STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-002302

Mitchell Rivers,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny post-conviction relief where Counsel did not renew his objection to properly admitted collateral injury and battered child syndrome evidence, and where Petitioner's own testimony confirmed his guilt?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Petitioner was indicted at the October 2010 term of the Chesterfield County Grand Jury for homicide by child abuse (2010-GS-13-01072). Matthew S. Swilley, Esq., and Tiffany Gibson, Esq. represented Petitioner at trial. Laura Suzanne Mayes, Esq., of the South Carolina Commission on Prosecution Coordination, and Adam Foard, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On February 8, 2011, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Petitioner guilty as indicted on February 11, 2011. Judge Burch sentenced Petitioner to imprisonment for remainder of his natural life.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Breen Richard Stevens, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issues:

1. Whether the trial court reversibly erred by admitting evidence of prior physical abuse to Child where the State provided no evidence indicating the injuries were inflicted by Appellant, and where the injuries did not cause Child's death?

2. Whether the trial court reversibly erred by failing to grant Appellant's motions for directed verdict in his trial for Homicide by Child Abuse where the State's theory for proving that the death occurred "under circumstances manifesting an extreme indifference to human life" was based on the failure to obtain adequate health care, despite the facts that Appellant provided CPR and called 911?

The South Carolina Court of Appeals denied the petition to be relieved as counsel and directed the parties address the following issue and any other issues of arguable merit: "Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?" State v. Rivers, S.C. Ct. App. Order dated Sept. 5, 2013.

Petitioner, by and through counsel Benjamin John Tripp, Esq., briefed the issue identified by the Court of Appeals. Jennifer Ellis Roberts, Esq., of the South Carolina Attorney General's Office, briefed the issue on behalf of the State. The parties proceeded to oral arguments before the Court of Appeals on January 8, 2015. By opinion decided February 11, 2015, the Court of Appeals affirmed Petitioner's convictions. State v. Rivers, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015). The Remittitur was issued on February 27, 2015.

Petitioner filed his application for post-conviction relief on February 27, 2015 (2015-CP-13-00108). Upon amendment dated May 31, 2017, and filed on June 2, 2017, Petitioner alleged the following grounds for relief:

1. Ineffective assistance of counsel, in that:
    a. "Counsel failed to object to testimony and argue at trial child's prior injuries were not connected to Applicant."
    b. "Counsel's failure to object to the section (A)(2) charge to jury as lesser included offense of section (A)(1) constituted deficient performance."
    c. "Defense counsel [failed to object to] Supplemental instructions [that] impermissibly enlarged indictment."
    d. "Defense counsel's failure to preserve for appellate review the issue of admissibility of evidence of collateral injuries constituted deficient performance."
2. Ineffective assistance of appellate counsel, in that:
    a. "The issue appellate counsel raised on appeal was 'unpreserved' when 'directed verdict' issue was unequivocally 'preserved for appellate review.'"

Respondent made its return on December 16, 2016, and an evidentiary hearing into the matter was convened on July 16, 2017, before the Honorable Roger E. Henderson. Petitioner was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, (undersigned) represented Respondent. By written order dated October 18, 2017, and filed October 19, 2017, Judge Henderson denied and dismissed the application. This petition follows.

STATEMENT OF THE FACTS

On August 7, 2005, at 7:10 a.m., emergency medical technician Ron Martin responded to a 911 call involving an infant ("Victim"). (Appx 126-28). Martin arrived at the location to find a child who was not breathing, had no pulse, and had petechial hemorrhage to the face. (Appx. 129, ll. 3-8). Martin and his colleagues began administering basic life support and tried advanced measures to resuscitate. (Appx. 129-30). However, Victim was pronounced deceased at the hospital. (Appx. 134-35). Dr. Janice Ross performed an autopsy on Victim and determined the manner of death was homicide and the cause of death was asphyxia. (Appx. 147-48).

Investigators Wayne Jordan, of the Chesterfield County Sheriff's Office, obtained written statements from Petitioner (Victim's adoptive father) and Kimberly Quick Rivers (Petitioner's wife and Victim's adoptive mother). (Appx. 195-96). On September 15, 2005, Investigator Jordan and other law enforcement agents met with Petitioner again and reinterviewed him. (Appx. 209-10). Following that interview, Jordan obtained a videotaped statement from Petitioner. (Appx. 212, ll. 4-14). On September 19, 2005, Petitioner made another statement in writing. (Appx. 216-19). Petitioner was arrested following that statement and charged with homicide by child abuse. (Appx. 221, ll. 14-22; Appx. 385-86).

Pretrial, the trial court held a Jackson v. Denno hearing to determine the admissibility of Petitioner's statements. (Appx. 28-86). The trial court determined Petitioner freely, voluntarily, and intelligently gave the statements without coercion, duress, threats, or promises and, thus, denied Petitioner's motion to suppress. (Appx. 86, ll. 1-14). The trial court also denied Petitioner's motion to suppress evidence of abuse. (Appx. 87, ll. 7-11). The trial court based its decision on written motions and memoranda each party submitted. (Appx. 86-87). Upon

denying the motion, the trial court informed Counsel: "You're protected on the record on that." (Appx. 87, ll. 7-12).

In its written Motion in Support of Evidence of Abuse, the State argued "the constellation of injuries is evidence of child abuse and neglect, directly relevant pursuant to SCRE Rule 404(b) to counter the argument of 'mistake or accident.'" (Appx. 387-88). Additionally, the State maintained the evidence of abuse and neglect established "motive" pursuant to Rule 404(b), SCRE. In its motion, the State pointed out that evidence of head and scalp injuries, in addition to external abrasions, were sustained within the same general timeframe of the fatal injury. Therefore, the State argued the "constellation of injuries [was] relevant and necessary in establishing evidence of child abuse and neglect." (Appx. 387-88).

The State cited several South Carolina cases and one United States Supreme Court case to support its motion. In support of its contention that the evidence countered mistake or accident and established motive, the State cited the Court of Appeals opinion in State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011),[1] which had recently been decided. In support of evidence of battered child syndrome being offered by a qualified medical expert, the State cited Estelle v. McGuire, 502 U.S. 62 (1991) and State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991). Additionally, the State cited State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), to support its argument that evidence of prior injuries to the victim in a child homicide prosecution have probative value and establish extreme indifference.

Petitioner argued in his motion that because the collateral injuries were not attributed to him, the evidence could not be introduced under Rule 404(b), SCRE. After reviewing both

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[1] Subsequently reversed by this Court in State v. Smith, 406 S.C. 215, 750 S.E.2d 612 (2013).

parties' motions and memoranda on the issue of collateral evidence of injuries, the trial court denied Petitioner's motion to keep the evidence out.

At trial, Dr. Janice Ross, the pathologist who performed the autopsy on Victim, testified regarding Victim's injuries. (Appx. 148, ll. 9-13). She described some bruises and abrasions found in the area of the scalp, some bruises of the head—mostly in the back, including several small circular ones—and several rib fractures that were healing. (Appx. 148-51). Petitioner did not object to Dr. Ross' testimony regarding these injuries. Dr. Ross noted contusions that were consistent with blunt force trauma such as a knuckle or fist. (Appx. 152, ll. 2-7). She testified the petechiae and the contusions to Victim's head would have occurred contemporaneously with the asphyxiation. (Appx. 154-55). Specifically with respect to the rib fractures, Dr. Ross testified the child's chest cavity would have to have been squeezed with a lot of pressure to have fractured the back part of the rib cage. (Appx. 157, ll. 5-18). Dr. Ross estimated the age of the fractures to be approximately seven to fourteen days prior to the time of death. (Appx. 157-58). Petitioner did not object to this testimony.

Dr. Ross reported the manner of death was homicide and the cause of death was asphyxia due to smothering. (Appx. 147-48). She specifically reached the determination of homicide based on "the findings of the petechia[e], . . . causing asphyxia, smothering, and the contusions around his head. There was also, internally around his brain, was subdural hemorrhage, which goes along with a blunt force trauma to the head." (Appx. 154, ll. 3-10). Dr. Ross testified "it would take significant force . . . to put pressure on the chest . . . and to stop the breathing or to put something around the neck to cause the petechia[e]." (Appx. 156, ll. 1-5).

On cross-examination, Petitioner was able to elicit testimony from Dr. Ross that there was no way to tell who might have caused the collateral injuries and that those particular injuries

did not cause Victim's death. (Appx. 166-67). Dr. Ross testified the abrasions found on Victim occurred at the same time as the death. (Appx. 167, ll. 17-19). While she testified the abrasions did not cause the death, she did not know whether they were related to the asphyxiation. (Appx. 167, ll. 17-24). When asked whether Victim's breathing problems could have contributed to the asphyxiation, Dr. Ross agreed that they might have caused some degree of asphyxiation but could not have caused petechiae. (Appx. 169, ll. 6-13). The petechiae occurred due to pressure on the blood vessels from pressure on the neck or upper chest. (Appx. 169, ll. 18-24).

Dr. Clay Nichols, the deputy chief medical examiner for North Carolina, also testified after reviewing Dr. Ross' autopsy findings and underlying data. (Appx. 177, ll. 4-14; Appx. 181, ll. 11-18). He, too, testified regarding the multiple rib fractures, abrasions, and contusions on Victim's body. (Appx. 183, ll. 1-7). Dr. Nichols pointed out that the multiple bruises, bleeding on the brain, and subdural hematoma that Victim had could not have been caused by CPR and stated, "[t]his is a classic case of Battered Child Syndrome." (Appx. 186, ll. 12-19). Petitioner did not object to the admission of Dr. Nichols' testimony regarding the collateral injuries to Victim or specifically to Dr. Nichols' using the phrase "Battered Child Syndrome." The only objections Petitioner made were based on bolstering, cumulative testimony, and speculation. (Appx. 181-84).

Dr. Ross and Dr. Nichols both testified the rib fractures had to have occurred sometime after June 20, 2005, when Victim had x-rays that did not show any rib fractures. (Appx. 158-59; appx. 184, ll. 6-15).

Investigator Wayne Jordan testified regarding a written statement he took from Petitioner. (Appx. 195-202). He read the statement to the jury, in which Petitioner stated Victim started crying at 6:00 a.m. on the morning of his death. (Appx. 201, line 11). Petitioner then stated he

changed Victim's diaper and gave him a bottle, burped him, and laid him on his back before going outside to do yard work. (Appx. 201, ll. 12-15). He then testified that at approximately 6:45 or 6:50, his wife told him Victim was not breathing, at which point he told her to call 911 and began CPR as the 911 operator talked him through it. (Appx. 201, ll. 18-22).

Investigator Jordan testified that SLED became involved in the case after he was advised of the autopsy results. (Appx. 209, ll. 5-12). At that time, SLED set up a time to re-interview Petitioner and his wife. (Appx. 209, ll. 12-20). That interview led to a videotaped statement, taken on September 15, 2005. (Appx. 211-12). The State published the videotaped statement to the jury. (Appx. 213-14). In the videotaped statement, Petitioner told police he had found Victim not breathing in his arms. (Appx. 214, ll. 20-24). On September 19, Petitioner gave another written statement. (Appx. 214, ll. 12-22). Investigator Jorden read this statement to the jury, which included the following account:

> That night our baby had slept in the same bed, and I was – laid him on the side between my chest and armpit, and we both went to sleep.
>
> Around 6:00 AM I woke up and the baby was not breathing, and I tried my hardest and hardest to do CPR that morning to bring him back, and his color had started coming back and he had started breathing.
>
> So, I laid him down in the play pen and went outside to clean off the yard. I came back inside and she said he stopped breathing. So, I told her to call 9-1-1 to help me this time, and I kept doing CPR like she said till the ambulance get [sic] there, and then I did, I know I was wrong for not calling the 9-1-1 first when that happened, and I should have told them that, everybody, but I did not know what to do. Lord knows I would never hurt my own son, and I'm sorry, and I regret it everday [sic]. But I please beg you, all of you to please help me.

(Appx. 220-21).

Sergeant Julie Duff, of the Florence Police Department, testified about her role in re-interviewing Petitioner with SLED. (Appx. 232-33). She recalled that during the interview,

Petitioner told them he wanted to change his story. (Appx. 238, ll. 19-22). At that point, Petitioner told them Victim had slept in the crook of his arm and was not breathing in the morning. (Appx. 239, ll. 2-6). He also admitted he had not fed the baby a bottle and changed him, as he originally said. (Appx. 239, ll. 7-9). Duff testified that Petitioner said he placed the baby face down in the play pen and went outside, without waking his wife and telling her something was wrong with the Victim. (Appx. 239, ll. 12-15). Duff stated, "[h]e went outside, he knew the baby was not breathing, and he said he went outside to smoke some crack, and he said later his wife notified him that the baby was not breathing. He also stated that he must have accidentally smothered the baby in his arm." (Appx. 239, ll. 16-20).

SLED Agent Rick Charles also testified regarding re-interviewing Petitioner. (Appx. 244-45). After finding nothing in Victim's stomach, Agent Charles questioned Petitioner about inconsistencies in his prior statement; Petitioner changed his story. (Appx. 250, ll. 3-16).

After the State rested, Counsel called Petitioner. (Appx. 258, ll. 20-21). He testified that on August 6, 2005, Victim slept in the bed with him and his wife and the following morning Petitioner awoke around 6:00 a.m. to find Victim's face under his armpit. (Appx. 265-67). He claimed he performed CPR and blew into Victim's mouth, causing Victim to start wheezing and get color back into his face. (Appx. #267, ll. 11-16). Petitioner stated, "[t]hen I'm thinking that he [sic] okay. So, I laid him down, and then that's when I went outside to get finished cutting the grass." (Appx. 267, ll. 17-19). He testified that as he was going back into the house after cutting the grass, his wife told him Victim had stopped breathing. (Appx. 268, ll. 6-9). He asked his wife to call 911 and started CPR as the 911 operator talked him through it. (Appx. 268, ll. 10-14).

The jury found Petitioner guilty of homicide by child abuse, and Judge Burch sentenced him to life in prison. (Appx. 373; Appx. 382).

Counsel acknowledged he filed motions to suppress the collateral injury and battered child syndrome evidence. (Appx. 509-10). Counsel testified to relying upon Judge Burch's statement that he was protected on the record as to his pre-trial motions. (Appx. 511-12). Counsel did not again object during the course of trial on the subject because he "thought the matter had already been decided by Judge Burch and it would have been superfluous." (Appx. 512, ll. 22-23). Counsel expressed his prior belief that the collateral injuries would be "the essential issue in the appeal[.]" (Appx. 514-15). Counsel opined his failure to object hurt Petitioner at trial and on appeal. (Appx. 516, ll. 12-20). Counsel noted his limited experience at the time of trial and expressed substantial remorse for not renewing the objection. (Appx. 516-18).[2]

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[2] The undersigned, upon memory and belief, notes upon late review that the PCR transcript appears to be replete with scrivener's errors, but none appear to substantially impact the meaning of the testimony provided.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

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; 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "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, 118, 386 S.E.2d 624, 625 (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. Id. 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. Strickland, 466 U.S. at 696. 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. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

THE PCR COURT PROPERLY DENIED POST-CONVICTION RELIEF BECAUSE PETITIONER CANNOT SHOW PREJUDICE FROM COUNSEL'S FAILURE TO OBJECT TO EVIDENCE OF A CHILD VICTIM'S COLLATERAL INJURIES WHERE SUCH EVIDENCE WAS ADMISSIBLE AND NECESSARY TO PROVE INTENT AND DISPROVE PETITIONER'S DEFENSE OF ACCIDENT, AND WHERE PETITIONER OTHERWISE DEMONSTRATED HIS EXTREME INDIFFERENCE BY WAY OF HIS OWN TESTIMONY.

The PCR court properly denied relief because Petitioner cannot show prejudice where, had Counsel objected in a manner sufficient to preserve the issue for appeal, Judge Burch still would have excluded the evidence consistent with his pre-trial ruling and the Court of Appeals would have affirmed because the collateral injury evidence was properly admissible, and because Petitioner otherwise testified to his own extreme indifference sufficient to support his conviction beyond a reasonable doubt.

a. The collateral injury and battered child syndrome testimony was properly admissible, such that Counsel's non-objection is inconsequential, because it tended to disprove accident, which is not related to and not reliant upon also proving identity.

The whole of the present matter, though it passes through the prism of Strickland, largely falls upon the question of the admissibility of the collateral injury evidence. If evidence of the collateral injuries and battered child syndrome was properly admissible, there was no prejudice from Counsel's non-objection, as it would have failed anyway at trial and again on appeal. If the Court finds the collateral injury and battered child syndrome evidence was not properly admissible, Counsel's reliance upon Judge Burch's admonition may have condemned Petitioner.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as

otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision made on an improper basis, such as an emotional one. State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001).

In State v. Martucci, this Court discussed the importance of admitting evidence of prior incidents of abuse in a homicide by child abuse trial. 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008). The Court of Appeals stated, "[w]hen a child is brought to an emergency room with injuries in various stages of healing, there is evidence of recurring child abuse. If the multiple, separately concurring injuries are not admissible in child abuse prosecutions, *the crime would be virtually impossible to prove.*" Id., 380 S.C. at 254, 669 S.E.2d at 609 (emphasis added). "As a result of the difficulties in proving child abuse, *evidence which shows a pattern of abuse becomes even more probative* than it might otherwise be." Id., 380 S.C. at 256, 669 S.E.2d at 611 (emphasis added, citations and quotations omitted). The Court of Appeals found the evidence "established a pattern of continuous abuse or neglect necessary to prove homicide by child abuse" and made it more probable that the child was a victim of child abuse or neglect. Id., 380 S.C. at 254, 669 S.E.2d at 610.

The Court of Appeals affirmed the admission of evidence in Martucci under the common scheme or plan exception pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and

under the *res gestae* theory. Here, the situation is, as Petitioner zealously argues, a little different because no evidence directly tied Petitioner to the injuries. However, whether or not the injuries are tied to Petitioner's identity is of no consequence where the evidence serves to establish the absence of mistake or accident. The record need not reflect the exact manner in which a collateral injury occurred. State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct. App. 2011), overturned on other grounds, 406 S.C. 215, 750 S.E.2d 612 (2013). "When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted the injuries." Estelle v. McGuire, 502 U.S. 62, 68 (1991); see also State v. Elliott, 475 S.E.2d 202, 215 (N.C. 1996) (quoting verbatim in affirming the admission of evidence of prior injuries to show intent, not identity); State v. Koon, 730 So.2d 503, 511 (La. Ct. App. 1999) (quoting Estelle verbatim for proposition that evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who inflicted the injuries); State v. Chavez, 793 N.W.2d 347, 354-55 (Neb. 2011) (Affirming the admission of evidence of collateral injuries where the child victim had three different caregivers because it served to show intent); cf State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991) (Permitting testimony of injuries to show battered child syndrome where given by a properly qualified expert). The United States Supreme Court in Estelle found that evidence of collateral injuries and "battered child syndrome" were admissible to disprove accident where the defendant argued that the child victim died after falling from the couch. Estelle at 69.

Petitioner argued Victim's killing was an accident at trial, and thus demonstrates the crucial import of the collateral evidence under the Estelle theory. "[T]he prosecution must prove all the elements of a criminal offense beyond a reasonable doubt. . . . By eliminating the

possibility of accident, the evidence regarding battered child syndrome was clearly probative of that essential element[.]" Estelle at 69; see also Pausch v. State, 596 So.2d 1216, 1219 (Fla. Dist. Ct. App. 1992) (Affirming the admission of evidence the child victim was undernourished and subjected to excessive force where defendant argued the death was caused by an accidental fall, emphasizing the evidence was relevant to show the victim's death was "the result of an intentional act by *someone*, and not an accident") (emphasis original); State v. Heath, 957 P.2d 449, 463 (Kan. 1998) (Affirming the admission of evidence concerning battered child syndrome to disprove accident even when the injuries to the child were so severe as to make it obvious to the jury that the injury was not accidental).

Petitioner argues that because a parade of his family testified to his character at trial, and because nobody could testify to the singular source of the collateral injuries, that Martucci is distinguished and inapplicable to the present case. To the contrary, that nobody could testify to seeing Petitioner inflict blows upon Victim reinforces the unique and extraordinary importance of the collateral injury and battered child syndrome testimony in this case, and too many like it. Behind the false veil of perpetrators' happy faces and "family secrets," innocent children are condemned to suffer the wrath and cruelty of abusive parents who are wise enough to cloister their sins behind closed doors, far from the eyes of those who may otherwise care, speak up, or report. Where, as here, abusers express only their joys to the outside world, and privately direct their otherwise impotent anger to children who cannot defend themselves, or find others to defend them, the ***only*** evidence to refute the ultimate claim of "accident" is the archive of the terrors they faced, written in their bruises and healing broken bones. And so the collateral injury evidence speaks not to "who" as Petitioner insists, but "how," and properly dissolves the illusion of harmony under which the child victim lived, suffered, and died.

Because the evidence of collateral injuries and battered child syndrome was admissible under South Carolina law, under the United States Constitution, and indeed *must* be admissible under South Carolina law if it is to serve the purposes of justice at all, Counsel's non-renewal of his pre-trial objection is of no consequence, and this Court should affirm the PCR court's denial of relief.

b. Under the specific facts of this case, Petitioner suffered no prejudice because the jury still would have convicted him in light of his extreme indifference as reflected in each of his statements and his own testimony.

A person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . ." S.C. Code Ann. § 16-3-85(A)(1). "For the purposes of the [homicide by child abuse] statute, 'extreme indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 366-67 (Ct. App. 2002)).

Petitioner's own statements and testimony established the extreme indifference sufficient to convict him for homicide by child abuse. Taking all facts as Petitioner presented them, *ad arguendo*, and only those facts, Petitioner left his helpless child alone immediately after reviving him by CPR. Petitioner did not call for follow-up medication attention. Petitioner did not wake his wife to monitor or attend to the child, who by his testimony slept through his performing CPR on the Victim. Petitioner went outside and stayed outside until his wife woke and found the child dead. Because of the testimony establishing Petitioner's extreme indifference, any error in admitting evidence of collateral injuries was harmless, and would not have changed the outcome of trial. Accordingly, this Court should affirm the PCR court's denial of relief.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for 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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5 Nov., 2018

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In the Supreme Court

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

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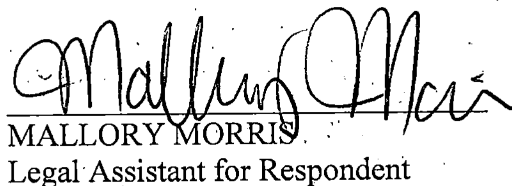
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Taylor D. Gilliam, Esquire
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201

This 5th day of November, 2018.



MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

November 5, 2018

RECEIVED
NOV 05 2018
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Mitchell Rivers v. State of South Carolina**
Appellate Case No. 2017-002302
Lower Court Case No. 2015-CP-13-0108

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Taylor D. Gilliam, Esquire