

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

JUL 06 2017

S.C. SUPREME COURT

JUSTIN R. HILLERBY, #339543,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

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.

In its Return, the Respondent argues that the “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.” Return at 19. This argument is misleading at best. Dr. Baden testified that the types of injuries inflicted upon the victim were made by a narrow object that struck the victim over fifty times. App. p. 977, line 12-p. 978, line 6. While Dr. Baden acknowledged, as he must, that it is possible that any adult could have killed the victim in such a manner, he testified that this conclusion was both inconsistent with his experience dealing with “hundreds of child abuse cases I’ve investigated,” App. p. 978, line 12, and wholly inconsistent with the type of abuse the Petitioner was alleged to have inflicted on the victim:

Q: Are the injuries in this case consistent with the victim being punched by a male adult?

A: Not in my opinion, no.

Q: Are they consistent with the victim being slapped by a male adult?

A: No.

Q: Are they consistent with a male adult striking the victim with his knee?

A: No.

Q: Are they consistent with a male adult hitting the child’s head on a wall?

A: No.

App. p. 1007, lines 3-15. In other words, unless the Petitioner poked the victim with a narrow object fifty times, he did not kill the victim.

Similarly, the Respondent also contends that since “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,” Dr. Baden’s findings should not be given any credibility. Return at 20. Again, this argument misses the point. It is not necessary for a forensic pathologist to review every piece of evidence in a case to give an opinion as to the manner and cause of an individual’s death. Dr. Baden reviewed the best evidence available to him—photographs from the autopsy, x-rays, and the testimony of Dr. Batalis—to determine the cause of death. See App. p. 975, line 25-p. 976, line 9. Furthermore, even if he had reviewed the Petitioner’s statements, it would not have changed his opinion since he was given the substance of those statements during the proceeding throughout his examination and remained convinced that the Petitioner did not kill the victim in the manner that the Petitioner described striking the victim.

Finally, the Respondent argues that Dr. Baden’s opinion is “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).” Return at 21. Again, this argument is misleading. The Petitioner agrees that Dr. Baden’s opinion as to the cause of the injuries is inconsistent with the opinion given by Dr. Batalis. However, this is not the argument made by the Respondent. The Respondent’s argument is that the injuries to the victim prove that Dr. Baden’s findings are incorrect, and that is simply not accurate. As Dr. Baden testified, there is an alternative explanation for those injuries: the repeated poking of the victim by

a narrow object. Indeed, Dr. Baden specifically testified that the injury to the “center of the ear ... is typical ... of a poke.” App. p. 982, lines 9-11. This argument only highlights the necessity of a forensic pathologist to review Dr. Batalis’ findings, as it was crucial for the jury to know that there was another potential, and far more likely, cause of the victim’s death: the poking of the victim by another child. This is the opinion of Dr. Baden, a world-renowned forensic pathologist, and it should not be ignored.

With regard to the other arguments advanced by the Respondent as to why this certiorari should be denied as to this issue, the Petitioner would rely upon his arguments advanced in his certiorari petition.

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

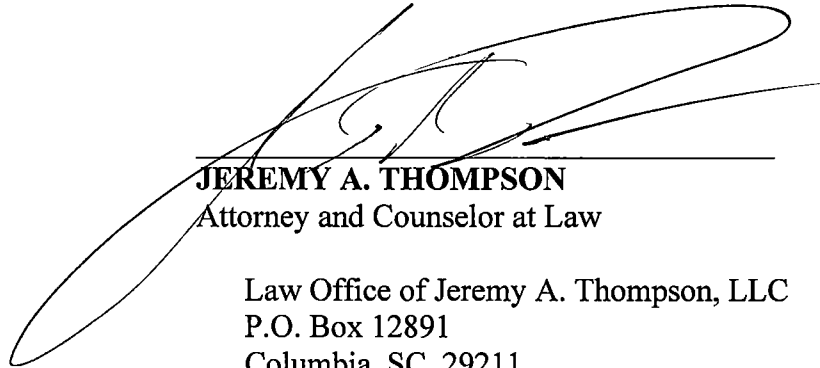
The Respondent principally argues that relief should be denied on this issue because “Petitioner failed to introduce the photographs of which he complains into evidence at the post-conviction relief hearing or otherwise present them to the post-conviction relief court.” Return at 22. The Petitioner should not have to reintroduce photographs that were part of the trial record again into the PCR record. Accordingly, this argument should be rejected because the photographs were already part of the record and readily available for the PCR court to review.

With regard to the other arguments advanced by the Respondent as to why this certiorari should be denied as to this issue, the Petitioner would rely upon his arguments advanced in his certiorari petition.

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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This 3rd day of July, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Reply to Return to Petition for Writ of Certiorari have been served upon opposing counsel, Megan Harrigan Jameson, Senior Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 3rd day of July, 2017.



JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 3rd day
of July, 2017.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/22/18

ompson



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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