p. 102). The solicitor further noted that Petitioner had not been appointed an attorney before making any of the statements and, regardless, was the person who

initiated contact with the officers before making the statements.[6] (App. pp. 102-105). In response, defense counsel argued Petitioner made the statements, was advised of his rights, and understood his rights. (App. pp. 107-108). However, he argued the officers' comments about the potential for the death to have been an accident, comments about the accuracy of forensic evidence, and remarks about religion coupled with the fact Petitioner smelled of alcohol and had been drinking and taking sleeping pills "the night before" one of the statements rendered the September 18th statement coerced under the totality of the circumstances. (App. pp. 108-111). Responding to defense counsel's argument, the solicitor noted Petitioner had substantial prior experience with the criminal justice system, Petitioner initiated the conversations with the officers, and Petitioner was not intoxicated before his statements. (App. pp. 111-113). Finally, defense counsel contended the "buddy-buddy" nature of Detective Sharp's question and the officer's representations that Petitioner would not get in trouble if Victim's death was simply an accident were promises or "inferred promises" and a form of coercion. (App. p. 113). After considering the arguments of counsel, the trial judge found the statements were knowingly, voluntarily, and intelligently made under the totality of the circumstances, Petitioner had been informed of and understood his rights, there was no coercion on the part of the police officers, and Petitioner was not under the influence of alcohol to an extent where his understanding of his rights had been impaired. (App. pp. 115-116).

Following the trial judge's ruling, defense counsel moved to prohibit the introduction of any evidence related to Petitioner's behavior at the pool on September 14, 2008, because he contended such testimony would constitute inadmissible prior bad act evidence and because he

[6] During the pre-trial hearing, documentation was presented confirming Petitioner was again advised of his right to counsel during the bond hearing, filed an application for appointed counsel on September 23, 2008, and was appointed a public defender on October 3, 2008. (App. p. 896).

had no responsibility to watch over the children at the pool. (App. pp. 117-118). In response, the solicitor indicated she intended to introduce the testimony of two witnesses as to their observations of Petitioner's statements and actions toward Victim at the pool and asserted the evidence was admissible to establish Victim's death was not the result of an accident at the pool and to show Petitioner's behavior towards Victim hours before the time period in which Victim died. (App. pp. 118-119). Following the solicitor's argument, defense counsel asserted the substance of that testimony was "clearly a prior bad act" and that Petitioner's statements and behavior at the pool did not establish intent or motive. (App. p. 120). He further asserted he did not intend to introduce testimony establishing Victim was injured at the pool. (App. pp. 120-121). In rebuttal, the solicitor asserted the testimony was highly probative and was admissible to establish motive, intent, and absence of mistake or accident and was also admissible under the res gestae theory. (App. pp. 121-122). The trial judge denied Petitioner's motion to suppress the evidence and ruled the testimony was admissible to prove intent and the absence of an accident and was also more probative than prejudicial. (App. pp. 123-124).

Subsequently, during trial, Brandon Hall, a sixteen-year-old high school student, testified he went to a neighborhood pool with several friends, including a sixteen-year-old friend named Courtney Thaman, on September 14, 2008.[7] (App. pp. 229-30; p. 237). Hall stated Petitioner, Mother, and Victim were also at the pool that day. (App. p. 230). While they were there, Hall indicated Petitioner yelled at Victim, told him to stand in the corner because no one cared about him, and yanked Victim by the arm a few times. (App. p. 232; p. 234). Furthermore, Hall testified he personally pulled Victim from the pool one time after his head went underwater and

[7] Prior to Hall's testimony, an off-the-record bench conference was conducted. (App. p. 228). Following the bench conference, defense counsel renewed an unspecified objection, and the objection was noted. (App. p. 228).

heard Petitioner state that he should have kept Victim in there. (App. p. 231). Hall further stated he was bothered by the way Victim was treated that day but did not believe he needed to report the behavior to the police at the time. (App. p. 232; pp. 234-35).

Likewise, Thaman testified she went to the pool with Hall and several other friends on September 14, 2008, and encountered Mother, Petitioner, and Victim there. (App. pp. 237-39). While at the pool, Thaman stated she observed Victim repeatedly jump into the deep end of the pool, and she and Hall pulled him out several times while Petitioner and Mother drank, listened to music, and paid no attention to Victim. (App. pp. 238-39; p. 241). However, on the last occasion Victim jumped into the pool, Thaman indicated Petitioner and Mother came over to get him, Petitioner called him a "pussy" and told him to go ahead and cry because no one wanted him, and then Petitioner dragged Victim away by his arm. (App. p. 239; p. 242).

In addition to Hall and Thaman's testimony, Mother testified about the events leading up to Victim's death and stated Petitioner called Victim a "pussy" at the pool on September 14, 2008. (App. p. 296). She further testified Petitioner told her he hit Victim but he did not believe it was what killed him. (App. p. 308; p. 313). She also acknowledged Petitioner called her several times from jail, and a recording of a call Petitioner placed to Mother on September 26, 2008, was played for the jury. (App. p. 308). In the recording, Petitioner told Mother:

> 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. I gave a true statement on Thursday, the day I got fucking jumped, and I guess they put it on the news that night, and when everyone saw it, that was it.[8]

[8] The day Petitioner and Mother took Victim to the pool was Sunday, September 14, 2008. (App. p. 298). Thereafter, Petitioner gave his final written statement to law enforcement four days later on September 18, 2008, which was a Thursday. (App. pp. 794-95).

(App. p. 313; 899; 1132-46).

Subsequently, Detective Sharp testified about his investigation into Victim's death and about the statements Petitioner made to him. (App. pp. 460-61). During his testimony, the solicitor introduced each of Petitioner's written statements, defense counsel indicated he had no objection to their admission, and the trial judge admitted the statements without objection. (App. p. 469; p. 477; p. 487).

Following Detective Sharp's testimony, the State presented the testimony of Dr. Batalis and Dr. Amaya in regards to Victim's injuries and cause of death before resting its case. (App. pp. 523-24; p. 579; p. 586). Thereafter, Petitioner testified in his own defense and offered his own account of what happened around the time of Victim's death.[9] (App. p. 624). At the outset of his testimony, defense counsel asked Petitioner if he hit Victim, and Petitioner responded that he had no reason to hurt Victim. (App. p. 624). He then recounted his version of what happened on the night of September 14, 2008, admitted he punished Victim for spilling a drink, stated he grabbed Victim's arm but did not put his hands on him, and claimed he collided with Victim after leaving him in a room unattended. (App. pp. 631-36). However, he testified Victim was fine after the collision and he later put Victim to bed when he started to appear tired. (App. pp. 636-42). On the following day, Petitioner stated they discovered Victim was deceased and he called 911. (App. pp. 645-46). He then indicated he went to the police department, was not there for a long period of time, wrote a statement accurately reflecting the majority of what happened on the night before they found Victim, and went home. (App. pp. 655-57). Thereafter, Petitioner stated

[9] In addition to his own testimony, Petitioner offered the testimony of his stepfather, John Williams. (App. p. 604). Williams testified Petitioner was dating both Mother and Georgoulis during the same time period and would go from one to the other. (App. pp. 606-07). Williams' testimony was consistent with the earlier testimony of Riggins and Mihill, who confirmed Petitioner occasionally left Mother's home to move in with his ex-girlfriend. (App. p. 462; p. 484).

he agreed to take a polygraph examination on September 17, 2008, but claimed the officers never hooked him up to a machine. (App. p. 658). He further asserted they wrongly accused him of refusing to take the examination when he told them he did not know what happened to Victim. (App. p. 658). After the officers told him Victim died of blunt force trauma, Petitioner claimed the officers told him it looked like an accident, stated no one gets in trouble for an accident, and advised him to tell them about it. (App. p. 660). At that point, Petitioner claimed he told the officers about running into Victim and then included in his statement he bumped Victim's head on the door and crib after he was asked about that by one of the officers. (App. pp. 660-61). Following his statement, he indicated he was arrested and subsequently denied bond. (App. pp. 662-63). After his bond hearing, Petitioner stated he was transported to the detention center and informed "they're going to fry [his] ass" if his story did not match what happened. (App. pp. 664-65). Thereafter, Petitioner said he asked to speak with the detectives again, claimed he was repeatedly placed in and out of a cell and questioned, and asserted he agreed to write he hit Victim because he was told the forensic evidence had to match his statement. (App. pp. 667-68). However, he denied hurting Victim and insisted he had no reason to do so. (App. p. 672). Subsequently, on cross-examination, Petitioner acknowledged he bounced back and forth between Mother and Melissa Georgoulis[10], the mother of his child, on a weekly basis. (App. p. 675). He further denied hitting Victim and denied ever calling any child a "pussy." (App. p. 675; p. 677). However, he admitted he called Mother after being incarcerated and told her he smacked Victim to the floor. (App. p. 680). He also stated he wrote numerous letters to Mother and Georgoulis from jail in which he told Melissa he was done with Mother and told Mother he was

[10] Georgoulis testified at trial regarding the tumultuous nature of her relationship with Petitioner, including a fight the evening of September 13, 2008 that slipped over to the next morning—the day Petitioner and Mother took Vicitm to the pool. (App. 330-38).

only dating Georgoulis to see his child. (App. pp. 682-83). He also acknowledged he wrote letters stating he knocked Victim over, he "popped" Victim in the head "no harder than we have smacked his hands," and he was going to "beat" his charge. (App. p. 685; pp. 687-88; p. 708). He further admitted he requested the interview with Detective Sharp but claimed he wrote his apology about waiting to tell the truth in his final statement because he was promised doing so would get him bond. (App. p. 705). Additionally, he claimed he was told people do not get in trouble for accidents but conceded what happened to Victim was not accidental. (App. p. 709).

Thereafter, the defense rested, and the State called several witnesses in rebuttal. (App. p. 712; p. 716; p. 724). Initially, Georgoulis was recalled to the stand and testified Petitioner never called her son a "pussy." (App. p. 716). However, she subsequently admitted Petitioner did, in fact, call her son a "pussy" but stated "[h]e wasn't directly talking about him being a pussy." (App. p. 719). Georgoulis further testified Petitioner never "laid a hand" on her other children and never beat her son. (App. p. 720). However, she admitted she told the police Petitioner "popped" her son on the butt after he spilled a beer on one occasion. (App. p. 721). Additionally, Sergeant Dixson testified about the polygraph examination he was scheduled to perform on Petitioner on September 17, 2008, and noted Petitioner refused to take the exam when asked if he purposefully did anything to Victim that could have caused his death. (App. pp. 724-25; pp. 739-40). Subsequently, the State again rested its case. Thereafter, at the conclusion of trial, the jury convicted Petitioner as indicted. (App. p. 832). Following the verdict, the trial judge sentenced Petitioner to a term of imprisonment of life without the possibility of parole. (App. p. 841).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a

court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. There is evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish trial counsel was ineffective for failing to investigate and present the testimony of forensic pathologist.

Petitioner contends the post-conviction relief court erred in refusing to hold trial counsel ineffective for failing to consult with and present the testimony of a forensic pathologist during Petitioner's trial, arguing such an expert witness "would have shown that the Petitioner did not kill the victim." At the evidentiary hearing, Petitioner presented the testimony of Dr. Michael Baden, a renowned forensic pathologist, in support of his allegation. After listening to the testimony of Dr. Baden and reviewing the record in its entirety, the post-conviction relief court denied and dismissed this allegation, finding Petitioner had failed to satisfy his burden of proof as to both deficiency or trial counsel or requisite prejudice for relief.

As an initial matter, it is crucial to note Petitioner did not establish—either through the testimony of Dr. Baden or any other evidence—that he did not kill the victim in this case. While Dr. Baden asserted he believed the victim's injuries were likely caused by a child rather than adult, he did **not** testify the injuries could not have been caused by an adult, but rather, testified several times, including in direct response to questioning by the post-conviction relief court, that an adult could have caused Victim's injuries. (App. p. 1002-03, p. 1008). Petitioner's repeated assertions Dr. Baden testified he could not have inflicted Victim's fatal injuries are incongruent with the record presented at the evidentiary hearing and are without merit.

Moreover, the post-conviction relief court's findings Petitioner did not meet his burden of proof as to both deficiency of counsel or prejudice are supported by ample evidence of probative value in the record. Central in the post-conviction relief court's findings are its credibility

determinations; specifically, the court held trial counsel's testimony to be credible and found Petitioner's and Dr. Baden's testimony to be uncredible. (App. p. 1157, pp. 1165-66). The court expressly found "[Dr. Baden's] account of the events of victims death **not** credible considering the evidence" presented at Petitioner's trial. (App. p. 1165) (emphasis added). In determining counsel was not credible, the post-conviction relief court noted it was not persuaded by Dr. Baden's testimony for several 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.

(App. p. 1165).

These findings are supported by the evidence presented at trial and the post-conviction relief hearing. Dr. Baden testified he reviewed only a fraction of the record in this case, and crucially, did not review any of Petitioner's statements to law enforcement. (App. p. 976). Dr. Baden's speculative claims that Victim's injuries were caused by repeated poking by a narrow

object, such a paint roller, are wholly inconsistent with all the medical evidence presented in this case, including: Victim had suffered fourteen facial injuries, including numerous fresh bruises, along with nine skull injuries (App. p. 524; p. 528; p. 548) and Victim had suffered subdural hemorrhages and subarachnoid hemorrhages to his brain, a bruise inside of his ear cavity, and retinal hemorrhages in his eyes. (App. p. 533; pp. 538-39). There is ample evidence in the record to support the post-conviction relief court's findings regarding Dr. Baden's lack of credibility in this case. These findings are given great deference on appellate review and are supported by the record, and therefore, must be affirmed by this Court. See Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (noting the heightened emphasis reviewing court's place the upon post-conviction relief court's credibility findings), citing Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (appellate court deference to post-conviction relief court's credibility findings is so great that it required the Court to uphold post-conviction relief court's determination even where testimony at post-conviction relief hearing was unequivocally contradicted by the trial record).

Furthermore, the post-conviction relief court properly determined Petitioner failed to establish any prejudice from trial counsel's alleged deficiency in failing to call a forensic pathologist to testify at trial, as there is no reasonable likelihood the result of the proceeding would have been different—that he would have been acquitted. This is a case of overwhelming evidence of guilt, including Petitioner's numerous statements to law enforcement where he admitted to striking Victim; Petitioner's statements to Mother where he again admitted to striking Victim; and the testimony of several disinterested parties describing Petitioner's hostile and cruel behavior to Victim in the hours leading up to his death. There is no reasonable likelihood Petitioner would have been acquitted had trial counsel consulted with or presented

testimony from a forensic pathologist at Petitioner's trial. As Petitioner failed to meet his burden of proof as to both deficient of trial counsel and prejudice, the post-conviction relief court properly denied and dismissed this allegation.

II. There is evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish trial counsel was ineffective for introducing "prejudicial and inflammatory photographs" at trial.

Petitioner alleges the post-conviction relief court erred in refusing to find trial counsel ineffective for introducing photographs during Petitioner's trial, which he characterizes as "prejudicial and inflammatory." In its order of dismissal, affirmed again in its denying Petitioner's motion to alter or amend, the post-conviction relief court found Petitioner failed to meet his burden of proof regarding this allegation. (App. p. 1168, p. 1185). This finding is supported by ample evidence of probative value and should be affirmed.

Initially, Petitioner failed to introduce the photographs of which he complains into evidence at the post-conviction relief hearing or otherwise present them to the post-conviction relief court. Additionally, these photographs are not part of the Record on Appeal or any other filing before this Court. As the photographs were never introduced to the post-conviction relief court, it is inconceivable that Petitioner could have satisfied his burden of proof as to this allegation. See Rule 71.1(e), SCRCP (an applicant has the burden of proving the allegations in his or her application); Caprood, 338 S.C. at 109, 525 S.E.2d at 517 (an applicant has the burden of proving both deficiency and prejudice). See also State v. Decker, 275 Kan. 502, 507, 66 P.3d 915, 920 (2003) (internal citations omitted) "Ronald failed to include the photograph in the record on appeal. The appellant bears the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. In the absence of such a record, an

appellate court presumes that the action of the trial court was proper. Without the photograph, this court is not in a position to determine that the trial court erred in admitting it into evidence."); Pate v. Riverbend Mobile Home Village, Inc., 25 Kan.App.2d 48, 52, 955 P.2d 1342 (1998) (without photographs, court was unable to conclude there was material error); State v. Gonzalez, 195 Wis. 2d 84, 537 N.W.2d 147 (Ct. App. 1995) ("Because Gonzalez has failed to provide the photographs as part of the appellate record, we must presume that the photographs support a conclusion that the trial court properly exercised its discretion in both admitting the photographs and showing them to the jury."); White v. State, 41 Ala. App. 54, 56, 123 So. 2d 179, 181 (Ala. Ct. App. 1960) ("The omission of photographs and blackboard drawings from the appellate record precludes our review as to the sufficiency of the evidence.").

Regardless of Petitioner's failure to provide the photographs to the post-conviction relief court, it is not likely the result of Petitioner's proceeding would have been different but for trial counsel's introduction of these photographs during trial. As discussed previously, this is a case of overwhelming evidence of Petitioner's guilt, including Petitioner's multiple statements to multiple parties that he struck the Victim. Therefore, it is not likely the jury would have acquitted Petitioner but for trial counsel introduction of these allegedly prejudicial photographs. As Petitioner has failed to meet his burden of proof as to this allegation, the post-conviction relief court properly denied and dismissed this allegation.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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May 31, 2017

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-001666

JUSTIN R. HILLERBY, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire
Post Office Box 12891
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 31st day of May, 2017.

Megan Harrigan Jameson

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