

STATE OF SOUTH CAROLINA
In the Court of Appeals

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.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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1 (The following proceedings were had
2 September 8, 2015, Charleston County Circuit Court,
3 Charleston, South Carolina @2:06 p.m.)

4 MR. JOHNSON: May it please the Court,
5 Your Honor.

6 THE COURT: Certainly.

7 MR. JOHNSON: This is Justin Hillerby
8 versus the State of South Carolina, Case No.
9 2013-CP-08-2121. Mr. Hillerby was indicted at the
10 December 2008 term of the Berkeley County Grand
11 Jury for homicide by child abuse. He was
12 represented by Mike Bosnak. On February 25, 2010,
13 he proceeded to trial and was found guilty as
14 indicted and was sentenced by the Honorable Kristie
15 Lee Harrington to confinement to a period of life
16 without parole.

17 He filed a timely notice of appeal and
18 his appeal was perfected by Ms. Patricia
19 Blanchette. The conviction and sentences were
20 affirmed by the Court of Appeals. The Remittitur
21 was thereafter issued on July 31, 2013. He filed a
22 timely PCR on September 19, 2013. The State filed
23 its return on December 30, 2014, and he is
24 represented by Mr. Jeremy Thompson.

25 THE COURT: Mr. Thompson?

1 MR. THOMPSON: May it please the Court,
2 Your Honor. For the record, my name is Jeremy
3 Thompson and I am the applicant's counsel for this
4 action. He alleges generally that he received
5 ineffective assistance of counsel at his trial, in
6 violation of his Sixth and 14th Amendment rights to
7 the United States Constitution, as well as the
8 corresponding divisions of the South Carolina
9 Constitution.

10 I have filed an Amended Application for
11 Post Conviction Relief. I believe I filed --

12 THE COURT: I have that.

13 MR. THOMPSON: -- a couple of weeks
14 ago. We are waiving any claims -- and I will have
15 my client do this when he testifies. We're going
16 to waive any claims for ineffective assistance of
17 appellate counsel, which was initially alleged in
18 the original PCR Application. We're not going to
19 go forward with any of those allegations today.

20 Just briefly, Your Honor, I have a lot
21 of testimony to present --

22 THE COURT: They will be waived if he
23 does not present --

24 MR. THOMPSON: Correct. Correct. And
25 we're going to get to that when he testifies, Your

1 Honor. I have -- I have a lot of -- a lot of
2 testimony, a lot of witnesses to try to get through
3 this afternoon. So I will just do a very brief
4 introduction.

5 My client was alleged to have beaten
6 his basically live-in -- he was the live-in
7 boyfriend for a girlfriend, her
8 one-and-a-half-year-old son. He was alleged to
9 have beaten her son to death. And most, if not --
10 well, most of our allegations here today are going
11 to center on an allegation that defense counsel was
12 ineffective for failing to call a forensic
13 pathologist to testify or to consult with a
14 forensic pathologist prior to trial. That's
15 primarily what most of the allegations are going to
16 kind of revolve around. So our first witness would
17 be Dr. Michael Baden.

18 MICHAEL MYER BADEN,
19 being first duly sworn, testified as follows:

20 THE CLERK: Be seated.

21 THE WITNESS: Thank you.

22 THE CLERK: Sir, if you would please
23 state your full name and spell your last name for
24 the record.

25 THE WITNESS: Michael Myer Baden,

1 B-A-D-E-N.

2 MR. THOMPSON: Your Honor, before I get
3 started, I will introduce a copy of Dr. Baden's bio
4 and his curriculum vitae as Applicant's 1 and 2.

5 (APPLICANT EXH. 1, Baden's Bio, was
6 marked for identification.)

7 (APPLICANT EXH. 2, Baden's CV, was
8 marked for identification.)

9 DIRECT EXAMINATION

10 BY MR. THOMPSON:

11 Q. Doctor, how are you this afternoon?

12 A. Digesting shrimp and grits, and it's
13 delicious. Thank you.

14 Q. Could you tell the Court a little bit
15 about yourself and where you -- where you live and
16 what you do?

17 A. Yes. I'm a physician, medical
18 examiner, forensic pathologist, born in New York
19 City, attended NYU School of Medicine, was an
20 intern and resident in pathology at NYU Medical
21 School and Bellevue Hospital. I began working with
22 the Medical Examiner's Office as a forensic
23 pathologist in training while a resident doctor at
24 Bellevue Hospital and became a full-time associate
25 medical examiner in New York City in 1965; board

1 certified in three areas of pathology: Anatomic
2 pathology, which has to do with the anatomy of the
3 body, clinical pathology, which has to do with the
4 biochemistry of the body, and forensic pathology,
5 which has to do with the investigation of sudden
6 unexplained and unnatural deaths.

7 I was in that office for 25 years
8 actually, beginning 1960, and did reach being Chief
9 Medical Examiner of New York City of the Five
10 Burroughs, then went from there to be the Chief
11 Medical Examiner for the New York State Police.

12 I spent another 25 years with the New
13 York State Police as their Chief Forensic
14 Pathologist, and I'm retired. I'm still a
15 consultant, but I retired three years ago. I'm
16 consultant to the State Police and in private
17 practice presently in forensic pathology, and
18 that's the basis I'm here now.

19 MR. THOMPSON: Your Honor, I have
20 copies of these for you. May I approach?

21 THE COURT: Thank you.

22 BY MR. THOMPSON:

23 Q. How many autopsies would you say you've
24 conducted? Just around?

25 A. Over the years, over 20,000

1 medical/legal autopsies.

2 Q. And have you been involved in any
3 high-profile autopsies and examinations?

4 A. Yes.

5 Q. Could you name just a few of them?

6 A. Well, on the federal level, I was the
7 chief forensic pathologist that reinvestigated the
8 deaths of President John F. Kennedy and Dr. Martin
9 Luther King for the US House of Representatives
10 Select Committee in Assassinations back in 19 --
11 late 1970s. I've been over to Russia at the
12 Russian government's request to reinvestigate the
13 deaths of Nicholas Alexander and the Romanov
14 family.

15 Most recently I was over in Poland to
16 help in the investigation of the President of
17 Poland and 93 other people who died in an airplane
18 crash in Russia a few years ago. I've been all
19 over most states assisting in investigations of
20 deaths of famous and, mostly, unfamous people.

21 And my role is, regardless of whether
22 asked by the prosecution or defense, to give the
23 best scientific evaluation of each death that a
24 forensic pathologist is trained to investigate.

25 MR. THOMPSON: Your Honor, at this time

1 I would move to have Dr. Baden qualified as an
2 expert in the field of forensic pathology.

3 MR. JOHNSON: The State has no
4 objection, Your Honor.

5 THE COURT: Admitted without objection.
6 BY MR. THOMPSON:

7 Q. Dr. Baden, did you prepare a report in
8 this matter?

9 A. I did.

10 Q. Could you identify that please?

11 A. This is the report I sent to you
12 August 19th of this year relative to the death of
13 Blaise Spoerl.

14 MR. THOMPSON: Your Honor, I would move
15 to have this admitted, Applicant's Number 3.

16 MR. JOHNSON: If I may just approach.
17 I would like to cross-examine him based on the
18 report.

19 THE COURT: I'll admit it. We don't
20 have a jury here.

21 (APPLICANT EXH. 3 in evidence.)

22 THE COURT: I will admit it subject to
23 your cross-examination.

24 BY MR. THOMPSON:

25 Q. In preparation for this report and for

1 your testimony today, what did you review in this
2 case?

3 A. I reviewed materials that were sent to
4 me from your office that included the autopsy
5 report that was performed, that -- the scene and
6 autopsy photographs, X-rays taken, which I
7 examined, and the trial testimony of the doctor --
8 the medical examiner who performed the autopsy.
9 Those are the main things that I reviewed.

10 Q. And based on your review of that
11 evidence, what was your conclusion to a reasonable
12 -- what is your opinion to a reasonable degree of
13 medical certainty as to the cause of the death of
14 the victim in this case?

15 A. My opinion to a reasonable degree of
16 medical certainty is that the baby died of
17 multiple -- many more than 20, 30, 40 -- blunt
18 force impact injuries. And I agree with the
19 medical examiner, that accumulated enough injuries
20 on the baby to cause the baby to die, largely of
21 the injuries to the head and brain.

22 Q. And is it your opinion that those
23 injuries were caused by an adult?

24 MR. JOHNSON: Objection; leading, Your
25 Honor.

1 THE COURT: Restate your question.

2 BY MR. THOMPSON:

3 Q. What is your opinion as to who is the
4 most likely culprit, the most likely person to have
5 inflicted the injuries?

6 MR. JOHNSON: Objection; that calls for
7 speculation.

8 THE COURT: Establish a little more
9 basis for this thing, these questions you're
10 asking.

11 BY MR. THOMPSON:

12 Q. Can you describe the injuries to the
13 victim?

14 A. Yes. The victim, according to the
15 medical examiner's autopsy report and according to
16 the photographs taken of the baby at the time of
17 the autopsy, died of many small injuries to the
18 head, face, legs, back, that in my experience was
19 caused by an object. Not by a hand, not by a fist,
20 but by a narrow object, as I've seen before in
21 situations where babies can be poked with toys or
22 with objects. And this is atypical and does not
23 happen with adults who beat up children, who
24 usually do it with their hands, fists, or bang the
25 child against furniture, causes large bruises and

1 fractures.

2 There were no fractures here. There
3 were just maybe, in my reviewing all the
4 photographs, more than 50 different small blunt
5 force impacts of the whole body, including the head
6 and face, and that this is what I've seen in the
7 past, so it's been described that occurs in sibling
8 rivalry-type deaths, where one older child can beat
9 up on the new baby that's getting so much attention
10 and uses a toy or a stick to injure the baby.

11 And so, in my opinion, based on
12 hundreds of child abuse cases I've investigated,
13 this is not at all the pattern of an adult and is
14 the pattern of a child. Usually the child patterns
15 I saw at Bellevue Hospital in the living children
16 who had come in with injuries, they don't usually
17 -- they aren't usually severe enough to cause
18 death, but occasionally they are. But the ability
19 of one sibling to cause injury to another is not
20 uncommon in the literature or in my personal
21 observations.

22 Q. And do you have the photographs up
23 there with you?

24 A. I do.

25 MR. THOMPSON: So we have an idea of

1 what we are looking at, Your Honor, I would like to
2 move the three photographs in as Applicant's 4
3 through 7.

4 THE COURT: Any objection?

5 MR. JOHNSON: Yes, sir. Your Honor,
6 there has been no authentication of those and there
7 are many more than that, that are in the actual
8 record. I believe that the clerk has them. So I
9 would object to just those photos coming in.

10 THE COURT: Where did they come from?
11 They're not part of the record?

12 MR. JOHNSON: They may be. I didn't --

13 THE COURT: I would suggest that they
14 probably came from the State.

15 MR. THOMPSON: These were autopsy
16 photographs, Your Honor -- well, a few of these
17 were autopsy photographs. This is a photograph of
18 the child in the crib. These came in discovery.

19 THE COURT: Were they used by your
20 expert in the formulation of his opinion?

21 MR. THOMPSON: They were, Your Honor.

22 THE COURT: I'm going to let it in.

23 MR. JOHNSON: Okay. The one question I
24 do have, were those in evidence at trial?

25 MR. THOMPSON: Honestly, I'm not sure.

1 They admitted several photographs. Most of the
2 photographs admitted at trial were of the face. I
3 believe these two may not have been, but I think
4 they are still relevant to show the basis of his
5 opinion.

6 THE COURT: Okay. See if he can
7 describe what he believed them to be.

8 BY MR. THOMPSON:

9 Q. Can you describe these pictures for --

10 THE COURT: How he got them, where he
11 got them, and if he used them in formulating his
12 opinion.

13 THE WITNESS: I received these four
14 from Mr. Nash, who printed them out from a disk
15 which I had reviewed previously; that is, at the
16 time I sent my report, I had viewed dozens and
17 dozens of photographs that were placed on a disk of
18 the -- as I say in my report, of the scene and of
19 the -- more than a hundred of the scene and
20 autopsy.

21 The one scene picture here, as
22 Mr. Thompson pointed out, is a baby in the crib,
23 that's at the scene; the other three were during
24 the autopsy, showing the outside of the body,
25 period. So these are four of over a hundred

1 photographs that I reviewed that were sent to me by
2 Mr. Thompson's office, that I understood came from
3 the medical examiner and the police through the
4 District Attorney's Office.

5 THE COURT: Counsel, do you have any --
6 you've seen these photographs?

7 MR. JOHNSON: I have not seen these
8 photographs.

9 THE COURT: Well, look at them and tell
10 me, do you have any doubt -- what we're talking
11 about here is whether or not trial counsel erred in
12 not retaining a forensic expert to testify in this
13 case. If these were the materials that were
14 available to them, the forensic expert, for the
15 formulation of some opinion, I think they're
16 relevant.

17 Counsel tells me they were photographs
18 provided to the defense by the State. I will allow
19 you to cross on that.

20 MR. JOHNSON: That's fine, Your Honor.
21 Thank you.

22 (APPLICANT EXH. 4 in evidence.)

23 (APPLICANT EXH. 5 in evidence.)

24 (APPLICANT EXH. 6 in evidence.)

25 (APPLICANT EXH. 7 in evidence.)

1 By MR. THOMPSON:

2 Q. I'm going to show you what has been
3 marked and admitted as Applicant's Number 5. Could
4 you describe that photo, please?

5 A. This eight-by-ten photograph, colored
6 photograph, is of the right side of the head,
7 showing primarily the right ear and the right
8 cheek. It's showing multiple small impact bruises,
9 including in the center of the ear, which is a
10 black-and-blue mark, which is typical for my
11 interpretation, of a poke.

12 It's not a pinch, as was raised at the
13 -- that somebody pinched the ears, that was raised
14 at trial. It's a poke, and it's consistent with a
15 poke with a thin stick-type object, as are the
16 other brownish bruises below the right ear. That's
17 Number 5.

18 Number 6 is a more distant view of that
19 same area, showing the right ear and multiple
20 bruises on the face, I think which are described by
21 the medical examiner that did the autopsy.
22 Multiple -- he describes at least something like 20
23 -- or many bruises on the face. These show the
24 bruises on the right side of the face.

25 Number 7 shows the top of the right

1 foot, showing also bruising, with one bruise being
2 circular with a pallor in the center, which is also
3 typical of a poke with a long stick-like object,
4 and others -- above it is a little bit of
5 nonspecific bruising.

6 And Number 5 -- Number 4 is the
7 photograph taken with the baby at the scene in the
8 crib, taken probably by the -- in my experience, by
9 police, as opposed to the other three, taken by the
10 Medical Examiner's Office at the autopsy. And in
11 this instance, it shows the baby face-up in the
12 crib with discoloration of the face by multiple
13 blunt force injuries on the right side of the face,
14 from a distance, and blood -- a maroonish dark
15 substance that appears to be blood, to the right of
16 the baby, indicating the baby had been turned over
17 with his mouth in that area.

18 There was blood -- injury to the mouth
19 described by the medical examiner, with some blood
20 coming from the mouth, the only place that was
21 bleeding. And so this photograph, in my opinion,
22 is consistent with the baby being found facedown,
23 with the mouth in this area, and then being turned
24 over by the police at the time they took these
25 photographs. Still in its -- the baby's

1 nightclothes.

2 THE COURT: All right, Doctor. Let me
3 get this very clear. Those photographs you just
4 described were photographs presented to you by
5 counsel for the petitioner and they were
6 represented as being part of the -- either the
7 autopsy photographs or the investigative
8 photographs and they formed a part or part of the
9 basis of your opinion.

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: Okay. All right. I just
12 wanted to get that clear.

13 THE WITNESS: Yes.

14 MR. THOMPSON: Thank you, Judge.

15 BY MR. THOMPSON:

16 Q. I'm looking specifically at Exhibit
17 Number 7, which is the picture of the foot. Could
18 you describe to me or could you testify as to why
19 you believe that that injury is caused by a poke as
20 opposed to, say, by a fist?

21 A. Because it's too narrow for a fist. A
22 fist would have a more diffuse nonspecific bruise.
23 A blow to the face, as we see in boxing matches,
24 you get diffuse black-and-blueness; it doesn't show
25 the outline of the fist or the hand. It just shows

1 diffuse bleeding over a large area.

2 This is a small area, probably a half
3 inch or so, or three-quarters of an inch with its
4 -- a small area of pallor, paleness, in the center.
5 And this is typical for a nightstick kind, when we
6 see police poke somebody. The -- the end of the
7 nightstick will depress the skin a little bit and
8 force the red blood cells, the capillaries, to the
9 sides, so the center is pale and the out -- outside
10 around the edges will be where the blood
11 hemorrhages from the capillaries, so one gets a
12 circular doughnut-shape discoloration.

13 This is similar -- when the nightstick
14 is used on the broad side, one gets a railroad
15 crack thing, where the center of the nightstick
16 striking sidewise is pale and the outside is
17 hemorrhage along the edges where the capillary
18 blood is forced because of the pressure in the
19 center.

20 So, in my opinion, this injury on the
21 top of the right foot is caused by a poke with some
22 -- the end of a round object.

23 Q. What would you expect to find if the
24 injury had been caused by a fist or by an open
25 slap?

1 A. Much larger and broader areas of
2 hemorrhage, without any pattern to the marks on the
3 skin. When I -- just diffuse bleeding under the
4 skin and no circular or other type of imprint. Not
5 an imprint, but a diffuse area of hemorrhage under
6 the skin that causes a diffuse black eye, for
7 example.

8 Q. And in reviewing the photographs,
9 including those others, were the injuries -- were
10 there any injuries that were consistent with a
11 fist?

12 A. I didn't see anything that looked like
13 a fist.

14 Q. Were all of the injuries consistent
15 with the poking?

16 A. Yeah. The injuries that I saw were
17 poking. The ones in the head, there were some --
18 could be multiple pokes that overlapped or a
19 nonspecific impact against the floor; that was
20 brought up at the -- at the trial. They were much
21 too narrow to be a fist or a slap, and they were
22 all consistent with a poke.

23 Q. In your experience, have you seen
24 injuries like this that were caused by an adult?

25 A. Caused by what?

1 Q. An adult?

2 A. No, not in a dead child. Sometimes at
3 Bellevue, you would see just the small punishment
4 injuries with a strap or something, but if the
5 child dies, there are much broader areas of
6 hemorrhage injury; injuries to internal organs,
7 laceration to the liver, skull fractures are the
8 typical kind of deaths when an adult beats a child
9 up.

10 Q. Now, is it your opinion that the marks
11 that you see, not just on the face but the rest of
12 the body, those are bruises as well?

13 A. Yes.

14 Q. Dr. Thomas testified that those were --
15 those were not bruises because there was no
16 hemorrhaging into the back.

17 MR. THOMPSON: And, Your Honor, that's
18 on -- I'm using the record on appeal page numbers.
19 There are four volumes of the transcript and the
20 page numbers start over with each volume. So it's
21 page --

22 THE COURT: I reviewed that earlier
23 today. Where -- where are you now?

24 MR. THOMPSON: It's page 553 on the
25 record on appeal page numbers, and then it's the

1 third volume, page 167.

2 THE COURT: And who is the witness?

3 MR. THOMPSON: Dr. Battalis, who is the
4 forensic pathologist.

5 THE COURT: I'm sorry, I don't think
6 mine -- I'm sure that mine does not have it. It's
7 not numbered as the record -- volume three?

8 MR. THOMPSON: Volume three.

9 THE COURT: But I can't find it here.
10 Page 167. All right.

11 BY MR. THOMPSON:

12 Q. Is it -- in your opinion, did Dr.
13 Battalis do a sufficient investigation into
14 examining those wounds to see if they were bruises?

15 MR. JOHNSON: Objection to leading,
16 Your Honor.

17 THE COURT: Ask him if he has an
18 opinion --

19 BY MR. THOMPSON:

20 Q. Do you have an opinion --

21 THE COURT: -- concerning Dr.
22 Battalis's examination?

23 BY MR. THOMPSON:

24 Q. Do you have an opinion regarding Dr.
25 Battalis's examination of the bruises that were not

1 to the face?

2 A. Yes.

3 Q. What is that opinion?

4 A. My opinion is, I agree with the doctor,
5 Dr. Battalis, when he said they looked to him like
6 bruises caused by impact. I disagree with the fact
7 that he then cut into these bruises -- some of the
8 bruises -- a few of the bruises, he says -- and
9 didn't see any bleeding underneath and then decided
10 they weren't bruises.

11 I would have a different opinion than
12 that, because, firstly, if these were important,
13 photographs should have been taken of the cut into
14 the bruises to see what bruises were cut and what
15 they looked like; but the important thing is to
16 take a piece of tissue and look at it under the
17 microscope, because oftentimes in these kind of
18 bruises, the bruise can only be superficially in
19 the -- due to the trauma, they're in the dermis;
20 not in the fat necessarily, but in the superficial
21 skin. And that can only be seen under the
22 microscope, and that wasn't done.

23 He did do 24 other tissues hat he took
24 microscopic sections of, but he didn't take any
25 sections of skin or of these bruises. These are

1 what I -- what I consider bruises, which he did
2 originally, but then decided after the incision
3 that they weren't. But they -- in my opinion, they
4 are -- clearly they are not caused by any
5 artifacts, as he mentions, of staying overnight in
6 the cold storage. That is typical for a body to
7 stay before the autopsy is done.

8 The staying overnight in the Medical
9 Examiner's Office before the autopsy absolutely
10 would not cause, in my opinion, these diffuse
11 bruises on the body seen here and in many other
12 photographs that we don't have. And they aren't
13 caused by any kind of -- these aren't skin
14 diseases.

15 These, in my opinion, are typical
16 bruises, as he thought initially, and that not
17 seeing bleeding in the underlying fat in a few of
18 them does not negate that. So, in my opinion, he
19 started out -- I agree with him, but then the
20 reason he went away from that, I disagree.

21 Q. And it's your opinion -- is it your
22 opinion, based on -- let me rephrase it. What is
23 your opinion regarding those injuries? Are they
24 bruises or not?

25 A. Yeah. I think these bruises on the

1 rest of the body are similar to the bruises of the
2 face -- on the face, caused by poking the baby with
3 -- many times, causing small -- he measures them at
4 a quarter inch, half inch -- discolorations, that
5 are not the result of a blow with a hand, fist,
6 shoe, knee. They're caused, as he says -- a couple
7 of times he refers to it in the testimony -- by an
8 object. By an object, and I agree with that.

9 And the object in this case I think is
10 some kind of stick-like object, but different kinds
11 of toys could also do this. I saw one child use a
12 toy against the other child. And there was a
13 stick-like object identified by the police at the
14 scene and they took photographs of it -- and I
15 think it's photograph number 1 -- which I think is
16 the most likely object that would have been used.

17 MR. JOHNSON: Objection. That's
18 complete speculation, Your Honor.

19 THE COURT: Sustained. Are you saying,
20 Doctor, that an object similar to the paint roller
21 could have caused injuries similar to what we have
22 seen?

23 THE WITNESS: Yes, sir.

24 THE COURT: Okay. I will allow that.

25 BY MR. THOMPSON:

1 Q. Now, Dr. Battalis also gave an opinion
2 regarding the time of death.

3 MR. THOMPSON: And, Your Honor, that's
4 on page 137 of volume 3, lines 2 through 8.

5 Q. (BY MR. THOMPSON) The question is: And
6 how big would you say the window is in this case?

7 The answer: Based on the -- from the
8 time that he was found, the changes described at
9 the scene by the first responders and then what we
10 saw at autopsy the following day, I would say
11 probably the closest I could get it down is to say
12 that he died within hours of when he was found.

13 Do you agree with that testimony?

14 A. No.

15 Q. Why?

16 A. Because he goes on to say, two to
17 three hours and more. The state of the body when
18 it was found at 10:00 in the morning was described
19 as cold and stiff. It would take at least eight
20 hours to develop stiffness --

21 Q. And I don't mean to interrupt you.
22 When you say eight hours, what eight hours? From
23 what point?

24 A. That is from the time the baby was
25 found at 10:00 in the morning, that the death would

1 have -- would have occurred at minimum, at minimum,
2 eight hours or could be, from the rigor mortis and
3 lividity, up to 15 hours, or longer, that -- we
4 know that it doesn't have to be that long, but
5 certainly he does say that eight -- two to
6 12 hours, I think Dr. -- the doctor testifies to.

7 I would disagree with the two, but I
8 would agree that it could be up to 12 hours that
9 the baby had been dead before the baby was found.
10 And that goes on the basis of not only what was
11 stated by the first observers, cold and stiff, but
12 also by the lividity that the doctor sees at the
13 time of the autopsy. 24 hours later when he does
14 the autopsy, he comments in the beginning of the
15 autopsy that the lividity, the settling of blood,
16 is on the front, the anterior portion, the front of
17 the body.

18 The body stays overnight on its back at
19 the coroner's office and in order for the lividity
20 to be still present on the front, it means that it
21 was fixed, that that lividity that we see in number
22 4 -- say number 4, we see a little bit of the
23 lividity of the baby on its back in the crib. That
24 stayed there, it didn't go away.

25 In order to be fixed like that so it

1 crib, Your Honor, that we believe may have been the
2 most likely object to have been --

3 THE COURT: Why don't you just ask him
4 if he would have liked to have looked at the paint
5 roller that was in the photograph?

6 MR. THOMPSON: I'm trying not to lead,
7 Your Honor.

8 THE COURT: Well, let me ask him.
9 Would you have liked to have looked at the paint
10 roller?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: You said it was in a
13 photograph?

14 THE WITNESS: Yes.

15 THE COURT: Now tell me why.

16 THE WITNESS: Because the medical
17 examiner begins the autopsy at the scene, so every
18 one of those cases that we investigate -- some
19 places, like New York, we go to the scene to see
20 what is there that we can utilize in doing a better
21 autopsy. And, in this instance, I have the
22 photographs of the scene which shows, I think
23 number 1, a paint roller bloodied, next to the
24 crib.

25 It's that type of object that could

1 cause all of these injuries that are seen -- you
2 know, the 40 or 50 or 60 injuries seen on the
3 child's skin, the surface of the skin. And,
4 certainly, I would want to discuss with the police
5 after doing the autopsy that -- our expertise as
6 forensic pathologists isn't treating the injury,
7 like the pediatrician might have done, it's
8 determining what caused the injury. So that's a
9 forensic pathology expertise and I would explain to
10 the police that it's that type of object that --
11 that would cause --

12 THE COURT: You're simply telling me
13 that in your -- in your field, it's customary to
14 compare any potential weapon with the injury?

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: That's where we're going.
17 Is that far enough?

18 MR. THOMPSON: I think so.

19 THE COURT: Okay. We got it.

20 MR. THOMPSON: And I think I'm just
21 about finished, Your Honor.

22 BY MR. THOMPSON:

23 Q. So based on your expertise and based on
24 your review of the evidence, to a reasonable degree
25 of medical certainty, are the injuries caused to

1 the victim in this case likely to have been caused
2 by my client or any adult male?

3 A. My opinion is, from the nature of the
4 injuries, it's much more likely that it would have
5 been caused by a child and not by an adult.

6 Q. Based on your review of the evidence
7 and your review of the photographs, were the
8 bruises to the child that were to the legs and
9 other extremities, were those visible at the scene,
10 from the crime scene photos taken at the scene?

11 A. Probably not, because, as I mentioned,
12 the bruises on the face would have been visible,
13 absolutely, but the rest of the body is covered by
14 I guess a onesie-type baby outfit. And my reading
15 of the record would be that that remained on the
16 child until the baby came to the Medical Examiner's
17 Office, when it was taken off at the Medical
18 Examiner's Office, so that the facial injuries
19 would have been readily apparent to anybody who
20 looked at the baby but the rest of the body
21 probably would not have been available because of
22 the clothing that the child was wearing.

23 Q. But you don't believe that those
24 markings were caused by the cooler, by the child
25 being placed in the cooler?

1 A. Absolutely not. There are certain
2 changes in color that can occur in the cooler as
3 lividity settles on the back, but not -- not
4 punctate. Those are broad settling discolorations
5 and not local circular bruises, things -- settling
6 of discolorations that look like bruises. That
7 would not happen in the cooler.

8 MR. THOMPSON: No further questions of
9 this witness.

10 THE COURT: All right. Counsel.

11 MR. JOHNSON: Just briefly, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. JOHNSON:

14 Q. Doctor, let me get this straight. Your
15 testimony is that it is not likely that Mr.
16 Hillerby killed his own child? That's what you're
17 trying to get at; is that not correct?

18 A. No, you didn't listen to me. What I
19 said is, it is not likely that any adult caused the
20 death of the child and, in my opinion, and my
21 experience, it is typical for a sibling or for
22 another child to injure a child in this fashion and
23 it is not at all the pattern of injuries that I
24 have seen in 50 years caused by an adult.

25 Q. So, in the converse, what you're

1 saying is that it was likely that a child killed
2 the victim in this case?

3 A. Yes.

4 Q. Okay. Were you at the scene that
5 night? Were you in the room where the victim was
6 killed?

7 A. I only saw the room by the many scene
8 photographs that I examined. I was not in the room
9 but there were dozens and dozens of photographs of
10 the room.

11 Q. And you weren't on scene when ~~Victim~~
12 was killed, were you?

13 A. That's correct.

14 Q. And have you read the entire
15 transcript?

16 A. Which?

17 Q. Mr. Hillerby's trial transcript?

18 A. I read the medical examiner's
19 transcript, the entire testimony of the medical
20 examiner that did the autopsy.

21 Q. Have you read the part of the
22 transcript where Mr. Hillerby testifies?

23 A. I did not.

24 Q. Where he testifies that he was alone
25 with Blaise on the night of this incident?

1 A. I did not read that.

2 Q. Okay. And you base your report on the
3 autopsy photos, the testimony of the forensic
4 pathologist, and the autopsy report, correct?

5 A. And the scene photographs, too, yes.

6 Q. But you actually did not do an autopsy
7 on this child, did you?

8 A. That's correct.

9 Q. Okay. Did you ever call Dr. Battalis
10 and speak with him?

11 A. I did not. I did not.

12 Q. So he could have clarified some of his
13 testimony to you; isn't that right?

14 A. No. He made testimony and some of it I
15 agree with and some I disagree with.

16 Q. But you never made an effort to call
17 him and say, what do you mean by this, in making
18 your report?

19 A. I understood what he meant by it.
20 That's right, I didn't call him.

21 Q. And your testimony, once again, is
22 that, because this seems to be a lot of small
23 bruises, it's more likely a child used some type of
24 object in this case?

25 A. Small bruises without injuries to

1 internal organs, without fractures of the skull or
2 otherwise, and small mini bruises, yes; this is
3 typical of a child using an object.

4 Q. Okay. Is it possible that an adult can
5 use an object the same way the child can use the
6 object?

7 A. An adult can use an object the same as
8 a child, but I have never seen that happen in my
9 50 years.

10 Q. And are you aware in this case that Mr.
11 Hillerby has admitted he actually smacked ~~WILLIAM~~
12 that night?

13 A. I have heard that. And when you say
14 admit, people say things that may or may not be
15 true, but I understand that may have happened.
16 None of the injuries I think here I would say is
17 typical of a slap.

18 Q. Do you agree with Dr. Battalis that
19 there is blunt force trauma in this case?

20 A. Yes.

21 Q. Okay. And blunt force trauma can be
22 created by hitting another object, not necessarily
23 a stick? A floor? A wall?

24 A. Yes.

25 Q. Okay. A hand?

1 A. Yes.

2 Q. An adult's hand?

3 A. Yes. Blunt force object in general,
4 but not this particular blunt force injury.

5 Q. But you don't know, because you
6 testified that you weren't at the scene that night?

7 A. Yeah. That's why we do autopsies and
8 that's why we look at photographs and the scene, as
9 we do in every -- it's very rare for a medical
10 examiner to be at a scene when the death occurs.
11 But it's common for medical examiners to testify in
12 court about it, both for defense and prosecution,
13 because we get enough information from all of the
14 different agency people, the police, the coroner,
15 the medical examiner, the toxicology, that we can
16 then evaluate and see what we agree with and what
17 we don't agree with and what the final opinions
18 are.

19 Q. So you're speculating in this case, is
20 what you're testifying?

21 A. No, I'm not speculating; I'm going by
22 the facts. When I look at this photograph and I
23 see a blunt force injury in number 5 in the right
24 earlobe, that could only occur with a thin object
25 poking that ear. There's no way that any fist or

1 hand, knee, or foot, or falling on the floor can
2 cause that particular protected area injury. And
3 that's part of what any forensic pathologist looks
4 at.

5 Q. And you're getting paid for your
6 testimony here today; are you not?

7 A. I'm being paid for the time I'm
8 spending coming down here, yes.

9 Q. And your purpose in coming down here is
10 to testify on Mr. Hillerby's behalf?

11 A. My --

12 Q. Correct or not correct?

13 A. No. No. My purpose in coming here is
14 to testify about the science of what happened here,
15 and I agree, I think that Mr. Hillerby could not
16 have done -- produced these injuries, because of
17 the nature of the injuries, regardless of what he
18 may have said. And that's my opinion, just on the
19 scientific basis of forensic pathology.

20 Q. But the real world issue is that you
21 don't know, because you weren't there, correct?

22 A. No. Even if I were there -- nobody was
23 there when the baby was beaten. Nobody was there
24 when the baby was beaten, right? Everybody came
25 afterwards.

1 MR. JOHNSON: No further questions,
2 Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. THOMPSON:

5 Q. The Attorney General asked you about
6 payment issues. Do you know Mr. Nash?

7 A. I'm sorry?

8 Q. Do you know Mr. Nash?

9 A. Yes, I do.

10 Q. How long have you known Mr. Nash?

11 A. Oh, I knew him when he was a sheriff
12 some years ago, that I was involved with the
13 prosecution of a case with him, yes.

14 Q. And you were involved on the
15 prosecution side of that case?

16 A. Yes.

17 Q. And was it your review of the evidence
18 that led to a prosecution of the individual?

19 A. I gave my evidence and whatever
20 Mr. Nash, the sheriff, did was up to him, but I
21 gave evidence to him as to what I thought the
22 injury patterns indicated.

23 Q. And when you gave your -- when you were
24 first consulted regarding this case, were you being
25 paid?

1 A. Here?

2 Q. When you reviewed the autopsy for the
3 first time, when you reviewed the autopsy report
4 for the first time, were you paid?

5 A. No.

6 Q. Did you do it as a favor to Mr. Nash?

7 A. I did it because he thought it was a
8 case that was -- deserved further attention. I
9 said I would review it; I didn't charge for that.
10 At some point, when I gave him my opinions and he
11 wanted me to continue on with the matter, I did
12 charge a retainer of \$5,000.

13 Q. But when you gave your initial opinion
14 -- has your initial opinion changed from then to
15 now?

16 A. No.

17 THE COURT: There's a sign back in
18 Judge McDonald's office that says, This ain't my
19 first rodeo. This is not mine either. I don't
20 care who brings him in here, somebody is going to
21 pay. I'm not offended. So we can move on.

22 MR. THOMPSON: Will do, Your Honor.

23 THE COURT: Whether he's testifying for
24 the State or the defense, somebody is going to pay
25 him.

1 BY MR. THOMPSON:

2 Q. Are the injuries -- I apologize, I'm
3 not trying to beat a dead horse. Are the injuries
4 in this case to the victim consistent with the
5 victim being punched by a male adult?

6 A. Not in my opinion, no.

7 Q. Are they consistent with the victim
8 being slapped by a male adult?

9 A. No.

10 Q. Are they consistent with a male adult
11 striking the victim with his knee?

12 A. No.

13 Q. Are they consistent with a male adult
14 hitting the child's head on a wall?

15 A. No.

16 Q. And you have never seen these kinds of
17 injuries to a child before committed by an adult;
18 is that right?

19 A. In a dead child. I have seen certain
20 injuries of living -- when I was at Bellevue
21 Hospital, in living children who had been struck by
22 an object, a belt or some other object, on the
23 skin, but -- coming into the hospital, but not
24 severe enough to cause death.

25 MR. THOMPSON: Beg the Court's

1 indulgence.

2 No further questions.

3 MR. JOHNSON: No recross, Your Honor.

4 THE COURT: Doctor, let me ask you a
5 couple of things. In the heat of direct
6 examination a moment ago, you said that these
7 injuries could not have been caused by an adult.
8 Did you misspeak there in saying that an adult
9 could not physically do this type of injury?

10 THE WITNESS: No, I'm sorry, then I
11 misspoke. It could be done by an adult. I just
12 said I've never seen it.

13 THE COURT: And you have described, as
14 the initial examiner did, some 25 or so injuries of
15 some sort. Can you be more specific as to cause
16 and manner of death in this case? Were there
17 specific life-threatening injuries? I would
18 suppose that some of these were not
19 life-threatening. You described bruises on the
20 legs and things of that nature, but were there any
21 bruises that you found that were life-threatening
22 and can you describe those for me?

23 THE WITNESS: Yes. There were many
24 bruises on the body and arms and legs that were
25 hurtful but would not have caused death. And I

1 agree with the medical examiner who focused on the
2 head injuries and the brain injuries, caused by
3 multiple, multiple injuries to the head and brain
4 area, that led to bleeding around the brain,
5 subdural hemorrhage.

6 THE COURT: Is that the cause of death?

7 THE WITNESS: Yeah, I agree.

8 THE COURT: Subdural hematoma?

9 THE WITNESS: Yes, sir.

10 THE COURT: Can you tell -- from your
11 examination of the evidence in this case, can you
12 tell me approximately to a degree of medical
13 certainty when those injuries took place?

14 THE WITNESS: Well, I think that all
15 the injuries happened approximately at the same
16 time.

17 THE COURT: Can you give me a time
18 frame?

19 THE WITNESS: It could have been over
20 many, many minutes. It would take many minutes at
21 least. It could take a longer time, half an hour,
22 20 minutes, depending on how much poking was going
23 on, but if the head injuries, the 25 that he
24 described of the head and face were done first,
25 probably within a few minutes.

1 Within five minutes or so, there could
2 be enough poking of the head, because if they were
3 done first -- to cause the baby to lose
4 consciousness and to then die -- go into a deeper
5 and deeper coma and then die within less than
6 45 minutes or so.

7 THE COURT: Okay. So it's your opinion
8 that on the evening -- 12 hours or so before the
9 time that he was discovered, he was probably
10 injured, in your opinion?

11 THE WITNESS: Yes. Yes, Your Honor.

12 THE COURT: All right. Thank you.

13 THE WITNESS: Thank you very much, sir.
14 Thank you.

15 THE COURT: Do you want to cross or
16 reexamine on that line?

17 MR. JOHNSON: No, Your Honor.

18 THE COURT: You may step down.

19 MR. THOMPSON: Your Honor, I call Ray
20 Nash.

21 THE COURT: Come around, Mr. Nash.

22 RAY WILLIAM NASH, JUNIOR,
23 being first duly sworn, testified as follows:

24 THE CLERK: Be seated. State your full
25 name and spell the last name for the record.

1 THE WITNESS: Ray William Nash, Junior,
2 N-A-S-H.

3

4 DIRECT EXAMINATION

5 BY MR. THOMPSON:

6 Q. Mr. Nash, what is your involvement in
7 this case?

8 A. I have a private investigation firm and
9 I was contracted to assist with the investigation
10 of this case, case review.

11 Q. In investigating this case, did you
12 investigate the qualifications of Dr. Battalis?

13 A. Yes.

14 Q. And I'm going to ask you to testify as
15 to whether -- just identify that document.

16 A. This is a letter I received from the
17 American Board of Pathology.

18 Q. And what's the date on that letter?

19 A. January 16, 2015.

20 Q. And why did you contact the American
21 Board of Pathology?

22 A. I was curious to determine that Mr.
23 Battalis was, in fact, a board certified forensic
24 pathologist, and if so, at what time he received
25 that certification.

1 MR. THOMPSON: Your Honor, at this
2 time, I would like to admit this document as number
3 8.

4 MR. JOHNSON: Your Honor, just one
5 second, please.

6 THE COURT: Did you provide a copy to
7 Counsel?

8 MR. JOHNSON: It's the first time I've
9 seen the document, Your Honor.

10 No objection.

11 (APPLICANT EXH. 8 in evidence.)

12 BY MR. THOMPSON:

13 Q. When was Dr. Battalis certified in the
14 subspecialty of forensic pathology?

15 A. The certification was effective on
16 September 4, 2008.

17 Q. And when was he certified in anatomic
18 pathology and clinical pathology?

19 A. August 21st, 2007.

20 MR. THOMPSON: I have no further
21 questions, Your Honor.

22 THE COURT: Counsel?

23 MR. JOHNSON: No questions, Your Honor.

24 THE COURT: You may step down.

25 MR. THOMPSON: Your Honor, I would call

1 Patricia Blanchette.

2 PATRICIA BLANCHETTE,

3 being first duly sworn, testified as follows:

4 THE CLERK: Please state your full name
5 and spell your last.

6 THE WITNESS: Patricia A. Blanchette,
7 B-L-A-N-C-H-E-T-T-E.

8 MR. THOMPSON: Your Honor, one minor
9 housekeeping matter. Dr. Baden has a plane to
10 catch back up to New York this afternoon. May he
11 be excused?

12 THE COURT: Counsel?

13 MR. JOHNSON: I don't need him.

14 THE COURT: All right. Without
15 objection he is released from his Subpoena.

16 THE WITNESS: Thank you.

17 DIRECT EXAMINATION

18 BY MR. THOMPSON:

19 Q. Ms. Blanchette, how did you get
20 involved in this case?

21 A. I was contacted by Mr. Hillerby and his
22 mother, Vicky, and I was retained to handle his
23 direct appeal at the end of May in the year 2011.

24 Q. And did you represent him all the way
25 through the direct appeal?

1 A. I did, yes.

2 Q. And I just want to start at the
3 beginning of, I guess, your representation. Is it
4 -- what is your practice upon getting -- upon
5 getting a new appellate case? What do you do?

6 A. I take very few appellate cases and
7 I've taken even less because of the nightmare that
8 this one has been. Usually, I see if the
9 transcript has already been obtained if I'm taking
10 over from the appellate defense or a private
11 attorney. I contact the Court Reporter, I work on
12 getting all the dates for transcripts that I need.
13 And that's where I ran into the first stumbling
14 block in this case, trying to obtain the dates for
15 the transcripts that I needed.

16 Q. Did you ultimately end up ordering the
17 transcript?

18 A. I actually ordered a number of
19 transcripts. And I can just go through what I did
20 as far as that is concerned. I had a lot of
21 communication with Mr. Bosnak. I called and
22 e-mailed and spoke with him a number of times, but,
23 unfortunately, he was never able to provide me with
24 the dates of the transcripts.

25 There were a number of preliminary

1 hearings in this matter, a number of motion
2 hearings. I traveled to the Berkeley County Clerk
3 of Court's Office three times to go through their
4 records to try to find the dates. I communicated
5 regularly with court administration. As a result
6 of that I actually had to keep asking for
7 extensions and explaining to the Court of Appeals
8 why I had not notified them that I had received all
9 of the transcripts, because I was still searching
10 for dates. I believe I was ultimately able to
11 locate three transcripts in this case.

12 Q. And did you also get a copy of Mr.
13 Hillerby's file from Mr. Bosnak?

14 A. That was also a very complicated
15 matter. I have notes starting immediately upon my
16 representation in this case all the way through
17 December of that year where I had numerous calls
18 and e-mails with Mr. Bosnak. I also had arranged
19 to meet him -- I should explain. I'm in Columbia
20 and so I had arranged to meet him twice here in
21 Charleston to pick up the file and he cancelled
22 both of those meetings. Ultimately, in
23 December 2011, his mother met me in the First
24 Baptist parking lot in Columbia, and in her trunk
25 she had what she said was his file. And that's all

1 I ever received from Mr. Bosnak in this case.

2 Q. Now, once you -- I guess once you got
3 into reviewing the case, what were your impressions
4 about the arguments for appeal?

5 A. The reason that I was really searching
6 for those preliminary hearings or other
7 transcripts, I was hoping there would be additional
8 issues I could raise based upon those transcripts.
9 And I failed to mention before, probably the most
10 helpful person in all this was Ms. Williams, the
11 Solicitor. She was the one that I ultimately got
12 some of the dates from to find those transcripts.
13 I had made a list of -- I think there was
14 originally eight issues that I went over with
15 Justin, and we went through them and I explained to
16 him the arguments that I can make and I even
17 drafted those.

18 But preservation was the number one
19 issue in this case because we have very strict
20 preservation rules on direct appeal in South
21 Carolina.

22 Q. And in terms of preservation, what do
23 you mean?

24 A. Well, I think the best example is, I
25 would sum up the Court of Appeals' opinion in this

1 case is that the issues that I raised were not
2 properly preserved. And they beat me up on that
3 during the oral argument. That was their main
4 focus that -- honestly, the only thing they
5 questioned me about was Mr. Bosnak's failure to
6 preserve certain issues.

7 Q. But, certainly, you raised those issues
8 on the appeal because you believed they had merit?

9 A. I did, yes. I thought in one instance
10 too the major issue that all three of the judges on
11 my panel of the Court of Appeals beat me up on is
12 Mr. Bosnak said that he did not object to Mr.
13 Hillerby's statement, and then he made a comment
14 that he had already made an objection previously.
15 And I was trying to get the Court to interpret
16 that, that he was essentially saying to the Court,
17 I am covered on that objection, not I don't object,
18 but they found otherwise.

19 Q. And they ultimately found that that
20 argument was not preserved for appeal because Mr.
21 Bosnak failed to object?

22 A. To renew his objection as he properly
23 should have.

24 THE COURT: Which argument?

25 BY MR. THOMPSON:

1 Q. The argument regarding the admission of
2 Mr. Hillerby's statements?

3 A. Yes. In reviewing -- you had provided
4 me the transcript to review because it had been
5 some time since I did the oral argument, and that
6 is what they drilled me on, statements made by
7 Mr. Bosnak, whether or not he was renewing his
8 objection or not.

9 Q. Could you identify the document I just
10 handed you?

11 A. Yes. This is a transcript of an audio
12 from June 5, 2013, in the South Carolina Court of
13 Appeals on Justin R. Hillerby versus the State. It
14 lists my name as the attorney of record for the
15 appellant, and I reviewed it and it fits with my
16 memory of the oral argument that was conducted in
17 this case.

18 MR. THOMPSON: Your Honor, I would like
19 to admit this as Applicant's 9.

20 THE COURT: All right.

21 MR. JOHNSON: No
22 objection.

23 (APPLICANT EXH. 9 in evidence.)

24 BY MR. THOMPSON:

25 Q. Now, you said you went to the Berkeley

1 County Clerk of Court's Office?

2 A. Yes, I went on three different
3 occasions. I typically go one time in every case
4 so that my sheet is in there that I've reviewed all
5 the exhibits on direct appeal, but in this case I
6 went three different times.

7 Q. Have you had a chance to review the
8 photographs that had been admitted at trial?

9 A. I did. And the clerk who had actually
10 handled the case cautioned me when she gave them to
11 me. I hadn't handled a lot of child death cases,
12 but it was my understanding that they were very
13 graphic and they were rather horrific.

14 Q. Do you remember the pictures that were
15 admitted by the State versus the pictures that were
16 admitted by the defense?

17 A. Very vividly, because once again, the
18 clerk who handled the case was the one that helped
19 me each time and we kind of got to know each other
20 a little bit more each time. And not only was I
21 shocked that the pictures were introduced by the
22 defense, but she also conveyed her shock to me that
23 those were pictures admitted by the defense in this
24 case.

25 I just saw no reason why those pictures

1 would be provided by the defense to the jury. You
2 know, the State had already introduced pictures,
3 but the pictures that the defense submitted, they
4 weren't merely cumulative, they were damaging and
5 prejudicial, in my opinion.

6 MR. JOHNSON: Objection, Your Honor,
7 move to strike all that testimony. According to
8 Green v. State, there are no expert witnesses in
9 PCR. She's trying to testify as to what a trial
10 attorney would have done or should have done, and I
11 would like to move to strike all that testimony.

12 THE COURT: Counsel?

13 MR. THOMPSON: She is just testifying
14 about impressions about the pictures, Your Honor.

15 THE COURT: She gave an opinion.

16 MR. THOMPSON: Okay.

17 THE COURT: Sustained.

18 MR. JOHNSON: Thank you, Your Honor.

19 MR. THOMPSON: No further questions of
20 this witness, Your Honor.

21 MR. JOHNSON: No questions, Your Honor.

22 THE COURT: Mrs. Blanchette, let me ask
23 you --

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: One of the issues is

1 prejudice --

2 THE WITNESS: Yes.

3 THE COURT: -- and a determination of
4 the effectiveness of counsel. You I'm sure are
5 familiar with the rule concerning appellate review
6 of a finding by a trial judge of voluntariness.
7 Wasn't there a Jackson v. Denno hearing held on
8 that issue and didn't Judge Harrington make a
9 determination as voluntary as to his statements?

10 MS. BLANCHETTE: Yes, Your Honor.

11 THE COURT: Okay. And on review, isn't
12 it reviewed by the any evidence standards, is there
13 any evidence -- it's clear error standard. It's
14 the clear error standard and on review they look
15 for any evidence. How were you going to handle
16 that if they had let you argue that? How were you
17 going to handle that?

18 THE WITNESS: Your Honor, if I could
19 have --

20 THE COURT: And I could be wrong. My
21 understanding is if the trial judge's finding as to
22 voluntariness will not be disturbed absent the
23 showing of clear error, and that is determined by
24 whether or not there is any evidence in the record
25 to support the trial judge's finding. Am I

1 incorrect?

2 THE WITNESS: Your Honor, if I could
3 just beg the Court's indulgence one moment to
4 freshen up on my argument so I answer properly.
5 Just once I heard the issues of ineffective
6 assistance of counsel were waived, I've been
7 preparing for my case --

8 THE COURT: What I'm looking at --

9 THE WITNESS: Right, I understand your
10 question.

11 THE COURT: -- from prejudice.

12 THE WITNESS: How is it prejudicial
13 that they found it was not preserved, if there was
14 not the potential for it to be overturned?

15 THE COURT: Yeah. I mean, even if he
16 did -- the trial attorney failed to preserve, which
17 obviously he did, was the defendant prejudiced? If
18 they had let you argue that, they had found, no, he
19 didn't waive it, we're going to let you argue it,
20 what argument would you have made to show that
21 Judge Harrington's ruling was clearly erroneous of
22 her findings of voluntary.

23 THE WITNESS: What was interesting is,
24 I was prepared to be drilled on that issue. I
25 remember getting ready for the oral argument, and

1 that's not what the Court was concerned about. The
2 transcript has been admitted so I'm sure you can
3 review it. And you're right, the Appellate Court,
4 when it's issues involving the voluntariness of the
5 statement, they review errors of law only, and it's
6 a clearly erroneous standard. So that was correct.

7 What I went into in the brief, just
8 briefly, sorry to be repetitive there, looking over
9 it is that the -- and this comes from the argument
10 obviously made by Mr. Bosnak because I had to argue
11 what he argued, that the interview itself was
12 coercive and that there were misrepresentations
13 made by law enforcement. It looks like my argument
14 focuses on that.

15 THE COURT: I understand that they
16 tried to soften up this thing and said it could
17 have been an accident and that sort of stuff. They
18 always do that. And I understand that he may have
19 at some time been drinking, but didn't Judge
20 Harrington specifically find that there was no
21 evidence of intoxication that would have affected
22 his ability to make a knowing and intelligent
23 decision as to whether to waive his rights and make
24 a statement? Didn't she make those findings and
25 weren't they supported amply by this record through

1 the Jackson v. Denno hearing? Did that make a
2 difference in that, and should it?

3 THE WITNESS: Your Honor, if I could
4 just look at the oral argument very briefly. I
5 want to make sure that I'm complete in my answers
6 to the Court. And also, Your Honor, in the brief,
7 there was a second argument that Mr. Bosnak had
8 made as well about the fact that he had requested a
9 Public Defender and there was a break in the
10 statements as they were taken over multiple days.
11 So it wasn't just the coercion and
12 misrepresentation. There was also a counsel issue.

13 THE COURT: I think he had counsel at
14 the time and there was an issue as to whether or
15 not he had initiated it.

16 THE WITNESS: Right; he had spoken with
17 a Public Defender at his bond proceeding and then
18 they brought him back and took his statement.

19 THE COURT: And he needed to be
20 transported and allegedly told the transporting
21 officer he wished to speak to the investigator or
22 someone.

23 THE WITNESS: The main argument that I
24 focused on in the oral argument is that the judge
25 actually didn't conduct the proper analysis and the

1 complete analysis. I was actually trying to go
2 after an error of law. And I don't want to
3 summarize the whole transcript since you have it,
4 but I think those were my two main points as far as
5 what Mr. Bosnak raised.

6 THE COURT: Was that your 403 issue?

7 THE WITNESS: Just one second, Your
8 Honor, I want to make sure that I have this right
9 because I just got this this morning before I came
10 down here.

11 THE COURT: -- 403 mistakes since I got
12 reversed the last time.

13 THE WITNESS: I just want to check the
14 order in which I made the oral arguments because
15 it's different than they are in the actual brief.

16 Your Honor, it appears, and that's how
17 I remembered it, they never let me get into the
18 meat of my argument. We spent, if I remember
19 right, at least ten minutes --

20 THE COURT: That's what I'm saying, is
21 if it had been preserved, was there an argument?

22 THE WITNESS: I would submit there was,
23 based upon my brief, Your Honor. I would stand by
24 the argument I made there. Unfortunately, I don't
25 have with me today -- I had outlined what I wanted

1 to argue in addition to the brief, but the Court
2 did not allow me to do it in the oral argument.
3 They simply nailed me on the fact that Mr. Bosnak
4 had not preserved the issue.

5 THE COURT: All right. Counsel, do you
6 want to examine as to that line of questioning?

7 MR. THOMPSON: I don't have any
8 questions.

9 MR. JOHNSON: Nothing from the State.

10 THE COURT: Thank you very much.

11 THE WITNESS: Thank you, Your Honor.

12 MR. THOMPSON: May Ms. Blanchette be
13 excused as well, Your Honor?

14 MR. JOHNSON: No objection, Your Honor.

15 THE COURT: You may be excused,
16 Counsel.

17 MR. THOMPSON: We would call the
18 applicant as our next witness, Your Honor.

19 JUSTIN HILLERBY,

20 being first duly sworn, testified as follows:

21 THE CLERK: State your full name and
22 spell your last.

23 THE WITNESS: Justin Hillerby,

24 H-I-L-L-E-R-B-Y.

25 DIRECT EXAMINATION

1 BY MR. THOMPSON:

2 Q. All right. Justin, I know you to be
3 kind of soft-spoken, so I need you to speak up and
4 speak clearly.

5 A. Okay.

6 Q. Do you recall being represented by
7 Mr. Bosnak?

8 A. Yes, I do.

9 Q. Was he appointed to represent you or
10 did you hire him to represent you?

11 A. He was representing me on another small
12 matter and my mom contacted him to talk about that,
13 and during the process of the conversation she
14 hired him as my attorney for this.

15 Q. And, for this, you mean this homicide
16 by child abuse?

17 A. Yes.

18 Q. How soon after you were arrested on
19 this charge did you retain Mr. Bosnak or did your
20 mother retain Mr. Bosnak?

21 A. A couple weeks.

22 Q. And were you ever released on bond?

23 A. No.

24 Q. Were you always housed at the jail?

25 A. Yes.

1 Q. And just approximately how long were
2 you at the jail awaiting trial?

3 A. 17 months and one week.

4 Q. Now, how many times did you meet with
5 Mr. Bosnak at the jail in total?

6 A. Four maybe.

7 Q. Four total. And that's over the course
8 of 17 months?

9 A. Yes.

10 Q. How soon after you retained him did you
11 meet with him?

12 A. Probably within a month or two.

13 Q. And how long after that was it before
14 you saw him again?

15 A. Probably five or six months.

16 Q. And then did you see him again after
17 that before the trial?

18 A. Yeah. I think I saw him maybe one
19 other time before he came to see me just before the
20 trial started.

21 Q. Now, over the course of those four
22 meetings, or so, what would you say the longest
23 meeting you had with Mr. Bosnak was? How long
24 would you say?

25 A. 45 minutes, maybe an hour.

1 Q. Longest was an hour?

2 A. Yeah.

3 Q. How long did the shortest one take?

4 A. 20 minutes, just to go over something
5 that he brought to my attention.

6 Q. How long would you say all told prior
7 to your trial did you spend with Mr. Bosnak at the
8 jail?

9 A. If it was five hours, I would be
10 surprised.

11 Q. Did you try to contact Mr. Bosnak in
12 the interim? While between meetings, did you try
13 to get in contact.

14 A. I told my mom to contact him, my dad,
15 and my grandma and I wrote several letters of
16 people to talk to and stuff to look into.

17 Q. Were you able to call Mr. Bosnak from
18 the jail?

19 A. No, I wasn't.

20 Q. So you primarily communicated with him
21 via letters; is that right?

22 A. I wrote letters and my dad did a lot of
23 communicating for me because I would call my dad
24 from the jail. My mom was in Cuba so I kind of
25 went through my grandma in Illinois.

1 Q. Would you say you had an easy time
2 communicating with Mr. Bosnak?

3 A. No. I just assumed that he got the
4 letters and was waiting to talk about them when he
5 showed up.

6 Q. Did you ever receive written responses
7 to your letters?

8 A. No, I never did.

9 Q. Did you -- did you have discovery
10 materials with you at the trial?

11 A. Only thing I ever got was my
12 statements.

13 Q. Did Mr. Bosnak go over the discovery
14 with you at the jail?

15 A. We talked about some of the injuries to
16 Blaise, but that was about as far as it went.

17 Q. So he never sat down with the physical
18 discovery and went over it with you, and went page
19 by page?

20 A. Just some of the injuries to ~~VICTIM~~ and
21 we went over my statement a few times.

22 Q. Was it your intent to go to trial on
23 this case?

24 A. Yes, from the very beginning.

25 Q. Did you get any plea offers?

1 A. He had mentioned something about
2 20 years. I told him it wasn't an option.

3 Q. What did you want Mr. Bosnak to explore
4 in terms of possible defenses?

5 A. Somebody else? He said he was going to
6 confer with somebody to look at the medical report
7 and somebody talk about the Reed Technique that the
8 officers admitted they used on me.

9 Q. Was it your belief, based on these
10 conversations, that Mr. Bosnak was going to consult
11 with experts regarding your case?

12 MR. JOHNSON: Objection; leading, Your
13 Honor.

14 THE COURT: Don't lead your witness,
15 please.

16 BY MR. THOMPSON:

17 Q. Did you want Mr. Bosnak to consult with
18 experts?

19 A. That's what he told me the money was
20 for.

21 Q. What kind of experts did you want him
22 to consult with?

23 A. Interrogation and medical.

24 Q. Did you ever have any conversations
25 with Mr. Bosnak regarding any potential

1 consultations?

2 A. He said that he had talked to somebody,
3 but he didn't like what they were saying.

4 Q. And in what -- what field of expertise?

5 A. Medical.

6 Q. Did you ever have a conversation with
7 him regarding a forensic pathologist?

8 A. He mentioned that he was going to have
9 someone, but I don't think he ever followed through
10 with it.

11 Q. Now, you testified at trial, right?

12 A. Yes, sir.

13 Q. Were you -- by your reaction, were you
14 intending to testify at trial? Was that part of
15 your defense?

16 A. I wanted to the few times that we had
17 spoken, but he told me in his opinion he didn't
18 think it was a good idea.

19 Q. So when you went to trial, what was
20 your belief as to -- were you going to testify or
21 not?

22 A. In the beginning, I didn't think I was,
23 but as we got towards the last day, he said that I
24 was going to need to testify and he would come and
25 see me and we would go over what my testimony would

1 be.

2 Q. Did you have -- prior to trial, did you
3 have any conversation with Mr. Bosnak regarding
4 what you would testify to?

5 A. Yeah; we talked about the statements.

6 Q. And what did you talk about regarding
7 the statements?

8 A. He said that I needed to admit to at
9 least the first one, because they said that it was
10 an accident. And I said that I didn't want to
11 admit to none of them because none of them
12 happened, but he said if I didn't at least admit to
13 the accident, which is what the officers agreed to,
14 I would just look like a liar.

15 Q. Did you actually ever strike the
16 victim?

17 A. No, I never hit ~~VICTIM~~.

18 Q. Now, when you got to trial, were you
19 pleased with the representation you received at
20 trial?

21 A. No. I was the only defense I had, so
22 what did we pay for?

23 Q. What were you expecting that didn't
24 happen? What were you expecting to happen?

25 A. A medical examiner and someone to talk

1 about the statements and the interrogation tactics
2 that they used, because they admitted to some of
3 it.

4 Q. And were you surprised that no
5 witnesses -- no expert witnesses were called?

6 A. Yeah, I was surprised. I was pretty
7 much my only defense. I could have done that by
8 myself.

9 MR. THOMPSON: Your Honor, I'm looking
10 at volume four of the transcript.

11 THE COURT: All right.

12 MR. THOMPSON: Page 206.

13 THE COURT: I'm there.

14 MR. THOMPSON: And line 22, going
15 through page 207, line 1. It's the -- it's the
16 portion of the jury instruction where the judge is
17 advising the jury about the verdict form.

18 THE COURT: I read that.

19 BY MR. THOMPSON:

20 Q. And are you familiar with that portion
21 of the transcript?

22 A. Very familiar.

23 Q. Did you catch the -- the judge
24 advised -- or did you realize what she said during
25 the trial?

1 A. Yes, I did.

2 Q. Did you tell Mr. Bosnak that?

3 A. I tried to get his attention, like I
4 did several times through the trial, and he just
5 put his hand down and said, hold on a second. We
6 spoke about it afterwards.

7 Q. What did you want him to do?

8 A. I wanted him to say that the judge
9 never gave a not guilty option. It was like she
10 was giving the jury her opinion that they had no
11 choice but to find me guilty. Both options she
12 gave was guilty. She never gave a not guilty
13 option.

14 Q. Is that something you would have wanted
15 him to object to?

16 A. Yeah. Or at least have her clarify, so
17 that the jury understood there was a not guilty
18 option that they could pick.

19 Q. The night before -- the night I guess
20 this all occurred, you weren't at the home by
21 yourself, were you?

22 A. No, I wasn't.

23 Q. Who was at the home?

24 A. Me, Serena and Eric and Brandy.

25 Q. Who is Serena?

1 A. Jenn's daughter.

2 Q. And were there portions of time during
3 the night where Serena could have been alone with
4 Blaise?

5 A. Yeah. I mean, I was in and out of the
6 living room where he was at and once I put him to
7 bed, I fell asleep on the couch.

8 Q. And you didn't -- you did not hit him?

9 A. No, I never hit ~~him~~.

10 Q. Did you bump his head on the wall?

11 A. No. That was something that Detective
12 William suggested, because the knee shot wasn't
13 going to be enough for what they said was in the
14 medical report.

15 Q. Did you hit him with your knee?

16 A. No, I just -- they said an accident and
17 -- when they first questioned me, they were asking
18 me about Jenn. And I asked, if it was an accident,
19 what did it matter if it was Jenn or if it was me?
20 And they said I wouldn't get in no trouble, and
21 that's when I come up with the knee, when I said I
22 ran into him in the hallway.

23 Q. But that never happened?

24 A. No, sir.

25 MR. THOMPSON: Beg the Court's

1 indulgence.

2 BY MR. THOMPSON:

3 Q. All right. Justin, barring some very
4 unusual circumstances, this is likely going to be
5 your one and only shot at a PCR hearing. So I
6 think I've covered everything that we talked about
7 regarding the issues we were planning on presenting
8 here today, but, again, this is your one and only
9 chance at a PCR hearing. Do you think I have left
10 anything out or is there anything you want to tell
11 the judge that I missed?

12 A. Nothing that's not in the application
13 and I don't want to go on about stuff we haven't
14 raised, so...

15 MR. THOMPSON: No further questions,
16 Your Honor.

17 THE COURT: Yes sir.

18 MR. JOHNSON: Just briefly, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. JOHNSON:

21 Q. Mr. Hillerby, you have just in fact
22 admitted that you lied to law enforcement; isn't
23 that correct?

24 A. Yes, sir.

25 Q. Okay. And you did that because you

1 thought it would help you out in some way?

2 A. That's what they told me, yeah.

3 Q. Your testimony is you never hit the
4 victim in this case?

5 A. No, I never did.

6 Q. Did you ever tell your girlfriend at
7 the time that you hit VICTIM?

8 A. I told her about the statements that I
9 wrote and what was in them.

10 Q. During your jail conversation, did you
11 ever say you smacked VICTIM?

12 A. Yeah; I told her that's what I put in
13 my statement.

14 Q. Did you tell her that VICTIM hit the
15 floor after you smacked him?

16 A. That's what me and the detective agreed
17 upon, yes, that he had to have hit the floor or a
18 hard object.

19 Q. Did you say that you didn't notice it
20 because you were drunk?

21 A. Yes.

22 Q. But at trial you testified that you
23 weren't drunk, that you had just been drinking all
24 day --

25 A. Everybody that was there knew I wasn't

1 drunk, including Jenn.

2 Q. That wasn't my question, sir. Trial
3 testimony was that you weren't drunk, you had eight
4 or nine beers, had a Gatorade, that you had been
5 swimming and it didn't affect you very much; isn't
6 that correct?

7 A. Yes.

8 Q. But then you tell your own girlfriend
9 that you were drunk?

10 A. She knows I wasn't drunk.

11 Q. But it came out of your mouth, that you
12 were drunk?

13 A. That's what I explained in the
14 statement. You keep referring to the statement as
15 if it was my testimony, but the statement and
16 testimony are very different.

17 MR. JOHNSON: Beg the Court's
18 indulgence.

19 May I approach?

20 THE COURT: Yes.

21 MR. JOHNSON: Let the record reflect
22 that I'm showing Mr. Hillerby, the applicant, a
23 copy of his detention recording dated September 26,
24 2008.

25 BY MR. JOHNSON:

1 Q. Do you recognize that document?

2 A. Yes.

3 Q. And can you tell the Court what that
4 is?

5 A. A recording of our phone call.

6 MR. JOHNSON: Your Honor, at this time,
7 I would move this in as Respondent's Number 1.

8 MR. THOMPSON: Without objection.

9 THE COURT: Without objection.

10 (RESPONDENT EXH. 1 in evidence.)

11 BY MR. JOHNSON:

12 Q. Will you read pages 1, 2 --

13 A. I don't have my glasses with me but I
14 can try.

15 Q. -- 3 -- it's actually 2, 3, 4 and 5.

16 And I will give you page 2. Here you go. And you
17 can read that to yourself.

18 MR. JOHNSON: Your Honor, may I
19 approach so you know what I'm referring to?

20 THE WITNESS: Go ahead.

21 BY MR. JOHNSON:

22 Q. And so you will agree with me that in
23 there it does not say, in my statement I told --

24 A. No.

25 Q. -- I told them that I smacked Blaise?

1 A. At the time this conversation took
2 place, Jenn had already been arrested, and I didn't
3 want to tell her that they were trying to get me to
4 write a statement against her because I knew she
5 would think I was trying to get her to help me and
6 I didn't want her involved in anything. I say that
7 several times.

8 Q. But in your own words, you say you
9 smacked Blaise and he hit the floor --

10 A. I was agreeing to what --

11 Q. May I finish what I'm asking you,
12 please?

13 Is that you smacked ~~VICTIM~~, he hit the
14 floor and you don't remember it because you were
15 drunk. That's what your statement to Jenn was,
16 correct?

17 A. My statement to Jenn was in reference
18 to what I put in my statement.

19 Q. But that's not what it says in that
20 document?

21 A. That's what it is, though.

22 THE COURT: Counsel, I'm lost. Are we
23 talking about this detention report?

24 MR. JOHNSON: Yes, sir.

25 THE COURT: And where are we?

1 MR. JOHNSON: Pages 2, 3, 4 and 5. The
2 crux of it is on the top of page 5.

3 THE COURT: Okay. All right. Thank
4 you.

5 MR. JOHNSON: Thank you, Your Honor.
6 No further questions at this time, Your Honor.

7 THE COURT: Counsel?

8 MR. THOMPSON: Just briefly, Your
9 Honor.

10 REDIRECT EXAMINATION

11 BY MR. THOMPSON:

12 Q. On that jail recording, explain what
13 you were trying to convey to Jenn.

14 A. Trying to explain to her what I put in
15 that statement -- at that time, she had been
16 arrested and I knew they were trying to use her
17 against me and they were trying to get me to say
18 something against her. So I just stuck with what I
19 put in my statement because I didn't want her to
20 get involved.

21 Q. You didn't want her to get in trouble?

22 A. No, I didn't.

23 Q. But you did not hit ~~VICTIM~~ ?

24 A. No, I never struck ~~VICTIM~~ .

25 MR. THOMPSON: No further questions,

1 Your Honor.

2 RECROSS-EXAMINATION

3 BY MR. JOHNSON:

4 Q. And just to follow up, you mentioned
5 you lied under oath, correct? At the trial?

6 A. Yes, sir.

7 MR. JOHNSON: Okay. No further
8 questions, Your Honor.

9 MR. THOMPSON: Nothing further, Your
10 Honor.

11 THE COURT: You may step down.

12 MR. THOMPSON: Your Honor, I would call
13 Vicky Williams.

14 VICKY WILLIAMS,

15 being first duly sworn, testified as follows:

16 THE CLERK: Please be seated. Speak
17 into the microphone and state your full name and
18 spell the last name for the record.

19 THE WITNESS: It's actually Vicky
20 Williams Clearman, C-L-E-A-R-M-A-N.

21 DIRECT EXAMINATION

22 BY MR. THOMPSON:

23 Q. What is your relationship to Justin?

24 A. He's my son.

25 Q. And he testified just a moment ago,

1 while these charges were pending, you were in Cuba.
2 Can you testify as to what your occupation is?

3 A. At that time I was working for Migrant
4 Operations and Homeland Security. I was like a
5 detention officer for Haitians and Cubans.

6 Q. And where were you stationed?

7 A. Well, that's how I got the job. I was
8 previously stationed there in the Navy working with
9 the detainees in Guantanamo Bay, Cuba.

10 Q. So you were stationed at Guantanamo Bay
11 while these charges were pending?

12 A. Yes.

13 Q. Now, did you -- while you were
14 stationed there, did you have communications with
15 Mr. Bosnak?

16 A. Yes, I did. I actually came back to
17 the States and met with Mr. Bosnak in person.

18 Q. And what was your understanding
19 regarding what experts would be hired?

20 A. Well, the first time I spoke with Mr.
21 Bosnak -- I'm not sure if it was the first or
22 second time, it's been awhile, but when I spoke
23 with him he told me -- because we weren't even sure
24 who we were going to hire yet. And he said, oh, I
25 know Justin, I know he's not capable of this. And

1 then we'd sit down and discussed that he could --
2 that actually he wanted to represent Justin and he
3 gave me the price of \$30,000.

4 And he told me at that time that he
5 knew somebody -- I believe the state he said was
6 North Carolina, I'm not sure about that -- but he
7 said he knew somebody in another state that was a
8 forensic pathologist that would go over the autopsy
9 photographs and stuff.

10 I have a law enforcement background and
11 I've been to autopsies before so I spoke a lot to
12 him about how I wanted to make sure that was
13 investigated.

14 Q. And, to the best of your knowledge, was
15 that investigated?

16 A. No, sir. The whole time I was in Cuba
17 I called and, to my knowledge, he was taking care
18 of that. And even the transcripts had people that
19 I thought was going to come forward and testify,
20 but no one ever did.

21 Q. And how many times would you say you
22 actually met with -- met with Mr. Bosnak in person?

23 A. I think I only actually met with him
24 twice in person. I spoke with -- I believe the
25 lady that worked in the office was Ms. Price, but I

1 had a lot of problems contacting him.

2 And I called often from Cuba to try to
3 get hold of him. And I had seen those autopsy
4 photographs. I had a disk of them.

5 Q. Was it your understanding that multiple
6 experts would be contacted in this case?

7 A. Yes, because -- well, I felt bad
8 because I thought Justin trusted the officers
9 because I had law enforcement background, and I
10 knew about the techniques that they used in
11 interrogation and he told me about this Reed
12 Technique, so I wanted that investigated.

13 And I told Mr. Bosnak that I had
14 several people in our neighborhood that could be
15 character witnesses that would say that my son had
16 baby-sitted their children, took them fishing, took
17 them to the beach. And I told Mr. Bosnak on
18 several occasions that we had lots of people that
19 would testify, and he said that we weren't going to
20 worry about character assassination, or whatever
21 they call it. And I kept telling him there was
22 plenty of people to come forward to testify to
23 that.

24 MR. THOMPSON: No further questions of
25 the witness.

1 THE COURT: Counsel?

2 CROSS-EXAMINATION

3 BY MR. JOHNSON:

4 Q. Just one, ma'am. You were in Cuba on
5 the night of this incident, correct?

6 A. Yes.

7 Q. So you have no personal knowledge of
8 what took place?

9 A. Just as everyone else didn't have any
10 personal knowledge.

11 MR. JOHNSON: No further questions.

12 MR. THOMPSON: Nothing further.

13 THE COURT: You may step down.

14 MR. THOMPSON: That would be the
15 applicant's case.

16 THE COURT: Very well.

17 MR. JOHNSON: May we have a few minutes
18 just to run to the rest room?

19 THE COURT: All right. We're at ease
20 for -- take about ten minutes.

21 (A recess transpired.)

22 MR. JOHNSON: Your Honor, the State
23 calls Counsel to the stand.

24 JOHN MICHAEL BOSNAK,
25 being first duly sworn, testified as follows:

1 THE CLERK: State your full name and
2 spell your last name for the record.

3 MR. BOSNAK: John Michael Bosnak,
4 B-O-S-N-A-K.

5 DIRECT EXAMINATION

6 BY MR. JOHNSON:

7 Q. Mr. Bosnak, would you please explain to
8 the Court how you became involved in this case?

9 A. I had originally represented Justin on
10 a -- or was representing him on a simple possession
11 of marijuana in Summerville, in the Town of
12 Summerville.

13 Q. And while that was pending, was this
14 charge picked up?

15 A. Correct. It was probably about a month
16 before I got involved in it and I think my
17 secretary read something in the paper and said,
18 here, I think it's our client that got caught with
19 this. I think David Schwacke with the Berkeley
20 County Public Defender's Office originally was Mr.
21 Hillerby's lawyer at the start.

22 Q. And he was denied bond based on the
23 charge?

24 A. He was denied initial bond, because a
25 magistrate can't set bond on a murder case, and

1 then David went in I think before one of the
2 Circuit Court Judges and the bond was set at a half
3 million dollars.

4 Q. Did you meet with Mr. Hillerby in the
5 jail?

6 A. When his mother and those eventually --
7 I think maybe I went and talked to him before I was
8 retained. I did talk to him in the jail and talked
9 to the mother and the mother signed a contract and
10 hired me to represent him.

11 Q. And how many times during the course of
12 your representation do you think you met with him?

13 A. Gosh, it's 17 months. Numerous,
14 numerous times I met with Mr. Hillerby. We filed
15 numerous motions on his behalf, so he had to be
16 aware of the motion, and he was present in court.

17 Q. Would you say it's more than the five
18 to six times that he --

19 A. I met with him every night during the
20 trial.

21 Q. And what motions did you file on his
22 behalf?

23 A. Well, we filed the Rule 5 discovery
24 motion, we filed a motion here that I've got, a
25 motion to compel to get the DNA evidence. We never

1 got the DNA evidence, and that was the thing I kept
2 telling his mother; we want to see what the DNA
3 evidence showed.

4 It's my understanding -- and I'm not an
5 expert, just what I know; I have been in law
6 enforcement. I've been trained at the Federal Law
7 Enforcement Training Center. Usually, when
8 somebody touches somebody or the Assistant
9 Solicitor hits somebody or something, their DNA
10 will be on that person.

11 So the first thing I wanted to see was
12 whose DNA was on the deceased child and whose DNA
13 was in his bed and in his room and different things
14 like that.

15 I had also talked to Mr. Hillerby and
16 asked him if his hand -- they had photographed his
17 hands and scraped under his fingernails. And he
18 said they had. He said his fingernails were always
19 cut very short because he was a roofer by trade,
20 and he said he didn't have any bruises or any marks
21 on his hands at all the next day when they
22 inspected him.

23 We did know that the child had died
24 from trauma to the head and face area. So,
25 undoubtedly, the child either had to be hit with a

1 fist or some type of object. So we did do that,
2 and I've got a copy of that motion, it's lengthy,
3 to get all of the DNA evidence on every piece of
4 evidence that the Summerville Police Department
5 took into custody.

6 MR. JOHNSON: May I approach the
7 witness, Your Honor? I apologize.

8 THE COURT: Uh-huh.

9 (RESPONDENT EXH. 2, Motion, was marked
10 for identification.)

11 MR. JOHNSON: At this time may I
12 produce that into evidence, Your Honor?

13 MR. THOMPSON: I have no objection.

14 THE COURT: Without objection, it's
15 admitted.

16 MR. JOHNSON: Thank you.

17 (RESPONDENT EXH. 2 in evidence.)

18 THE WITNESS: We also filed a Lyle
19 motion, to know what type of prior bad acts or
20 character evidence they would use against Mr.
21 Hillerby, besides the Rule 5. We also -- this
22 thing went on so long, that we didn't get anything.
23 Back in May 1st of 2009, I filed a motion for a
24 speedy trial, or in the alternative, release from
25 trial; in other words, if we can't get this thing

1 -- in other words, they kept saying they couldn't
2 get the evidence back from SLED.

3 So I filed a speedy trial motion where,
4 if this was going to be drug out any longer
5 concerning the forensic evidence, then Mr. Hillerby
6 should be released. We couldn't get a date
7 certain. And I filed that too. There might have
8 been something else I filed also, but those are
9 just the ones I remember offhand.

10 And those were discussed with Mr.
11 Hillerby and they were told to him and he was
12 present in the courthouse when we filed those
13 motions.

14 BY MR. JOHNSON:

15 Q. Did you consult with and/or retain any
16 experts in this case?

17 A. I did; two people.

18 Q. Who would those two people be?

19 A. The first person, Dr. Ronald Orlowski,
20 I think I'm pronouncing his name correctly, he's a
21 DNA expert. The Public Defender and people use him
22 here; Ashley Pennington, the Public Defender here
23 in Charleston County, gave me his name. He's in
24 North Carolina.

25 When we filled that motion, those were

1 -- those things that you have that were Federally
2 Expressed to him, that was just in Hillerby's case
3 file, and the pictures and different things like
4 that, that we sent to him. When the judge -- what
5 the judge stated about the physical evidence and
6 forensic evidence, was that SLED was to send all
7 that evidence to Dr. Orlowski. And then when he
8 finished analyzing it, he was to send it back to
9 SLED. So, in other words, I never touched it. I
10 never put my hands on it at all. It was sent to
11 him, and then after he analyzed it, it was sent
12 back.

13 Q. And if you could identify these --

14 MR. JOHNSON: May I have them marked as
15 Respondent's 3?

16 (RESPONDENT EXH. 3, Materials Fed Ex'd
17 to expert, was marked for
18 identification.)

19 BY MR. JOHNSON:

20 Q. All Right. Tell the Court what those
21 are.

22 A. These are documents that I sent him in
23 North Carolina, Shady Tree Lane in North Carolina.
24 Now, it's got Linda J. Sullivan. Linda J. Sullivan
25 is an attorney here in Charleston, a good friend of

1 mine, and she has an account with Fed Ex. We were
2 in the same law building and we used to date and go
3 out and she was asking me what I did, and I said,
4 well, I need to send this out. And she said, well,
5 I have a prepaid account, let me just give you
6 copies and you can just pay me back for it. So
7 that's why it has her name on it. It's my name
8 down here, Bosnak, but it looks like it comes from
9 her.

10 Q. Are those true and accurate copies of
11 that document?

12 A. Those are the original ones that we
13 used, the copies that Fed EX gave me back when I
14 sent them off that day.

15 MR. JOHNSON: Your Honor, we would move
16 them into evidence.

17 MR. THOMPSON: No objection.

18 THE COURT: Without objection.

19 (RESPONDENT EXH. 3 in evidence.)

20 THE WITNESS: So we sent -- got the
21 evidence to Dr. Orlowski, so I hired him. The
22 second person, on medical, to explain to me the
23 medical procedures and what the forensic
24 pathologist had done, I used a lady by the name of
25 Dr. Betsy Gibbs.

1 And I had met Dr. Gibbs through Ms.
2 Debbie Herring-Lash in the back, but I was the
3 Assistant Solicitor and we had used her in a lot of
4 child abuse cases, and at that time she ran CMAC,
5 Children's Medical Assessment Center. And children
6 that were sexually and physically abused were taken
7 to this clinic that she had.

8 And it was my understanding she was one
9 of the foremost experts in the State of South
10 Carolina on that type of thing. So I hired her to
11 give me an opinion about what happened and explain
12 to me the autopsy report and the medical report.

13 BY MR. JOHNSON:

14 Q. And so those are the two things that
15 you sent to Dr. Gibbs?

16 A. I met with Betsy originally and gave
17 her copies -- she's here in Charleston -- and gave
18 her copies, and we met again and she explained
19 everything to me.

20 Q. And based on what she told you, what
21 steps did you take from there?

22 A. I was going to use her as a witness on
23 this because there was some disagreements with her
24 with some of the things that the forensic
25 pathologist said at MUSC, Medical University of

1 South Carolina. She had some disagreements --
2 probably got along a little bit more with Dr. Baden
3 -- about some of these bruises. He claimed they
4 weren't bruises, she said they were bruises.

5 The problem was, after reading the
6 report and giving her all the material and letting
7 her go through it -- and, again, she's not a
8 forensic pathologist; she's a person that works in
9 that type of field and did it for years -- she
10 said, I don't think you want me to testify, because
11 I believe your client killed the child.

12 Now, if I could -- and we talked about
13 this paint roller stick. I was concerned. I did
14 believe that Mr. Hillerby, if he had hit this child
15 in the mouth and in the head 20 to 27 times, and I
16 think that's what the doctor testified to, there
17 were that many wounds on the child, he would have
18 bruising to his hands and maybe cuts to his hands.

19 And I even asked those questions. And
20 he admitted, yes, if somebody had done that to the
21 child, there's a possibility they could have cuts
22 and bruises. Justin didn't have any. Justin
23 didn't have any of the child's DNA underneath his
24 fingernails. Justin Hillerby didn't have any of
25 the child's DNA on his clothes. According to the

1 crime scene people that I talked to that did the
2 crime scene for Summerville, I asked them about
3 that specifically, and they said no.

4 And, again, I'm not trying to be an
5 expert, but I don't know how you wash a child, feed
6 a child, play with a child, put a child in the
7 crib, and live with a child and your DNA is not on
8 the child. I was, you know, kind of taken aback by
9 all of that. But according to SLED, Mr. Hillerby's
10 DNA wasn't on the child, wasn't on any of the
11 child's sheets, the child's -- that little suit he
12 was in, that little sleeping suit he was in, wasn't
13 on any of that. None of the child's DNA or blood
14 was on any of Mr. Hillerby's clothes or anything
15 they claim they tested.

16 Also, that stick -- that roller stick
17 should have been sent. They claimed there was no
18 blood, no hair fibers, no DNA on that. Certainly
19 none of Mr. Hillerby's DNA on that stick. So --
20 and it was confusing. Nobody could really say if
21 somebody had hit the child with their fist or had
22 used some type of object to hit the child. We
23 never got to that. Nobody could ever give us an
24 answer to that.

25 Q. But as a matter of fact, you used the

1 lack of that DNA as a trial strategy in this case?

2 A. Exactly. Let me say one thing. What I
3 believe happened is I believe the crime scene
4 messed up. I believe Summerville Crime Scene -- I
5 don't think they did what they were supposed to do,
6 and I think they messed it up, but I certainly do
7 not want to get into that because that's
8 exculpatory evidence on Mr. Hillerby.

9 Here he was supposed to have hit this
10 child 20-something times and slapped him and
11 knocked him down with his knee, and his DNA is
12 nowhere to be found on this child. There's blood
13 coming out of the child's mouth in the photos; none
14 of that is on Mr. Hillerby, none on his clothing
15 so, certainly, that's exculpatory evidence.
16 There's no need to go any further.

17 Q. And based on that, you didn't ask for
18 it to be sent off?

19 A. No. Well, I did get it sent off and I
20 did get it sent off to Dr. Orlowski and he went
21 through all of it. And he came back with the same
22 conclusion as SLED. With what he checked, he said
23 the same thing. And so we talked about it and he
24 said, well, this is good for your client. I don't
25 know how this could have happened, his DNA wouldn't

1 be on the child.

2 Q. Did you explain that to Mr. Hillerby?

3 A. Yeah. Yeah. We talked about that.

4 Q. And what type of trial strategy did you
5 come up with?

6 A. Well, I thought we had a winnable case
7 when I first got the case with the first evidence.
8 The first statement he gives, there is not one
9 single thing in there whatsoever that could be used
10 against him. He just said he didn't know what
11 happened and this and that. The second statement
12 is a little worse about what he did, but he still
13 didn't admit that he killed the child or anything
14 like that.

15 Q. Now, let me back up, before you get
16 into that statement, were you representing him at
17 the time he gave the statements?

18 A. No.

19 Q. Okay.

20 A. No. As a matter of fact, my
21 understanding is they had called the Public
22 Defender's Office and the Public Defender's Office
23 told him not to give any statements, told him not
24 to say anything, not to talk.

25 Q. But, in fact, he did?

1 A. Yeah. As a matter of fact, he
2 requested on that second statement -- they had
3 already talked to him. They were carrying him to
4 the detention center, and on the way to the
5 detention center he told the officer that was
6 taking him there, transporting him, to take him
7 back I believe to Detective Sharp because he wanted
8 to talk to Detective Sharp again. He wanted to be
9 straight up and talk to him.

10 And that's what he did and that's when
11 Justin gave that -- gave that statement.

12 Q. Now I know he refutes that. Did you
13 see any way to challenge that statement?

14 A. Well, again, I think the judge said
15 things better than anybody. They always try to
16 tell you, you know, it's an accident. Just tell us
17 -- you know, I know you had something to do with
18 it, but I'm sure it was an accident; they use the
19 nice guy approach. And it's, just tell us, tell us
20 that you did this or you did that and, you know, it
21 was an accident. Is there anything that you can
22 tell us that might could have contributed to this?

23 And there is a whole long list of
24 things that we haven't talked about, but they kept
25 going back in that pool. Supposedly the child was

1 bruised at the pool. They state in there that he
2 had bruises on him from the pool, that he had hit
3 himself, whatever. You know, small child running
4 around outside the swimming pool, they're going to
5 fall down and get bumps and bruises and stuff like
6 that.

7 Supposedly the child had some bruises
8 and I think they said something around his eye and
9 they claimed he got it at the swimming pool that
10 day. So there is that.

11 Then Mr. Hillerby claims that the child
12 ran into him and fell down, hit his head. And the
13 rest of the stuff about clipping a door and all
14 that, he said they told him to say that, that that
15 might have happened. I don't know. He said that
16 he didn't think the child ever clipped his head and
17 he never hit the child's head on the back of the
18 crib, or anything like that. And they made a big
19 deal at the trial about the child just kept like
20 falling out.

21 What Justin and I attributed to that,
22 it was kind of late at night, maybe 10:00 when he
23 put him to bed, and the child had been playing all
24 day. He had been playing since early that morning
25 and had been out at the swimming pool where it was

1 hot, jumping in and out of the water. I figured
2 that the child was probably tired, and like
3 children do, when they get tired, they just kind of
4 like run out of gas. That's what I thought and
5 that's what he and I both thought.

6 Q. That's the strategy that you --

7 A. Yeah. That was the strategy we were
8 going to do. Nobody could tell us where they got
9 these marks. Nobody today has really explained how
10 that child died and who could have done it. What
11 I've heard today, now they're trying to blame it on
12 his eight-year-old sister, Serena S. , which
13 nobody -- that's the first I've ever heard of
14 anything that that little girl had anything to do
15 with the death of her brother, but that's what
16 we're hearing today.

17 I'll cut to the chase quick. We
18 finally got all this information and Anne Williams
19 called me and said, look, I got -- and she was
20 calling me constantly. The baby's mother, his
21 girlfriend, deceased child's mother, he's calling
22 her continuously. They were talking back and
23 forth, sending letters back and forth; they weren't
24 supposed to be.

25 I don't know if she was complaining or

1 her mom and daddy were complaining, but I was
2 constantly getting calls from the Solicitor's
3 Office, could you tell Justin to leave her alone?
4 Could you tell Justin to quit calling over here?
5 Justin's not supposed to be talking to her.

6 So I would talk to him about it, it
7 didn't do any good. Anne called me and said, look,
8 I have a tape here, a telephone conversation that
9 Justin had. You need to hear it, and I've got you
10 a copy. I went over there and listened to it. And
11 when I heard that tape, I said, we're done, we're
12 finished. We got no -- I mean, it's a confession.

13 He calls her, she asked him what
14 happened, and he said that he hit him, knocked him
15 down on the floor, and that's when it started.
16 Nowhere in there does that say, that's what my
17 statement says, so I'm just repeating my statement.
18 Nowhere in that phone conversation does it say
19 that. Nowhere in that phone conversation does he
20 say, ~~VICTIM~~ was okay, I wouldn't hurt ~~VICTIM~~.
21 That's the only time I hit ~~VICTIM~~. He was fine.
22 None of that is in any of that.

23 So he can say you're taking it out of
24 context or it's this or that; huh-uh, that's what
25 it said. That's what got him convicted. Okay.

1 So when Anne gave me that, I called
2 Mrs. Williams and I told Mrs. Williams I needed to
3 talk to her. And she eventually came to my office.
4 And I played that tape for her and the transcript.
5 And I asked her -- I said, we need to cut a deal.
6 We need to -- we need to -- we need to plead him.
7 We need to plead him to this. Tell me what I can
8 say to explain this.

9 And her direct words to me were, I
10 didn't pay you to plead this case. We paid you to
11 take this case to go to trial and we want a trial.
12 I said, well, I don't know how you're going to win
13 it with this kind of stuff, no matter what we do.
14 As a matter of fact, I believe my paralegal was
15 present when all of this was being said. She was
16 certainly present during the whole trial. She can
17 testify to a lot of this.

18 Q. No, Mr. Bosnak, let me just stop you
19 right there. Is the transcript that's in evidence,
20 is that the conversation that you're speaking of?
21 The conversation between Mr. Hillerby and Jenn, is
22 that the transcript --

23 A. That's the transcript that you gave to
24 the judge and brought in. That was the -- that was
25 the telephone call from the jail and it even says,

1 this is the Berkeley County Detention Center, all
2 calls are being recorded. And then next it says,
3 who is the call from? And it says, Justin.

4 Q. One quick point.

5 MR. JOHNSON: Your Honor, may I
6 approach the witness? And I'm looking at volume
7 four of the transcript and I'm going to cover the
8 jury charge allegation.

9 BY MR. JOHNSON:

10 Q. I'm on page 206 at the bottom. Please
11 read that to yourself.

12 A. Yes, sir, I'm very aware of this.

13 Q. Did you -- during the explanation of
14 the jury charges, did you hear anything that
15 alarmed you?

16 A. I had told Mr. Hillerby -- because
17 Justin loves to talk. I had told him that he could
18 not be whispering in my ear during the trial, that
19 I had to listen to what was going on, where I could
20 make objections and I can hear what people were
21 saying. I told him to write it down -- and I'm
22 sure we have the tablet somewhere, to write down
23 any questions, thoughts, or anything that he had on
24 a piece of paper, on like a yellow pad. And if he
25 needed to talk to somebody, to please talk to my

1 paralegal, Florene Price, who is a retired deputy
2 sheriff and detective from New York State, to
3 please talk to her, that I had to listen to what
4 was going on.

5 Judge was giving the jury instructions
6 and Justin leans over to me and starts talking to
7 me in my ear, and I didn't hear her say it.

8 Q. Is there a notation down there that
9 means there is an accident or mistake that we use
10 in legal briefs?

11 A. Yes.

12 Q. And what is that?

13 A. Sic, S-I-C-K (sic). She realized that
14 she shouldn't have said that.

15 Q. Is it possible that she would have said
16 not guilty right there, Judge Harrington?

17 A. Could have. I didn't hear anything
18 because he was talking to me, but I was certainly
19 made well aware of it after it happened. And I
20 don't know, we might have even came forward and had
21 a conversation about it.

22 Q. But it could have possibly been a
23 scrivener's error?

24 A. Could have been. That courtroom, the
25 sound is not real good in that old Berkeley County

1 Courthouse.

2 MR. JOHNSON: Court's indulgence, Your
3 Honor.

4 No further questions at this time.

5 THE COURT: Counsel?

6 CROSS-EXAMINATION

7 BY MR. THOMPSON:

8 Q. Just briefly. Hi, Mr. Bosnak. My name
9 is Jeremy Thompson. How are you?

10 A. Fine, sir.

11 Q. Now, Dr. Gibbs?

12 A. Correct.

13 Q. She is a pediatrician, right?

14 A. I believe so; I'm not sure.

15 Q. She's not a forensic pathologist?

16 A. No, she is not.

17 Q. I heard you say on direct, and I just
18 want to make sure, you did not consult with a
19 forensic pathologist specifically on this case?

20 A. No, I didn't.

21 Q. You moved prior to trial -- or I guess
22 pretrial, you moved to exclude Justin's statements,
23 right?

24 A. Yes; Jackson v. Denno hearing.

25 Q. Right. Do you have any explanation for

1 -- let me ask it this way: Do you have a strategic
2 reason why you did not renew your objection when
3 those statements were admitted into evidence later
4 on?

5 A. Judge Harrington wasn't going to change
6 her mind. She had already made her ruling.

7 Q. Are you aware that our preservation
8 rules require --

9 A. I know the preservation rule.

10 Q. I understand you didn't believe --
11 believe me, I understand where you're coming from
12 with not wanting to rechallenge the same argument,
13 but you understand that you needed to re-object in
14 order to preserve the issue for appeal, right?

15 A. You should always say it every chance
16 you get, defense counsel would like to renew all
17 objections; every chance you get.

18 Q. And you don't have a strategic
19 explanation as to why you didn't do that at this
20 time?

21 A. No.

22 Q. Now, you specifically recalled that
23 Justin was talking in your ear at the time the
24 verdict form was being read out to the jury?

25 A. Jury instruction and the verdict form,

1 correct.

2 Q. He was talking in your ear the whole
3 time or --

4 A. During that part.

5 Q. During that little portion?

6 A. Yeah.

7 Q. And you said that you may have brought
8 something up to the judge's attention, but if that
9 -- would that have happened off the record?

10 A. Let me say one thing that happened bad
11 in this case. Any time you make an objection in
12 front of Judge Harrington, you object, state your
13 ground, and then you come up to the bench to make
14 your arguments. At the Berkeley County Courthouse
15 we would make our -- we would talk to her, like
16 right here, (Indicating) to the left side of the
17 bench. There was a microphone sitting right there.

18 It was my understanding that the Court
19 Reporter could hear what we were saying through
20 that microphone. As we've come to find out, any
21 objection that I made during the trial, and my
22 arguments, none of them were being recorded.

23 Now, I don't know if there was
24 equipment error, I don't know what it was, but we
25 found out later that -- and Anne Williams also.

1 Whether the prosecution made an objection or
2 whether defense counsel made an objection, we were
3 called to the bar, we stated our case, and our
4 evidence and our reasons why we felt like the
5 objection should have been upheld, or whatever, and
6 we thought that little microphone sitting right
7 there at that side, the Court Reporter was
8 recording everything. That's why there is none of
9 that in the record.

10 Q. Do you recall specifically making an
11 objection at the bench regarding the verdict -- the
12 verdict form?

13 A. I think we did call it to her
14 attention. I don't remember off the top of my
15 head. It's been five, six years ago. I do recall
16 that happening, sure do.

17 Q. But you don't disagree that the record
18 reflects that right after the judge gives the
19 instruction, she asked if you have any objection,
20 and you say you don't, right?

21 A. I think we had already straightened out
22 that issue. I think she had gone through
23 everything -- I think she had gone through
24 everything else and then she came up, is there
25 anything else you would like for us to add or any

1 objection to anything I said, I believe.

2 MR. THOMPSON: And, Your Honor, for the
3 record, I'm referring to page 208, lines 5 through
4 10.

5 THE COURT: Which volume?

6 MR. THOMPSON: Volume four.

7 THE COURT: 208?

8 MR. THOMPSON: Yes, sir.

9 THE COURT: Go ahead.

10 THE WITNESS: She had already given --
11 she had already given all this stuff out when we
12 get over to page 208. I think we had already
13 addressed it back at 206. On page 206, where it
14 says, sic, we find the defendant guilty, sic, it
15 could have been that she said not guilty. I think
16 we did talk about that at that time and supposedly
17 got it resolved and then all this was done if there
18 was any objection to these other things.

19 By MR. THOMPSON:

20 Q. But there's no record of the actual
21 correct instruction being given, right?

22 A. I don't see it here.

23 Q. The photographs that you admitted at
24 trial, what was your intention in admitting those?
25 Why did you admit those photographs?

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

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

11 Q. And one last thing, did you do any
12 investigation into Dr. Battalis' qualifications or
13 anything like that prior to the trial?

14 A. Other than when I realized that he was
15 a forensic pathologist for the Medical University
16 of South Carolina and he was -- he was working for
17 them and he was on staff for them.

18 Q. Right. But you didn't -- you didn't go
19 figure out when he was certified or anything like
20 that before trial, did you?

21 A. I think I went on line. I think it
22 said he was certified.

23 Q. I'm asking when did he get certified.
24 Did you get documentation showing when he was
25 certified?

1 A. It was my understanding he was
2 certified when he did the autopsy and he certainly
3 was certified at the time he testified at trial.
4 And if I'm not mistaken, he was asked under oath if
5 he was certified, which he said he was.

6 Q. I don't disagree with you, that he was
7 certified. I'm asking you if you looked into when
8 he became certified?

9 A. I can't recall that. I did look into
10 who he was, what his background was, we got a
11 resume from him. Mrs. Williams gave us a resume
12 concerning him. We looked through all that
13 information and at that time he said he was
14 certified. He did admit that he was certified the
15 day of trial, he had been certified the day he did
16 the autopsy. I'm not -- I'm just really not sure
17 what you're asking.

18 Q. Just asking when he was certified. If
19 you did any investigation as to the date of his
20 certification. That's all I'm asking.

21 A. I'm sure I looked at it. I don't
22 recall exactly; I just know that they said he was
23 certified.

24 Q. You said -- you testified Dr. Gibbs had
25 disagreed with some of the thing Dr. Battalis said,

1 right?

2 A. I think she thought -- he had said that
3 wasn't bruising, some of the marks on the child's
4 legs and arms and things like that weren't bruising
5 because -- let me say one thing. If the child had
6 marks -- now, again, we claimed -- you know, when I
7 listened to Dr. Baden, the best forensic
8 pathologist probably in the country -- but nobody's
9 mentioned possible bruising at the pool.

10 None of them's mentioned statements
11 that Mr. Hillerby's made that he knocked the child
12 down, which could have caused bruising. We're now
13 saying that the bruising was made by a child with
14 possibly a paint roller handle, but it seems to me
15 that if the child has bruises on his legs and on
16 his feet and on his arms, then somebody kind of had
17 to manhandle the child for the child to have
18 bruising on him.

19 Another child, I don't know if they
20 would have been able to manhandle -- I just don't
21 know. But we were just trying to determine where
22 these bruises and stuff came from and why there was
23 no DNA and that type of thing.

24 Q. And wouldn't a forensic pathologist
25 have helped you determine where those bruises came

1 from and what kind of bruises they were?

2 A. Well, we knew that the child had been
3 killed by blunt -- blunt trauma of some type to the
4 head. A bruise on the leg that could have been at
5 a swimming pool or a child playing in the house,
6 fell down, how is that going to show that Mr.
7 Hillerby is not guilty of anything? I'm not
8 following you on that.

9 Q. I understand.

10 MR. THOMPSON: Beg the Court's
11 indulgence.

12 No further questions of the witness,
13 Your Honor.

14 THE COURT: Counsel?

15 MR. JOHNSON: No further questions.

16 THE COURT: You may step down.

17 MR. JOHNSON: I would like the Court to
18 take judicial notice of one of the exhibits, this
19 is the letter about Dr. Battalis being a
20 certified --

21 THE COURT: Certified at the time of
22 the examination and at the time he testified.

23 MR. JOHNSON: Thank you, Your Honor.

24 State has no further witnesses.

25 THE COURT: Okay. Gentlemen, I would

1 like for you to each submit proposed orders. I
2 want you to look carefully at the Strickland and
3 Cherry, I want you to emphasize the prejudice prong
4 of the test of whether or not the attorney has
5 competently represented his client. Get those to
6 me within two weeks, please.

7 MR. THOMPSON: Will do, Your Honor.

8 MR. JOHNSON: Can I ask for an
9 extension on that? I'm going out of the country
10 next week.

11 THE COURT: All right. Do it in
12 30 days.

13 MR. JOHNSON: Thank you, Your Honor.

14 MR. THOMPSON: Would you like that
15 e-mailed to your law clerk?

16 THE COURT: Absolutely.

17 (These proceedings were concluded at
18 4:34 p.m.)

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CERTIFICATE OF REPORTER

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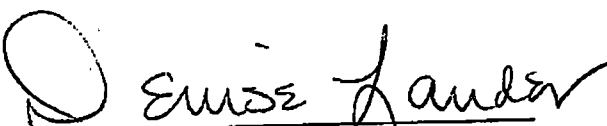
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I, Carol Denise Lauder, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 8th day of April, 2016 at Charleston, Charleston County, South Carolina.

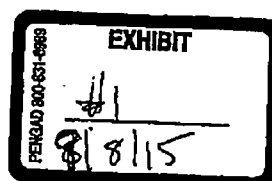

Carol Denise Lauder
Registered Professional
Reporter, CP
My Commission expires
August 2, 2017

Michael M. Baden, M.D.

Dr. Michael Baden is the former Chief Medical Examiner of New York City and past Director of the New York State Police Medico-Legal Investigations Unit. He received a B.S. Degree from the City College of New York and an M.D. Degree from New York University School of Medicine. He trained in internal medicine and pathology at Bellevue Hospital Medical Center where he was intern, resident and Chief Resident. He has been a medical examiner for forty-five years and has performed more than 20,000 autopsies. He has held professorial teaching appointments at Albert Einstein Medical School, Albany Medical College, New York University, New York Law School and John Jay College of Criminal Justice. He has been a consultant to the Federal Bureau of Investigation, Veteran's Administration, Bureau of Alcohol, Tobacco and Firearm's, Drug Enforcement Agency and the United States Department of Justice.

He was Chairman of the Forensic Pathology Panel of the U.S. Congress Select Committee on Assassinations that re-investigated the deaths of President John F. Kennedy and Dr. Martin Luther King, Jr. in the 1970s. He was the forensic pathologist member of a team of U.S. forensic scientists asked by the Russian government to examine the newly found remains of Tsar Nicholas II, Alexandra and the Romanov family in Siberia in the 1990s. He has been an expert in multiple Iraq-related court martials in the United States and Camp Liberty, Baghdad. He has also been an expert in the investigations concerning Medgar Evers, John Belushi, Yankee Manager Billy Martin, Marlon Brando's son Christian Brando, O.J. Simpson, Jayson Williams, Kobe Bryant, Robert Blake, and Las Vegas hotel owner Ted Binion. He has investigated deaths in Croatia, Serbia, Israel, the Gaza Strip and the West Bank, Monaco, Panama, England, Canada, Zimbabwe and other countries for human rights groups and private attorneys. He has taught homicide courses for police, judges, attorneys and physicians in most of the 50 states as well as in China, Taiwan, Kuwait, Australia, France, Italy, Ecuador, Puerto Rico, Columbia and other countries. He has been a member of the board of directors of a number of drug abuse and alcohol abuse treatment programs where he attempts to apply what he has learned from the dead at the autopsy table to the betterment of the living.

Dr. Baden has also served as President of the Society of Medical Jurisprudence and Vice President of the American Academy of Forensic Science. He was the host of the HBO "Autopsy" series for thirteen years, which demonstrated how the various forensic sciences assist in solving crimes and was a consultant for the "Crossing Jordan" television series. He has been author or co-author of more than 80 professional articles and books on aspects of forensic medicine and two popular non-fiction books "Unnatural Death, Confessions of a Medical Examiner" and "Dead Reckoning, the New Science of Catching Killers." He is also the author, with his wife, attorney Linda Kenney Baden, of two recent forensic thrillers, "Remains Silent" and "Skeleton Justice." He is the Forensic Science Contributor for FOX National News and is a reviewer for the New England Journal of Medicine.



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CURRICULUM VITAE

EDUCATION

- The City College of New York (1955) B.S. Degree
- New York University School of Medicine (1959) M.D. Degree

POST-GRADUATE TRAINING

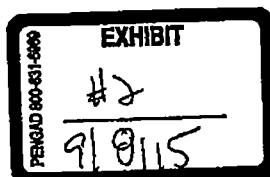
1959-1960 Intern, First (Columbia) Medical Division, Bellevue Hospital
1960-1961 Resident, First (Columbia) Medical Division, Bellevue Hospital
1961-1963 Resident, Pathology, Bellevue Hospital
1963-1964 Chief Resident, Pathology, Bellevue Hospital

LICENSURE

- New York State Medical License (1960)
- Diplomate, National Board of Medical Examiner's (1960)
- Diplomate, American Board of Pathology:
 - Anatomic Pathology (1965)
 - Clinical Pathology (1966)
 - Forensic Pathology (1966)

PROFESSIONAL POSITIONS

1985-2011 Director, Medicolegal Investigations Unit, New York State Police
1961-1985 Office of Chief Medical Examiner, New York City; Chief Medical Examiner (1978-1979)
1981-1983 Deputy Chief Medical Examiner, Suffolk County, New York; Director of Laboratories, Suffolk County, New York



TEACHING APPOINTMENTS

1961-1989	New York University School of Medicine, Associate Professor, Forensic Medicine
1975-2001	Visiting Professor of Pathology, Albert Einstein School of Medicine
1975-1988	Adjunct Professor of Law, New York Law School
1975-1978	Lecturer in Pathology, College of Physicians and Surgeons of Columbia University
1986, 1989	Visiting Professor, John Jay College of Criminal Justice
1965-1978-	Assist Visiting Pathologist, Bellevue Hospital, New York
2002	Adjunct Lecturer, The Cyril H. Wecht Institute of Forensic Science and Law, Duquesne University School of Law
2002	Distinguished Professor/Adjunct Lecturer, Henry C. Lee Institute, University of New Haven (Connecticut)

GOVERNMENTAL APPOINTMENTS

1977-1979	Chairman, Forensic Pathology Panel, United States Congress, Select Committee on Assassinations, Investigations into the deaths of President John F. Kennedy and Dr. Martin Luther King
1973-Present	Member, New York State Correction Medical Review Board
1976-2013	Member, New York State Mental Hygiene Medical Review Board
1983-1986	Member, National Crime Information Center, Committee on Missing Children, United States Department of Justice (F.B.I.)
1971-1975	Special Forensic Pathology Consultant, New York State Organized Crime Task Force (investigation of deaths at Attica Prison)
1974-2006	Director and/or Moderator, Annual Northeastern Seminar in Forensic Medicine, Colby College, Maine
1973-1987	Lecturer, Drug Enforcement Administration, Drug Law Enforcement Training School, United States Department of Justice

PROFESSIONAL ORGANIZATIONS

1966-Present	American Academy of Forensic Sciences; Fellow Vice President and Program Chairman (1982-1983)
1965-Present	The Society of Medical Jurisprudence; Fellow, President (1981-1985)
1966-Present	College of American Pathologist; Fellow, Chairman, Toxicology Subcommittee (1972-1974)
1971-1975	College of American Pathologists Foundation; Forensic Pathology Seminar Faculty
1973-1976	American Board of Pathology; Forensic Pathology Board Test Committee (1973-1976)
1966-1986	American Society of Clinical Pathologist; Fellow Member, Drug Abuse Task Force (1973-1977)
1965-1978	New York State Medical Society; Chairman, Section of Medicolegal and Workers' Compensation Matters (1972)
1965-Present	Medical Society of the County of New York
1969-1978	National Association of Medical Examiner's
1965-Present	American Medical Association

HONORS

- The City College of New York: Senior Class President; Editor-in-Chief of The Campus (newspaper); Phi Beta Kappa
- Honor Legion, New York City Police Department, 1969
- College of American Pathologists, Certificate of Appreciation (Chairman, Toxicology Resource Committee, 1972-1975)
- American Academy of Forensic Sciences, Award of Merit, 1974 and 1983
- Drug Enforcement Administration, United States Department of Justice, Certificate of Appreciation, 1982

- New Jersey Narcotic Enforcement Officers Association, Certificate of Appreciation, 1977
- Fire Department of the City of New York, Certificate of Appreciation, 1978
- New York State Bar Association, Certificate of Appreciation, 1980
- New York City Health and Hospitals Corporation, Certificate of Appreciation for participation in development of emergency facilities for Emergency Medical Services for the City of New York, 1980
- New York University, Great Teacher, 1980
- First Fellow in Forensic Science of the University of New Haven, Henry C. Lee Institute, (Connecticut), 2002

PROFESSIONAL PUBLICATIONS AND PRESENTATIONS

1. M. Helpern and M. Baden; Editors: Atlas of Legal Medicine by Tomio Watanabe, Lippincott, 1968
2. D. Louria, M. Baden, et al.: The Dangerous Drug Problem. New York Medicine, 22:3, May 1966
3. D. Gold, P. Henkind, W. Sturmer and M. Baden: Occulodermal Melanocytosis and Retinitis Pigmentosa. Am. J. of Ophthalmology, 63:271, 1967
4. B. Van Duuren, L. Lanseth, L. Orris, M. Baden and M. Kuschner: Carcinogenicity of Expoxides Lactones and Peroxy Compounds v. Subcutaneous Injection of Rats. J. Nat. Cancer Institute, 39:1213, 1967
5. M. Helpern and M. Baden: Patterns of Suicides and Homicides in New York City, Proceedings of the Seventh International Meeting of Legal Medicine (Budapest); October 1967
6. M. Baden: Pathology of Narcotic Addiction, Proceedings of the Sixth Latin American Congress of Pathology (San Juan, Puerto Rico); December 1967
7. M. Baden: The Diagnosis of Narcotism at Autopsy, Proceedings of the American Academy of Forensic Sciences (Chicago); February 1968
8. M. Baden: Medical Aspects of Drug Abuse, New York Medicine, 24:464, 1968
9. C. Cherubin, M. Baden, et al.: Infective Endocarditis in Narcotic Addicts. Ann. Int. Med., 69:1091, 1968.

10. M. Baden: Pathologic Aspects of Drug Abuse, Proceedings of the Committee on Problems of Drug Dependence, National Academy of Sciences, National Research Council, 1969.
11. W. Matusiak, L. Dal Cortivo and M. Baden: Analytical Problems on a Narcotic Addiction Laboratory, Proceedings of the American Academy of Forensic Sciences (Chicago), February 1969
12. M. Baden, P. Hushins and M. Helpert: The Laboratory for Addictive Drugs of the Office of Chief Medical Examiner of New York City, Proceedings of the International Conference on Poison Control (New York City), June 1969.
13. M. Baden, S. Hofstetter and T. Smith: Patterns of Suicide in New York City, Proceedings of the Fifth International Meeting of Forensic Sciences (Toronto), June 1969
14. R.W. Richter and M. Baden: Neurological Aspects of Heroin Addiction, Proceedings of the Ninth International Congress of Neurology (New York City), September 1969
15. R.W. Richter and M. Baden: Neurological Complications of Heroin Addiction. Transactions of the American Neurological Association
16. M. Baden: Of Drugs and Urine, Editorial, Medical Tribune
17. M. Baden: Methadone-Related Deaths in New York City, Proceedings of the Second National Conference on Methadone Treatment (New York City), October 1969. Int. J. Addictions.
18. M. Baden: Chairman, Workshop on Techniques for Detecting Drugs of Abuse, Proceedings of the Statewide Conference on Prevention Aspects of Treatment and Research in Drug Abuse. New York City Narcotics Addiction Control Commission, 1969.
19. M. Baden: Investigation of Deaths of Persons Using Methadone, Proceedings of the Committee on Problems on Drug Dependence. National Academy of Sciences National Research Council, 1970.
20. M. Baden: The Changing Role of the Medical Examiner, Proceedings of the American Academy of Forensic Sciences (Chicago), February 1970, Med. Op. 7:64-68, 1971
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80. M. Baden, J. A. Hennessee: Unnatural Death, Confessions of a Medical Examiner, Random House, New York 1989
81. M. Baden, M. Roach: Dead Reckoning, The New Science of Catching Killers, Simon & Schuster, New York 2001
82. M. Baden: The Role of the Medical Examiner and Coroner in the Investigation of Terrorism in Forensic Aspects of Chemical and Biological Terrorism, Lawyers & Judges Publishing Company, Inc., Tuscon, Arizona 2004.
83. M. Baden, L. Kenney Baden: "Remains Silent," Alfred A. Knopf, August 2005.
84. M. Baden: Preface in Forensic Nursing by Virginia A. Lynch. Elsevier/Mosby, St. Louis, Missouri 2006.
85. M. Baden: Exhumation in Spitz and Fisher's Medicolegal Investigation of Death, 4th Edition, Charles C. Thomas, Springfield, Illinois 2006.
86. M. Baden: Encyclopedia of Legal Medicine, Book Review, New England Journal of Medicine, 2006.
87. M. Baden, L. Kenney Baden: Scientific Evidence in Civil and Criminal Cases, 5th Edition, Contributor, Foundation Press, 2007.
88. M. Baden, L. Kenney Baden: "Skeleton Justice," Alfred A. Knopf, June 2009.

RECENT LECTURES

- NACDL/National Forensic College, "Special Problems in Forensic Pathology: Discovery, Time of Death Determinations and Cognitive Bias," Benjamin N Cardozo School of Law Cordozo Law School, New York, New York, June 8, 2015
- "Confessions of a Medical Examiner," The Lotus Club, New York, New York, May 11, 2015
- Medicolegal Investigation of Death, "Asphyxial Deaths: Chokeholds, Sleeperholds and Back Pressure," Wayne State University, Dearborn, Michigan, April 30, 2015
- American Academy of Forensic Sciences, Co-Chairman, Bring Your Own Slides, February 17-21, 2014
- American Academy of Forensic Sciences, "Plausible Deniability The Ethics of Inconsistent Consistency," February 17-21, 2014
- Keynote Speaker, Baruch Biomedical Society, New York, New York, October 17, 2013
- Speaker, Markle Symposium, "Medical Examiner Perspective on the Death of JFK," October 15, 2013
- Speaker, NAMFCU Annual Training, "Use of a Medical Examiner in a Nursing Home," Mobile, Alabama, October 7, 2013
- Speaker, Northeastern Association of Forensic Scientists, Cromwell, "Medical Evidence in the JFK Assassination," Connecticut, September 27, 2013
- Lecturer, Henry F. Williams Seminar, "Cold Cases with Dr. Baden," New York State Police, September 24, 2013
- "Use of a Medical Examiner in a Nursing Home Death Investigation," Resident Abuse Training Program, Virginia Beach, Virginia, June 6, 2013
- "Medicolegal Investigation of Death, "Investigating the Scene of Mass Disasters: What to Look for with Fire, Explosion or Terrorist Attack," Wayne State University, Dearborn, Michigan, May 1-3, 2012
- Children's Law Topical Conference, "When 'Abuse' is Not Abuse," Albany, New York, April 19, 2013
- "Determining Cause of Death," Making Sense of Science VI: Forensic Science and the Law, NACDL & CACJ's 6th Annual Conference, Las Vegas, Nevada April 5-6, 2013

- American Academy of Forensic Science, Panelist, "150 Years — Does Time Bring Agreement? The H.L. Hunley, the R.M.S. Titanic, and the Assassination of John F. Kennedy," Washington, D.C., February 17-24, 2013
- American Academy of Forensic Sciences, Co-Chairman, Bring Your Own Slides, February 17-24, 2013
- Speaker, Corrections and Youth Services Association Annual Meeting, Saratoga Springs, New York, October 31, 2012
- Lecturer, 21st Annual Arnold Markle Symposium, "Sexually Related Homicides," October 9, 2012
- Lecturer, Henry F. Williams Seminar, New York State Police, "Forensic Pathology," September 18-19, 2012
- Society of Professional Investigators, "Current Status of the Forensic Sciences," New York, New York, September 12, 2012
- Speaker, New York State Police Sexual Abuse Seminar, Albany, New York, May 21, 2012
- "Medicolegal Investigation of Death, "Problems in Forensic Pathology," Wayne State University, Dearborn, Michigan, May 1-3, 2012
- 2012 NASDEA Spring Conference, "Drug Deaths: Homicide v. Overdose," The Roosevelt Hotel, New York City, NY, April 24, 2012
- Concord Seminars for the Dental and Medical Professions, "Forensic Odontology," Manchester, New Hampshire and Bangor, Maine, April 20-21, 2011
- Emory School of Medicine, Grand Rounds, "Forensic Pathology: The Good, The Bad, The Ugly," Atlanta, Georgia, March 3, 2012
- Major Case Squad of Greater St. Louis Annual Retraining Conference, "Forensic Pathology," St. Louis, Missouri, March 4-5, 2012
- American Academy of Forensic Sciences, "Conflicting and Misleading Testimony in the Forensic Pathology Community," February 19-25, 2012
- American Academy of Forensic Sciences, Co-Chairman, Bring Your Own Slides, February 19-25, 2012
- Lecturer, 20th Annual Arnold Markle Symposium, "Investigation of Sex Crime: Forensic Investigation of Sexual Assault, Serial Offenders, and Sexual Abuse," October 10, 2011

- Lecturer, Henry F. Williams Seminar, New York State Police, "Forensic Pathology," September 18-21, 2011
- Speaker, Annual Investigation for Identification, New Orleans, Louisiana, August 25-26, 2011
- Lenox Hill Hospital, Medical Grand Rounds, "Controversies in Forensic Medicine," New York City, March 11, 2011
- Valley Forge Dental Conference, Keynote Speaker, "Justice Through Science," Valley Forge, Pennsylvania, March 4, 2011
- American Academy of Forensic Sciences, Communications in Forensics, "In My Experience ..." February 21, 2011
- American Academy of Forensic Sciences, A Multidisciplinary Look into Forensic Science: Perspectives, Views and Experiences, "Forensic Pathology Perspectives," February 22, 2011
- American Academy of Forensic Sciences, Co-Chairman, Bring Your Own Slides, February 23, 2011
- Lecturer, "CSI: Dartmouth," University of Massachusetts/Dartmouth Law School, Dartmouth, Massachusetts, November 18, 2010
- Guest Forensic Lecturer (4 lectures), Transatlantic Crossing of the Queen Elizabeth II, November 1-8, 2010
- Lecturer, Henry F. Williams Seminar, New York State Police, "Forensic Pathology," September 27-30, 2010
- Speaker, 13th Annual Investigation for Identification, New Orleans, Louisiana, "A History of Forensic Science from Cain and Abel Through Katrina," August 27-28, 2010
- Speaker, Brigham & Women's 2010 Master Clinician Section, August 1, 2010
- Speaker, "Post-Mortem with Dr. Michael Baden," Kentucky Funeral Director's Association, Louisville, Kentucky, June 30, 2010
- Speaker, Northeast College and Universities Security Association, 57th Annual Conference, Skidmore College, Saratoga Springs, New York, June 28, 2010
- Speaker, 13th Annual Investigation for Identification, New Orleans, Louisiana, "A History of Forensic Science from Cain and Abel Through Katrina," August 27-28, 2010

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- Speaker, Brigham & Women's 2010 Master Clinician Section, August 1, 2010
- Speaker, "Post-Mortem with Dr. Michael Baden," Kentucky Funeral Director's Association, Louisville, Kentucky, June 30, 2010
- Speaker, Northeast College and Universities Security Association, 57th Annual Conference, Skidmore College, Saratoga Springs, New York, June 28, 2010
- * Lecturer, New York Prosecutor's Training Institute, Westchester, New York, June 8, 2010
- SELETS 14th Annual Law Enforcement Training Seminar, Lawrenceburg, Tennessee, June 1, 2010
- New York State Police Sex Offense Seminar, "The Forensic Sciences," Albany, New York, May 24-28-2010
- Society of Professional Investigator's Meeting, New York City, May 20, 2010
- Wayne State University, Medicolegal Investigation of Death, "Exhumation and Time of Death," and "Fire, Explosion and Mass Casualty," April 21-22, 2010
- Oswego University, "History of Forensic Science," March 25, 2010
- American Academy of Forensic Sciences, "Bring Your Own Slides," Seattle, Washington, February 22-26, 2010
- 2010 Forensic Seminar for Capital Defense Attorneys, DePaul University College of Law, February 18-19, 2010
- CSI Symposium, Norwich University, "Forensic Pathology," January 29, 2010
- NYSP Child Physical Abuse and Neglect Seminar, November 18, 2009
- New York Council of Defense Lawyers, Rye, New York, November 7, 2009
- FBI/IT Exchange Conference, Keynote Speaker, Seattle, Washington, September 20-21, 2009
- Henry F. Williams Seminar, New York State Police, "Forensic Pathology and Child Deaths," Albany, New York, September 14-17, 2009
- New York State Funeral Director's Association, Saratoga, New York, September 1, 2009

- Cabell Sheriff's Department, West Virginia (Marshall University in Huntington, West Virginia), August 25, 2009
- NCSTL Conference, Tampa, Florida, May 20-21, 2009
- Wayne State University, Medicolegal Investigation of Death, "Exhumation and Time of Death," and "Forensic Questions: The Experts Answer," with Werner Spitz, M.D., Dearborn, Michigan, April 22-24, 2009
- Bronx High School of Science, March 11, 2009
- American Academy of Forensic Sciences, "Bring Your Own Slides," Denver, Colorado, February 16-21, 2009
- American Academy of Forensic Sciences, "New Investigative Techniques and Scientific Advancement for Forensic Scientists in the Future," Denver, Colorado, February 16-21, 2009
- South Carolina Funeral Director's Association, "Post Mortem with Dr. Michael Baden," Columbia, South Carolina, February 4, 2009
- CSI Symposium, "Forensic Pathology," Norwich, Connecticut, January 29-30, 2009
- New York State CASA DNA Initiative Conference, Albany, New York, January 28, 2009
- Medicolegal Investigation of Death Conference, "Exhumation and Time of Death," Las Vegas, Nevada, January 5-6, 2009
- Mattapoisett (Massachusetts) Police Department, Forensic lecture, November 25, 2008
- George Mason University, "Sexually Violent Crime: the Body as Evidence," November 10-11, 2008
- Hofstra University, "An Evening of Crime and Wine," October 29, 2008
- New Jersey State Funeral Director's Association, "Post Mortem with Dr. Michael Baden," September 17, 2008
- SPIAA 57th Annual Retraining Conference, July 23, 2008
- NY Cops Foundation Annual Dinner Gala, Keynote Speaker, June 2, 2008
- New York State Police Sex Offense Seminar "The Forensic Sciences," May 2008

- Keynote Speaker, National Council of Investigation & Security Services annual meeting, May 2, 2008
- Medicolegal Investigation of Death Conference, Wayne State University, "Terrorism," April 23, 2008
- Medicolegal Investigation of Death Conference, Wayne State University, "Exhumation and Time of Death," April 23, 2008
- 17th Annual Arnold Markle Symposium, Connecticut State Police, March 23-24, 2008
- "Forensic Pathology and Living/Injured Victims," Academy for BCI Basic School (NYSP), March 11, 2008
- Lecturer, New Jersey Chapter of Int'l Assn of Arson Investigators, March 5, 2008
- American Academy of Forensic Sciences, Young Forensic Scientists Forum "Death is My Teacher," February 19, 2008
- American Academy of Forensic Sciences, "Healthcare Serial Killer Workshop," February 19, 2008
- American Academy of Forensic Sciences, "Significant Achievements and Contributions by Forensic Scientists to the International Community," February 19, 2008
- Medicolegal Investigation of Death Conference, "Postmortem Changes & Time of Death," and "Forensic Questions: The Experts Answer," Las Vegas, Nevada, December 4-6, 2007
- 33rd Annual Arson Seminar, NYS Fire Academy, "The Role of the Forensic Pathologist in Fire Investigation," November 7, 2007
- 12th Annual Investigation for Identification Educational Conference, Pensacola, Florida, October 19-20, 2007
- Penn State University, Forensic Sciences Seminar, September 24, 2007
- Col. Henry F. Williams Homicide Seminar, "Forensic Pathology," September 17-20, 2007
- Harvard Medical School, Intensive Review of Internal Medicine Course, "CSI Meets IRIM - The New Science of Catching Killers," Boston, Massachusetts, July 2007
- Arizona Judicial Conference: Forensic Pathology, 2007
- New York State Police Sex Offense Seminar "The Forensic Sciences," May 2007

- Smithsonian Associates, "Murder Investigation with Forensics: The Good, the Bad, and the Ugly," May 2007
- Medicolegal Investigation of Death Conference, "Death Investigation" and "Fire, Explosions and Terrorism," April 24-26, 2007
- Louisiana Judicial College, "CSI Effect," April 19-20, 2007
- 16th Annual Arnold Markle Symposium 2007, "Parents who Kill: Muchausen's by Proxy," April 9, 2007
- Harvard Medical School "Brigham Master Clinician: Update in Medicine," "The Forensic Sciences: From Cain and Abel to JFK to OJ Simpson," March 29, 2007
- American Academy of Forensic Sciences, "Bring Your Own Slides," February 21, 2007
- American Academy of Forensic Sciences, "Police Use of Force: Where is the Line and When is it Crossed" February 22, 2007
- Medicolegal Investigation of Death Homicide Conference, "Asphyxias, Serial Murders and Sexual Assaults," "Death Investigations: Fire, Explosions and Terrorism," Las Vegas, Nevada, November 29-30, 2006
- American College of Trust and Estate Counsel, Westin Providence, Rhode Island, October 12, 2006
- Col. Henry F. Williams Homicide Seminar, "Forensic Pathology," September 19-21, 2006
- 57th Annual Harvard Associates in Police Science Conference, Vermont Criminal Justice Training Council, Burlington, Vermont, June 27, 2006
- SEAK National Expert Witness, "The Role of the Expert Witness: from the Expert's Perspective," Cape Cod, Massachusetts, June 23, 2006
- Mississippi Coroner's Association, Vicksburg, Mississippi, June 15, 2006
- Monmouth University, "Time of Death Determination" and "Electrocution, Explosives, and Fire-Related Deaths," Oceanport, New Jersey, June 13, 2006
- SELETS Homicide Conference, Lawrenceberg, Tennessee, June 7-8, 2006
- NYSP Sex Crimes Seminar "The Forensic Sciences," May 22, 2006

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- Fermilab National Accelerator Laboratory, Colloquium, "How Long Has Grandpa Been Dead and Other Forensic Mysteries," Chicago, Illinois, May 17, 2006
- AtlantiCare Regional Medical Center, New Jersey, Keynote Speaker, 8th Annual Trauma Symposium, "Forensic Sciences, Trauma & Mass Disasters," May 2, 2006
- Medicolegal Investigation of Death Homicide Conference: "The Asphyxias, Serial Murders and Sexual Assaults," Detroit, Michigan, April 26-28, 2006
- Albany, New York, Area Association of Certified Fraud Examiners, keynote speaker, March 30, 2006
- American Academy of Forensic Sciences, "Victims & Defendants: Clinical Aspects of Their Death," February 21, 2006
- American Academy of Forensic Sciences, "The Role of the Forensic Scientist in the Investigation of Police-Related Deaths - A Current Dilemma," February 22, 2006
- American Academy of Forensic Sciences, "'Shaken Baby Syndrome: Medical Myth or Medical Fact?" February 24, 2006
- Clinical Forensic Nursing, Veterans Administration, Phoenix, Arizona, Impacting Patient Care Delivery, Quality Management and Investigations in Healthcare Settings, January 23, 2006
- Advanced Practical Homicide Seminar, "Modes of Death Involving Firearms, Knives, Blunt Force and Child Abuse," November 8-9, 2005
- Monmouth University, Oceanport, New Jersey, "Determining Time of Death" and "Fire-related Death and Electrocution and Explosions," June, 2005
- New York State Police, Sex Offense Seminar, "The Forensic Sciences," May 23, 2005
- New York State Association of County Coroners & Medical Examiners, "Violence Among Children," April 30-May 1, 2005
- Medicolegal Investigation of Death Conference, "Serial Killers, Autoerotic Asphyxias, Sexual Assault or Accident," and "Death by Fire and Explosion," Wayne State University, School of Medicine, April 20-22, 2005
- College of Mt. Saint Vincent, Department of Nursing, "Unraveling the Mystery of the Nurse Investigator," April 14, 2005.
- The National Clearinghouse for Science, Technology and the Law at Stetson University College of Law, "Forensic Pathology on Both Sides of the Pond," April 4, 2005

- Markle Symposium, Connecticut State Police Homicide Conference, Foxwoods Lodge, Connecticut, March 27-28, 2005
- The Learning Annex, "Revealing the Mysteries of Forensic Science," March 10, 2005
- American Academy of Forensic Sciences, "Complex Forensic Science Issues on Highly Controversial Cases," February 21-26, 2005
- Quinnipiac University, Law and Forensic Sciences, Hamden, Connecticut, February 5, 2005
- Duquesne University, The Cyril H. Wecht Institute of Forensic Science and Law, "Tracking Terrorism in the 21st Century," October 21-23, 2004
- Greater Cincinnati Regional Arson and Fire Investigators Seminar, "The Death Detective," October 14, 2004
- Col. Henry F. Williams Homicide Seminar, "Forensic Pathology," October 5, 2004
- Associated Licensed Detectives of New York State, Keynote speaker, October 1, 2004
- Nebraska Institute of Forensic Sciences, "Crime & Death Scene Reconstruction: Utilizing Bloodstain Pattern Analysis," September 15-17, 2004
- Southeast Law Enforcement Seminar, "Fascinating Cases of Death," June 9, 2004
- Florida Coastal School of Law, "Role of Forensic Pathology in Criminal and Civil Litigation," Jacksonville, Florida, May 7, 2004
- Wayne State University, "Medicolegal Investigation of Death," Dearborn, Michigan, April 21-23, 2004
- The Three Sleuths (with Drs. Cyril Wecht and Henry Lee), The Rio Suite, Hotel & Casino, Las Vegas, Nevada, April 17, 2004
- Annual SleuthFest Meeting, Exhumation Session, "Famous Cases," March 20, 2004
- 44th Annual American College of Legal Medicine, "The Role of the Forensic Pathologist in Medical Malpractice Cases," Las Vegas, Nevada, March 5-7, 2004
- Stetson University College of Law, "The Complete History of Murder and Science in One Hour," Gulfport, Florida, January 29, 2004
- Quinnipiac Law School, Law and Forensic Science, January 24, 2004

- The City University of New York, Graduate School and University Center, "Forensic Series," December 2, 2003
- Testified before the United States Senate Committee on the Judiciary Department of Justice Oversight: "Funding Forensic Sciences, DNA and Beyond" 2003
- Duquesne University, National Symposium on the 40th Anniversary of the JFK Assassination, "Solving the Great American Murder Mystery," November 20-23, 2003
- Smithsonian Associates, Educational and Cultural Programs, "Murder, Mystery and the New Forensics," November 1, 2003
- Association of Inspectors General, John Jay College of Criminal Justice, "Non-Traditional OIG Investigations," October 17, 2003
- Colorado Association of Sex Crimes Investigator's Annual Conference, Snowmass, Colorado, August 20-22, 2003
- 31st Annual Florida Medical Examiner Educational Conference, F.A.M.E. 2003, "The History of Forensic Science from Cain & Abel to O.J. Simpson," Ponte Vedra Beach, Florida, August 6-8, 2003
- Washington County Prosecutors Office, "Dead Man Talking: Forensic Science and Homicide Investigation," May 5 and 6, 2003
- Medicolegal Investigation of Death, Wayne State University, "Adult Sexual Assault & The Asphyxias" and "Child Sexual Assault/Abuse Myths Dearborn, Michigan, April 2-4, 2003
- New York State Trial Lawyer's Association, Wrongful Death Seminar, "Using Medical Science to Prove the Cause of Death and Conscious Pain and Suffering," March 25, 2003
- DNA Symposium, The State College of Pennsylvania, "The Role of the Forensic Pathologist regarding DNA Evidence: From Autopsy to Courtroom," March 2003
- American Academy of Forensic Sciences, "Overview of the Legal Issues Concerning the Discovery and Investigation and Prosecution of the Abuse of Elderly Patients in Healthcare Facilities and the Homicide of All Patients in Various Medical Treatment Facilities," Chicago, Illinois, February 17-22, 2003
- American Academy of Forensic Sciences, "Presentation of Specific Cases through the Initial Contact by Prosecutors Concerning Suspected Criminal Deaths through the Exhumation and the Trial" Chicago, Illinois, February 17-22, 2003

- 1st Eastern Analytical Symposium & Exposition, Somerset, New Jersey, November 18-21, 2002
- Utah County Police Officer's Workshop, November 2002
- 10th Annual Investigation for Identification Educational Conference, "New Concepts in Forensic Pathology," Pensacola, Florida, September 20-21, 2002
- Singapore Government Ministry of Health Services Administration, Centre for Forensic Medicine, August 17-31, 2002
- State of New York, Office of the Attorney General, Medicaid Fraud Control Unit, 2002 Training Conference, June 10-13, 2002, Lake Placid, New York
- Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, International Postblast Investigation Class, May 8, 2002, Brunswick, Georgia
- American Academy of Forensic Sciences, Addressing Social and Legal Issues Associated with Police Involved Shooting Incidents Through Forensic Investigation & Shooting Scene Reconstruction, February 11-15, 2002, Atlanta, Georgia
- American Academy of Forensic Sciences, Bring Your Own Slides, February 11-15, 2002, Atlanta, Georgia
- The UMKC School of Law, The History of Murder Investigation and Forensic Science, University of Missouri, Kansas City, January 24, 2002
- DNA and the Law: Reining in the Revolution, "The Role of the Forensic Pathologist in DNA Use: From Autopsy to Courtroom," Duquesne University, November 30, 2001, Pittsburgh, Pennsylvania
- New Technologies and the Proof of Guilt & Innocence, Court TV, October 25, 2001
- 2001 Ohio Attorney General's Conference on Law Enforcement, Plenary Speaker, October 11, 2001
- The Second European-American Intensive Course in Clinical and Forensic Genetics, September 3-14, 2001, Dubrovnik, Croatia
- Forensic Nursing Clinical Update, "Death Investigation, Adverse Patient Events and Evidence Collection in the Hospital Setting," August 27 and 28, 2001, Phoenix, Arizona
- Harvard Associates In Police Science, Keynote Speaker, August 20-23, 2001, 52nd Annual Conference, Annapolis, Maryland

- The Boston Strangler Case: A High Tech Hearing on the Murder of Mary Sullivan, August 4, 2001, American Bar Association Annual Meeting, Chicago, Illinois
- Emerging Technologies in Forensic Investigation, June 1-3, 2001, Nova Southeastern University, Fort Lauderdale, Florida
- The Forensic Investigation of Child Abuse and Neglect, May 30, 2001, The Family Partnership Center
- Making Communities Safer, May 21-22, 2001, New York State Alliance of Sex Offender Service Providers, Sixth Annual Training Conference, Albany, New York
- Practical Homicide and Medicolegal Death Investigation, April 9-11, 2001, Beaumont, Texas
- Police Liability in New York, May 2, 2001, Albany, New York
- Symposium on Forensic Medicine, Kuwait Institute for Medical Specialization, January 27-29, 2001, Kuwait
- Forensic Science and the Law, October 27-28, 2000, Duquesne University, Pittsburgh, Pennsylvania
- 8th Annual Investigation for Identification Educational Conference, Speaker, September 22-23, 2000, Pensacola Beach, Florida
- Advanced Practical Homicide Investigation, September 11-15, 2000, Southern Law Enforcement Foundation, Irving, Texas
- Vision 2000: Together We Can, Funeral Service Conference of the Northwest, August 27-29, 2000, Coeur d'Alene Resort, Idaho
- Mississippi Attorney General Prosecutor's Annual Training Conference, April 26-28, 2000, Gulfport, Mississippi
- Forensic Crime Scene Analysis Training, April 28, 2000, Union County Police Chief's Association, Cranford, New Jersey
- At the Heart of the Matter: The Medicolegal Aspects of Organ and Tissue Donation, May 4, 2000, New York Organ Donor Network, Poughkeepsie, New York
- NYSBA Criminal Justice Section Spring Meeting, May 19-21, 2000, The Ethics of Scientific Evidence, Chautauqua, New York
- 2000 Dodge Seminar, March 20-23, 2000, Clearwater Beach, Florida

- **Medicolegal Investigation of Death, March 16 and 17, 2000, Wayne State University School of Medicine and Michigan State Police**

Michael M. Baden, M.D.

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New York, New York 10019

Telephone: (212) 397-2732

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E-mail: MBaden@mac.com

19 August 2015

Via e-mail to jeremyatlaw@yahoo.com

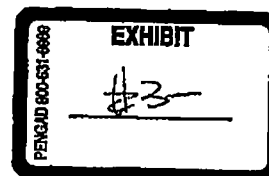
Jeremy A. Thompson, Esq.
Post Office Box 12891
Columbia, South Carolina 29211-2891

Re: *VICTIM* deceased

Dear Mr. Thompson:

I have reviewed the autopsy report, scene and autopsy photographs and X-rays and the trial testimony of the medical examiner that you sent to me relative to the death of *VICTIM*.

VICTIM was two years old when he was found dead in his crib by his mother about 10:40 a.m. on September 15, 2008. She told investigators that she had left *VICTIM* with her boyfriend, Justin Hillerby, when she went out the evening before; that she didn't check *VICTIM* when she returned at 1:30 a.m.; and that "he appeared to be fine" when she saw him at 9:30 a.m. EMS personnel noted that he was "cold and stiff" when they arrived at 10:54 a.m. It takes many hours after death for a baby to become "cold and stiff." He could not have been alive and fine at 9:30 a.m.



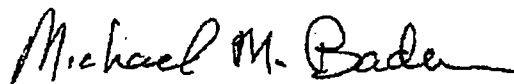
The medical examiner confirmed 23 separate blunt impact injuries on ~~the~~ face and head that are seen in autopsy photographs. The resulting extensive discoloration of his face would have been very apparent at 9:30 a.m. when the mother says he was fine. There were also many additional fresh, small, focal and round bruises on the upper and lower extremities and back and buttocks of the infant that, in my opinion, are typical bruises produced by blunt force injuries from a narrow object. The medical examiner testified that they were not bruises because he incised a "representative sample" and saw no "hemorrhage into the fat," but he did not document this finding with photographs nor examine them under the microscope. Small traumatic bruises can be superficial, with hemorrhage seen only under the microscope, especially if they are inflicted as the child is dying with decreasing blood pumped by the failing heart.

The blunt force injuries that are listed in the autopsy report are described as small "punctate lesions" and "circular lesions" and are consistent with having been inflicted by someone poking the baby repeatedly with the ends of the blood smeared wooden paint roller handle that is present on the floor next to the crib and captured in scene photographs. (I would like to see the laboratory reports on the examination of that handle.) In my more than 50 years' experience investigating child abuse deaths, this handle is the type of small, hard object that can be used by older siblings to inflict injuries upon infants, the cumulative nature of which can sometimes cause death. Fatal

injuries by adults are typically caused by hands or fists, are much broader, usually cause fractures or lacerations of internal organs, and are few in number.

It is my opinion, to a reasonable degree of medical certainty, on the basis of my education, training and experience as a forensic pathologist and medical examiner and on the materials that I have reviewed, that the pattern of injuries incurred by ~~Victim~~ show that his death was caused by the cumulative effects of dozens of small blunt force impacts to his head and body inflicted by the paint roller handle that is present at the scene of death; that such injuries are consistent with having been inflicted by an eight year old; and that they are not consistent with being inflicted by an adult. It is also my opinion that the mother could not have seen ~~Victim~~ alive and fine at 9:30 a.m.

Yours very truly,



Michael M. Baden, M.D.
Former Chief Medical Examiner,
City of New York
Former Chief Forensic Pathologist,
New York State Police

MMB:ph

MARGARET M. GRIMES, M.D., M.Ed.
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STEVEN H. SWERDLOW, M.D.
PITTSBURGH, PENNSYLVANIA

January 16, 2015

Ray W. Nash
P.O. Box 52384
Summerville, SC 29485

Dear Mr. Nash,

Nicholas Ike Batalis, M.D. is a diplomate of the American Board of Pathology, having been certified in combined Anatomic Pathology and Clinical Pathology effective 8/21/2007. The certificate remains valid provided that ongoing Maintenance of Certification requirements are met.

Dr. Batalis was certified in the subspecialty of Forensic Pathology effective 9/4/2008. The certificate remains valid provided that ongoing Maintenance of Certification requirements are met.

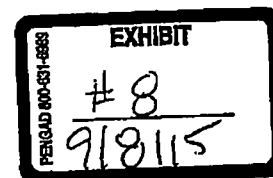
Dr. Batalis is currently meeting all MOC Requirements.

Sincerely,

Rebecca L. Johnson, M.D.
Chief Executive Officer

RLJ/gw

SEAL



THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Justin R. Hillerby, Appellant,

v.

The State of SC, Respondent.

Appellate Case No. 2010-165126

Court of Appeals Audio
Transcript of Audio
June 5, 2013

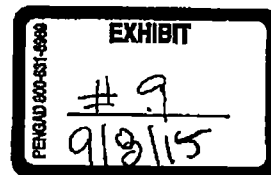
Appeal From Berkeley County

Kristi Lea Harrington, Circuit Court Judge

Tricia Blanchette, of Law Office of Tricia A.
Blanchette, LLC, of Columbia, for Appellant.

Assistant Attorney General Mark Reynolds
Farthing, of Columbia, for Respondent.

Leah Guerry Dupree, Berkeley County
Court Reporter



1 (Whereupon, at digit 00:10:03, Court comes to
2 order.)

3 **THE CLERK:** Case number 2010-165126, State
4 versus Justin Hillerby.

5 **THE COURT:** Ms. Blanchette.

6 **MS. BLANCHETTE:** Chief Judge Few, may it
7 please the Court.

8 My name is Tricia Blanchette and I'm here
9 today on behalf of the Appellant Justin Hillerby.

10 In criminal cases, the Appellate Court
11 sits to review errors of law. And the Appellant
12 submits in this case that the lower court committed
13 three reversible errors of law.

14 First, the lower court erred when she
15 admitted the testimony of two teenagers from the
16 pool under rule 404(b) of the South Carolina rules
17 of evidence.

18 Rule 404(b) provides that evidence of
19 other crimes wrongs or acts is generally not
20 admissible to prove the defendant's guilt of the
21 crime charged; such evidence is, however, admissible
22 to show motive, identity, the existence of a common
23 scheme or plan, the absence of mistake or accident,
24 or intent.

25 Here defense counsel moved at the

1 beginning of trial and informed the Court that he
2 had filed a motion under rule 404(b). He explained
3 it was his understanding that the State had
4 witnesses on the issue, but he didn't know what they
5 intended to use.

6 In response, the State informed the Court
7 that she planned to call two brief witnesses from
8 the pool; and that their testimony went to the
9 theory of the State's case. The State further
10 explained that these are just two witnesses that are
11 going to testify to things they observed directly;
12 behavior by the defendant toward the victim that
13 day.

14 After hearing argument from both sides,
15 the Court ruled that based upon what the State had
16 indicated that the two witnesses would testify to
17 she found the evidence admissible to prove intent in
18 the absence of -- intent in the absence of accident.

19 She also found that the evidence in the
20 actions of Mr. Hillerby were more probative than
21 prejudicial.

22 In State versus Smith, this Court laid out
23 the proper tests for the admissibility of rule
24 404(b) evidence and the key is the State must lay
25 the proper foundation.

1 First, if it is not a criminal conviction,
2 the State must prove by clear and convincing
3 evidence that the Defendant committed the act. Here
4 no testimony was offered. There was no proffer, and
5 the Court failed to make a finding that this
6 evidence met the clear and convincing standard.

7 Secondly, the State must prove a logical
8 connection. In State versus Smith it was explained
9 that the State must show how the evidence of the
10 other act will assist the judge or the jury in
11 understanding some material issue in the case
12 related to one of the rule 404(b) exceptions.

13 When the State adequately explains how the
14 evidence of the other act logically connects to an
15 issue in the case, it demonstrates how the judge or
16 the jury can use the evidence without using it for
17 the prohibitive purpose of inferring guilt from the
18 Defendant's propensity to commit the crime. Here,
19 the State made no logical connection; but more
20 importantly, the Court did not rule there was a
21 logical connection. It is absent from the record.

22 Since the Court didn't hear the testimony,
23 we must look at the testimony later in the trial and
24 we would submit that it was inconsistent and tenuous
25 at best. The State admitted that these witnesses

1 only saw the victim and the Appellant at the pool
2 for approximately an hour the day before his death.

3 What was clear from their testimony is
4 that the victim's mother was negligent in her care
5 of her children.

6 Even considering the trial testimony, the
7 Appellant submits that the logical connection is not
8 made to one of the exceptions. It just shows
9 behavior as the State admitted, but unfortunately
10 for the Appellant, it shows bad behavior.

11 Now, if the State meets the first two
12 elements, the Court is required to conduct a rule
13 403 analysis in this -- in rule 404(b) cases, the
14 question is whether the logical connection
15 articulated by the State --

16 **THE COURT:** Did the State contend at trial
17 that the testimony of these teenagers were formed as
18 a part of the res gestae of the crime?

19 **MS. BLANCHETTE:** The State did. In the
20 transcript and I won't, I won't read it through for
21 this Court, but on pages 121 to 122, the State gives
22 about a two paragraph argument and throws in pretty
23 much every exception.

24 Now, in the Brief, the State contends that
25 this should, this Court should over look the error

1 of the trial court for failing to conduct the
2 analysis and this is properly admitted under res
3 gestae, but that is not the basis on which the trial
4 court admitted this evidence.

5 The trial court specifically said that it
6 was being introduced for intent in the absence of
7 accident.

8 So I would ask that this Court not sustain
9 it on the grounds argued in the Brief because that
10 was not the basis on which the trial court admitted
11 this evidence.

12 **COURT 2:** There was no contention of
13 accident here, right?

14 **MS. BLANCHETTE:** Actually that's a very
15 interesting point, Your Honor, because the defense
16 attorney informed the Court that he did not intend
17 to go into any theory of there being an accident.

18 And it goes to why this evidence is not
19 probative and would fail a proper 403 analysis.

20 The State offered much more probative
21 testimony as to why this wasn't an accident in the
22 form of their two medical experts. First, their
23 forensic pathologist testified that the death was
24 caused because of non-accidental blunt force head
25 trauma and he reached that -- he reached that

1 conclusion due to the severity in the number of
2 injuries.

3 Then the State's forensic pediatric expert
4 testified that the victim would not have been able
5 to function after the injury, so that was much more
6 probative evidence to -- to look at the issue of
7 accident versus this testimony of two teenagers for
8 approximately what they saw for approximately an
9 hour at the pool.

10 Going back to what I said about rule 403,
11 here the Court did make a one sentence determination
12 on rule 403 and said that she found the evidence to
13 be more probative than prejudicial, but that is not
14 what is required. There is to be a further analysis
15 and, again, she failed to do that.

16 I would argue that this case is similar to
17 State versus Spears, where this Court recently
18 remanded because there the Court did the proper rule
19 404(b) analysis, but failed to do the 403 analysis.
20 Here, the Court failed to do the proper analysis in
21 total.

22 So, therefore, the Appellant would
23 respectfully submit that this Court would reverse on
24 that first issue.

25 Turning to the second issue, the Appellant

1 submits that the lower court erred when she admitted
2 his statements at trial: And determining whether a
3 statement is given voluntarily, the court must
4 consider the totality of the circumstances. Some
5 factors regularly considered are background,
6 experience, conduct of the accused, the age, the
7 length of custody, police misrepresentations,
8 threats of violence and promises of leniency.

9 Here, the events started on
10 September 15th, 2008, when the Appellant went in and
11 voluntarily spoke to Detective Sharp. Both him and
12 his attorney conceded that was a truthful statement
13 at trial. But what's important to note there is
14 that interrogation ended with EMS being called
15 because the Appellant was dizzy and had chest pain.

16 He then returned on September 17th, 2008,
17 to do a polygraph examination with Detective Dixon.
18 No polygraph was conducted, but Detective Dixon
19 testified about the Appellant telling him that the
20 victim had run into his knee and he had shook him a
21 little bit. He also admitted drinking and taking
22 sleeping pills the night before. That polygraph
23 examination that didn't happen transferred right
24 into an interrogation again with Detective Sharp;
25 and, interestingly, there is no video recording of

1 any of these interrogations.

2 Detective --

3 **THE COURT:** While there were in limine
4 objections to these statements, were there
5 objections made by the Appellant at the time the
6 statements were actually introduced?

7 **MS. BLANCHETTE:** Yes. And the State
8 argues in their Brief that this issue was not
9 properly preserved.

10 All that I can point out to the Court is
11 that when Detective Sharp was testifying on page 487
12 of the record, Defense Counsel says: Without
13 objection. We've already made these objections
14 earlier.

15 **THE COURT:** What does that mean though?

16 **MS. BLANCHETTE:** To be honest, Your Honor,
17 I hope it means that he is saying it is my
18 understanding that I'm covered on the record with
19 these objections and the Court didn't respond that
20 he was not.

21 I think --

22 **THE COURT:** That could mean that we give
23 up. We tried before you didn't -- you didn't agree
24 with us on the objections, and we're not going to
25 try again.

1 **MS. BLANCHETTE:** Your Honor, I don't see
2 it as an "I give up." I see it as: I want to make
3 sure I'm covered on the record here. And he says
4 without objection, and I don't know why he chose to
5 use that language.

6 **COURT 2:** I mean, "without objection"
7 clearly means without objection. I mean, I don't, I
8 don't know how else to read that.

9 **MS. BLANCHETTE:** That is true, Your Honor.
10 And I understand the case law on that point is very
11 clear too, but he goes on to say we've already made
12 these objections earlier.

13 **COURT 2:** Yeah, and they were, they were
14 overruled. I mean, the point would have been to:
15 We renew our objections.

16 **MS. BLANCHETTE:** Exactly. I wish that is
17 the language that he would have used, but I'm just
18 focusing on that second half where he said: That
19 I've already made these.

20 And since the Court did not indicate any
21 concern about him properly making his objection, I
22 take it that the Court understood.

23 **COURT 2:** But the court shouldn't have to
24 show any concern about him properly making his
25 objections.

1 **MS. BLANCHETTE:** That is true, Your Honor,
2 but the case law also says as long as the Court
3 understands the nature of the objection. And so my
4 argument would be that she understood here that he
5 was, in essence, objecting by making that statement.

6 **COURT 2:** I don't think anyone questions
7 what he was objecting to. The question is: Was it
8 a properly made objection?

9 **MS. BLANCHETTE:** Yes, Your Honor. And,
10 unfortunately, I'm stuck with the record as it is.

11 **COURT 2:** I know, I understand. I'm not
12 arguing with you about it I'm --

13 **MS. BLANCHETTE:** And I think --

14 **COURT 2:** -- just saying that -- that I,
15 I don't understand how that's a properly made
16 objection.

17 I mean, if his -- it would be one thing
18 if the initial objection was sustained then, of
19 course, it wouldn't -- it would obviate any further
20 objections. But since -- the Court had not ruled in
21 his favor initially, I don't understand the nature
22 of his objection there.

23 **MS. BLANCHETTE:** Yes, Your Honor, and I
24 understand the strict preservation requirements, I
25 just ask this Court to focus on the second part of

1 what he said and then the fact that the trial court
2 appeared to accept that. It would be my opinion as
3 an objection.

4 I see my time has expired. If the Court
5 would like, I do have an third issue I can address
6 or I can save that for my reply portion.

7 **COURT 3:** Why don't you save that for your
8 reply.

9 **MS. BLANCHETTE:** I'll be happy to do that,
10 Your Honor.

11 Thank you.

12 **COURT 3:** Mr. Farthing.

13 **FATHER:** Thank you. May it please the
14 Court.

15 My name is Mark Farthing and I'll be
16 representing the State today in its case against the
17 Appellant Justine Ryan Hillerby.

18 And I'm going to do this in the opposite
19 order since we were just talking about the
20 voluntariness of the statement issue; and just to
21 respond to that, going right back to Page 487, the
22 trial judge did indicate that he didn't understand
23 the nature of the objection if that was, in fact, an
24 objection because we had the first statement without
25 objection, the second statement without objection,

1 and trial judge, both times, indicated without
2 objection and then the third time he specifically
3 said: Without objection, I've already made these
4 objections; not, I've already made these objections
5 so subject to my earlier objection or anything along
6 those likes. He explicitly started without
7 objection. And if you will look at what the trial
8 judge's response was to that the trial judge said:
9 Admitted without objection.

10 So the trial judge understood that not to
11 be an objection, but to be an indication that there
12 was no objection to the admission of those
13 statements.

14 **COURT 3:** Which one is 40? Is that all of
15 them or is that one of the statements?

16 **MR. FARTHING:** 487 is one of the
17 statements.

18 469 --

19 **THE COURT:** No, they're talking about
20 State's Exhibit 40.

21 **MR. FARTHING:** State's Exhibit 40 is the
22 statement from September 18th. It was the final
23 statement.

24 **COURT 3:** Okay.

25 **MR. FARTHING:** 469, on the record and 477

1 on the record are the first two written statements
2 and both times there it is admitted without
3 objection. The trial judge admitted it without
4 objection. But each time the written statement was
5 introduced, the trial judge admitted it without
6 objection and when Sergeant Dixon testified about
7 the oral statement made during the polygraph exam,
8 there was no objection raised to that either. So,
9 at no point in time when any of these statements
10 were introduced in trial was an objection raised.

11 **COURT 3:** But the Defendant wanted the
12 first two in; didn't he?

13 **MR. FARTHING:** Well, he said without
14 objection. Apparently, he wanted all of them in
15 because he --

16 **COURT 3:** He didn't want all of them in.
17 He just -- that was kind of dumb to say without
18 objection, but surely he's not that dumb to actually
19 mean it.

20 **MR. FARTHING:** Well, the Defendant --

21 **COURT 3:** But he wanted 38 and 39 in
22 because that helped him.

23 **MR. FARTHING:** Yes, Your Honor. And part
24 of the Defendant's strategy though was at the end of
25 the day, he needed all of the statements in so he

1 could explain his defense because in his testimony
2 his defense was these two statements are the true
3 ones that I gave and they tricked me into giving
4 this one on the 18th, so he wanted it in there to
5 have the contrast that this is where I'm telling the
6 truth and this is when I'm lying.

7 But each and every time he said without
8 objection and under our case law like State v.
9 DiCapua and Burke v. AnMed, those make it clear that
10 regardless of what objection has been raised prior
11 to trial, if the Defendant indicates he doesn't have
12 an objection when the evidence is introduced, it
13 constitutes a waiver of any objection.

14 But, regardless, even if the issue wasn't
15 waived, the trial judge absolutely did not abuse her
16 discretion in admitting the statements and finding
17 that they were freely, knowingly, and voluntarily
18 given.

19 And the overriding concern that you're
20 looking at is whether or not the Defendant's will
21 was ever borne and you determine that by looking at
22 the totality and circumstances. And when you look
23 at the totality of the circumstances here there is
24 absolutely no question that he made the statements
25 knowingly and voluntarily.

1 First off, he absolutely knew his rights
2 because he was informed of his rights each and every
3 time prior to making a statement and he waived those
4 rights because he orally waived those rights and he
5 signed a waiver form.

6 He was of a sufficient age and educational
7 level to voluntarily make a statement as well.
8 We're talking about an employed adult with prior
9 experience with the criminal justice system. He had
10 sufficient level of education to read and write.
11 And literacy is not even a requirement for someone
12 to make a voluntary statement, but he was capable of
13 doing so in this case and he actually wrote out on
14 all of his own statements and there is nothing that
15 was presented during trial at all that suggest he
16 had any kind of mental condition that would affect
17 his ability to know what he was doing or writing.

18 Also there was no testimony of any
19 threats, or coercion, or promises. He wasn't
20 handcuffed. He wasn't subjected to any kind of
21 lengthy interrogations any of the times, none of
22 them were more than a couple of hours. And during
23 his trial testimony, he even said I was only at the
24 police station for an hour or two. And, you know,
25 you contrast that with Salts, where we had a six to

1 seven hour interrogation of a 17 year old that
2 wasn't considered to render the statement
3 involuntary.

4 **THE COURT:** He requested the meeting that
5 gave rise to the last statement too; didn't he?

6 **MR. FARTHING:** Yes, Your Honor. He --
7 actually other than the first statement, he either
8 requested or voluntarily came for all of the
9 statements.

10 The first statement -- it is not a hundred
11 percent clear from the transcript but --

12 Yes, Your Honor?

13 From the transcript, it appears that the
14 police asked them at the scene to accompany them on
15 the first statement. But then after that, he
16 voluntarily came to the police department for the
17 statement on the 17th. After he terminated the
18 polygraph interview, he voluntarily asked to
19 continue speaking with the officer and made the
20 statement on the 17th. And then after he was
21 transported to the Berkeley County Detention Center,
22 he asked to be transported back.

23 So -- and he also wasn't deprived of any
24 liberties, or food, or anything, was allowed to take
25 smoke breaks. So when you consider all of that in

1 totality, it establishes the statement wasn't
2 voluntary and nothing has been presented to suggest
3 that -- this case is really similar to the situation
4 in State v. Breeze as well. Where we have all of
5 this testimony established and the statements are
6 voluntarily given and then nothing was presented
7 during -- on Hillerby's behalf during the pretrial
8 portion of the trial to contradict anything that the
9 officer said.

10 So the trial judge was presented with
11 uncontradicted testimony from all of these officers
12 about how the statements were voluntary, so it
13 really left it where there is no evidence where it
14 would support anything but the trial judge's ruling.

15 Turning to the issue of the testimony
16 regarding Appellant's behavior at the pool.
17 Initially, this case is a lot different than the
18 situation in State v. Spears regarding a lot of the
19 arguments that are being raised on appeal that
20 weren't raised below.

21 The sole argument that got raised to the
22 trial judge was I don't believe any of these acts
23 fit into one of the exceptions of 404(b). On
24 appeal, the argument is being made that the trial
25 judge failed to make a finding on the proper

1 foundation. The trial judge failed to conduct an in
2 camera hearing where actual testimony was admitted
3 and the trial judge failed to determine the proof
4 was clear and convincing.

5 In Spears, the issue was that the 403
6 evidence, the trial judge didn't make a 403 ruling.
7 The key difference between this case and that case
8 is in Spears the defense attorney specifically
9 objected to the probative value versus the
10 prejudicial that could result from the evidence.

11 Here, we did not have any kind of
12 objection at all on the lack of an in camera hearing
13 or lack of a finding of clear and convincing
14 evidence.

15 And, in fact, the trial judge specifically
16 on page 118 asked defense counsel if he had
17 witnesses or evidence that he wanted the Court to
18 consider. And defense counsel didn't offer any
19 evidence, didn't ask for the State to be required to
20 present any evidence in response to that question.
21 So, he didn't ask for an in camera hearing to occur
22 even -- in camera hearing with formal testimony to
23 occur even when presented with that opportunity. So
24 for that reason, he's limited to the grounds he
25 raised below and the only ground he raised below was

1 that it didn't fit into one of the exceptions; and
2 that argument was without merit because the
3 testimony of Hillerby's actions at the pool was
4 admissible to show his intent and his absence and
5 mistake or absence.

6 And regarding the absence of mistake or
7 accident, it does not matter that defense counsel
8 chose not to present that defense because the State
9 is required to prove every element of the offense
10 beyond a reasonable doubt regardless of what the
11 defense is that the defendant is going to present.
12 And the United States Supreme Court in Eustave v.
13 McGuire (phonetic) has specifically recognized that
14 we have that burden and, therefore, even if they're
15 not alleging accident, we can present evidence to
16 show that the death wasn't accidental.

17 Regarding intent, the offense of homicide
18 by child abuse requires proof that the victim's
19 death occurred under circumstances manifesting
20 extreme indifference to human life and that makes
21 Hillerby's mental state and intent highly, highly
22 relevant in the case. And, in turn, that makes
23 Hillerby's behavior and actions directed toward the
24 victim especially those directed toward the victim
25 directly before he was killed highly relevant and

1 toward establishing that required intent and mental
2 state.

3 And this Court in Gerald recognized that
4 the events on the day of a victim of homicide by
5 child abuse in death is one of the most significant
6 factors in an analysis of whether or not extreme
7 indifference existed.

8 And the testimony of Brandon and Courtney,
9 the two high school students in this case, was
10 probative in that intent and mental state because it
11 established this cruel and indifferent and hostile
12 behavior directed toward the victim just hours
13 before the victim's death. And it is highly, highly
14 similar to the situation of Martucci except for
15 we're talking about a much more short, shortened
16 time span that really gets into res gestae, which
17 Martucci did as well, but Martucci was abuse that
18 occurred weeks even months before the victim died.
19 Here we're talking about hours before the victim
20 died that he is directing this behavior. And, just
21 like in State v. Holder, the evidence wasn't offered
22 to show a propensity based on character, it was
23 offered to prove an element of defense of that
24 extreme indifference and therefore the trial judge
25 didn't err in admitting it; however, assuming the

1 trial judge did err, it was entirely harmless in
2 this case because first off it is largely cumulative
3 to the victim's mother's testimony because she
4 testified in a very consistent manner to Courtney
5 about his behavior at the pool and the names he was
6 calling the victim and that establishes that cruel
7 and indifferent hostile manner towards the victim
8 shortly before his death, so it is cumulative in
9 that respect. But even if it is not sufficiently
10 cumulative to render it harmless, the other evidence
11 of guilt is overwhelming in this case because we
12 have his confession to law enforcement. Then, not
13 only do we have the confession to law enforcement,
14 we have him calling the victim's mother from jail
15 and telling her my confession that was given on
16 Thursday, which was the September 18th statement
17 where he admitted his guilt, was the true one. And
18 then telling her that he smacked the child in the
19 head until he hit the floor and that's when it
20 began.

21 So when you consider the context of
22 Brandon and Courtney's testimony in relation to all
23 of the other testimony presented, it was entirely
24 harmless.

25 And very quickly, the trial judge also

1 didn't abuse her discretion in admitting any of the
2 testimony of Melissa Georgoulis.

3 First off, the testimony regarding his
4 whereabouts the night before and his attitude when
5 he left the house weren't relevant under res gestae
6 just to establish the full context of the crime and
7 the testimony regarding the mother staying at the
8 house was relevant for bias.

9 Thank you very much.

10 **THE COURT:** Thank you.

11 **COURT 3:** Ms. Blanchette.

12 **MS. BLANCHETTE:** Thank you. Very briefly.

13 The remaining issue is the appellant
14 submits that the lower court erred in admitting
15 irrelevant testimony.

16 There were three objections made on the
17 grounds of relevancy during the testimony of Melissa
18 Georgoulis. First, counsel objected to any further
19 line of questioning about what happened the day
20 before. In response, the lower court did not
21 provide any analysis under rule 403 and simply
22 stated I'm going to allow it.

23 The second objection came when Ms.
24 Georgoulis was asked about Appellant's mood the day
25 before.

1 Again, the Court overruled defense
2 counsel's objection without any form of analysis or
3 reasoning under rule 403.

4 And then, finally, defense objected when
5 Ms. Georgoulis was asked about Appellant's mother
6 staying with her. The State argued it went to bias
7 and there was a bench conference. There was no
8 ruling on the record and the State was allowed to
9 proceed with that line of questioning.

10 There are two issues here: The Appellant
11 submits this testimony simply was not relevant.
12 And, secondly, there is no probative value.

13 Pursuant to 403, relevant evidence may be
14 excluded if its probative value is substantially
15 outweighed by the danger of unfair prejudice,
16 confusion of the issues, misleading the jury,
17 consideration of undue delay, waste of time, or
18 needless presentation of cumulative evidence.

19 Interestingly here, the State argues that
20 this evidence was cumulative testimony, cumulative
21 of other testimony already in the record and they
22 use that in support of their argument of harmless
23 error.

24 But the Appellant would submit that shows
25 the Court's error in admitting it; and, furthermore,

1 that the court erred in not conducting a rule 403
2 analysis on the record when these objections were
3 made.

4 Unless the Court has any questions that
5 concludes the presentation of the Appellant's case.

6 **COURT 3:** Thank you.

7 **MS. BLANCHETTE:** Thank you.

8 (Whereupon, at digit 00:32:49:02, the
9 hearing was adjourned.)

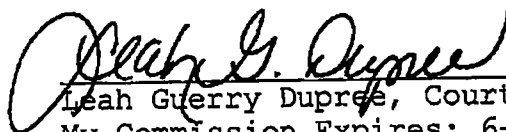
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

I, Leah G. Dupree, Court Reporter, do hereby
certify that the foregoing is a true, accurate transcript
transcribed to the best of my abilities on the 25TH
day of AUGUST , 2014.



Leah Guerry Dupree, Court Reporter
My Commission Expires: 6-28-2023

84123 26-2014-014 1/3

Prepared for: Jeremy Thompson

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

The State of SC
Plaintiff,

versus

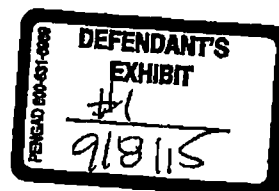
Justin Hillerby
Defendant.

Court of General Sessions
08-GS-09-0594

Detention Recording

September 26, 2008

Leah G. Dupree
Court Reporter



1 Call initiated.

2 EVERCOM CALL SERVICE: Hello, this is a
3 collect call from:

4 JUSTIN: Justin.

5 EVERCOM CALL SERVICE: An inmate from the
6 Berkeley County Detention Center.

7 To accept charges, press zero. For paying
8 customers --

9 (phone beeps)

10 EVERCOM CALL SERVICE: This call is
11 subject to monitoring and recording.

12 Thank you for using Evercom.

13 JUSTIN: Hello?

14 UNIDENTIFIED FEMALE SPEAKER: Hey.

15 JUSTIN: Hey, Baby.

16 UNIDENTIFIED FEMALE SPEAKER: I'm not
17 allowed to talk very much now you just take that
18 into consideration, all right.

19 JUSTIN: What?

20 UNIDENTIFIED FEMALE SPEAKER: I'm not
21 allowed to talk about that very much, so take that
22 into consideration.

23 JUSTIN: Why not?

24 UNIDENTIFIED FEMALE SPEAKER: Because I
25 got arrested too.

1 JUSTIN: Are you serious, for what?

2 UNIDENTIFIED FEMALE SPEAKER: Unlawful
3 conduct towards a child.

4 JUSTIN: You didn't do anything.

5 UNIDENTIFIED FEMALE SPEAKER: Apparently,
6 whatever I did at the pool or didn't do at the pool
7 they are charging me with and I'm facing ten years.

8 JUSTIN: Oh, my God, Baby.

9 UNIDENTIFIED FEMALE SPEAKER: I talked to
10 Grandma last night, how are you doing? I heard you
11 got hurt.

12 JUSTIN: Yeah, they tried to fucking kill
13 me.

14 UNIDENTIFIED FEMALE SPEAKER: How are you
15 doing?

16 JUSTIN: Okay. I'm -- thinking about you
17 is the only thing keeping me going.

18 We're going to get through this, okay.

19 UNIDENTIFIED FEMALE SPEAKER: (Sigh.)

20 JUSTIN: How did you get out?

21 UNIDENTIFIED FEMALE SPEAKER: My parents
22 posted my bond.

23 And I got a really, really, good lawyer.

24 JUSTIN: Yeah.

25 UNIDENTIFIED FEMALE SPEAKER: It is

1 costing me, a lot of money.

2 JUSTIN: Well, my mom is supposed to be in
3 town soon, so I want you to spend some time with her
4 when she gets here, okay.

5 UNIDENTIFIED FEMALE SPEAKER: I don't
6 know. Big John hasn't been talking to me. The only
7 person I've been talking to is your mom --

8 JUSTIN: Well, Big John is probably
9 been --

10 UNIDENTIFIED FEMALE SPEAKER: -- and your
11 brother.

12 JUSTIN: -- real fucked up. And my Dad
13 has been busy trying to get my lawyer and all of my
14 other shit straight. He came up here Monday to see
15 me. And, we're going to make it through this,
16 right?

17 UNIDENTIFIED FEMALE SPEAKER: Yeah.

18 JUSTIN: No matter what, okay.

19 UNIDENTIFIED FEMALE SPEAKER: Justin, I'm
20 really scared for you.

21 JUSTIN: I'll be fine, Baby, I'm worried
22 about you. I can survive. I just want to make sure
23 that when this is all over with that you are going
24 to be there waiting for me, right?

25 UNIDENTIFIED FEMALE SPEAKER: Justin, what

1 happened?

2 JUSTIN: Baby, I smacked him, I didn't
3 smack him that hard, but when he hit the floor is
4 when, I guess, it started. And, I didn't notice
5 it because I was drunk, I guess. And, I put him on
6 the futon.

7 I gave a true statement on Thursday, the
8 day I got fucking jumped, and I guess they put it on
9 the news that night, and when everyone saw it, that
10 was it. It was about 50 dudes. They said there was
11 more, but I got two stab marks on my back, one hit
12 my rib, and a dude fucking saved my life pretty
13 much. I got a split eye, two black eyes, a
14 fractured eye socket, a cut behind my ear.

15 But I'm in DP now, so I'm locked down 24
16 hours a day.

17 You got --

18 UNIDENTIFIED FEMALE SPEAKER: I'm trying
19 to stay home, but every time you keep on calling I
20 have to be out.

21 JUSTIN: Okay, Baby. I just wanted to --
22 can I write to you --

23 UNIDENTIFIED FEMALE SPEAKER: Listen.

24 JUSTIN: What?

25 UNIDENTIFIED FEMALE SPEAKER: My cell

1 phone. You can call my cell phone too.

2 JUSTIN: I know I got to get minutes.

3 UNIDENTIFIED FEMALE SPEAKER: You don't
4 have to get minutes.

5 JUSTIN: I can call your cell phone?

6 UNIDENTIFIED FEMALE SPEAKER: Yes. I can,
7 I can put four numbers on my ---

8 Listen -- hold --

9 JUSTIN: Go ahead.

10 UNIDENTIFIED FEMALE SPEAKER: John -- John
11 gave me his house phone number, he wants you to call
12 him. Can you take down the number?

13 JUSTIN: I have to go get a pencil real
14 quick, but yeah.

15 UNIDENTIFIED FEMALE SPEAKER: Yeah, I have
16 to go --

17 JUSTIN: Actually hold on a second, no, I
18 can't, I can't, I'm not supposed to be talking on
19 the phone.

20 UNIDENTIFIED FEMALE SPEAKER: You don't
21 have any Kool-Aid or anything you can write in?

22 JUSTIN: No, I'm not allowed any -- I'm in
23 lock down with bad dudes. I mean, we're locked down
24 24 hours a day, I get to use the phone three times a
25 week for 30 minutes and I have to take a shower in

1 that time too.

2 UNIDENTIFIED FEMALE SPEAKER: That's why
3 you have only been calling every other day?

4 JUSTIN: Yeah, because I'm only allowed
5 Monday, Wednesday and Friday and we don't know what
6 time. And other than that, I am locked down 24/7,
7 me and three other dudes in a two-man cell. And I'm
8 going to be like this for the next six months.

9 UNIDENTIFIED FEMALE SPEAKER: Oh, my God.

10 JUSTIN: Yeah.

11 UNIDENTIFIED FEMALE SPEAKER: What about
12 your bond? What is going on with that?

13 JUSTIN: They don't give a bond. I have
14 got to see a General Sessions judge. And there
15 isn't any available -- there is one October 3rd --

16 UNIDENTIFIED FEMALE SPEAKER: That's
17 fucking bullshit.

18 JUSTIN: I know -- you need to talk to --
19 I need you to get in touch with Big John and tell
20 him to tell my lawyer that there is a General
21 Sessions on October 3rd. Instead of waiting until
22 November 21st, there is one coming up on October
23 3rd.

24 UNIDENTIFIED FEMALE SPEAKER: That's on
25 Friday.

1 JUSTIN: This Friday coming up.

2 UNIDENTIFIED FEMALE SPEAKER: Yeah, that's
3 -- what about our court?

4 JUSTIN: I know you got to tell -- you
5 have to call our public defender and let her know
6 that I am in jail, because Big John is supposed to
7 call Michael Bonding (sic) about the Hill Detention
8 and let him know that I am in fucking jail. But I'm
9 going to write you a letter today, we get to write
10 letters on Friday. So, I am going to write you a
11 letter today, okay. So you can write me back
12 whenever you want, okay?

13 UNIDENTIFIED FEMALE SPEAKER: Okay, don't
14 forget to put your inmate number on there so I can
15 write back.

16 JUSTIN: No, all you have to do is send it
17 to Justine Hillerby 89, everything will be on the
18 envelope.

19 UNIDENTIFIED FEMALE SPEAKER: Because
20 Grandma was trying -- Grandma told me that she was
21 trying to write you a letter and you probably need
22 to have an inmate number that she can't just write
23 it towards the jail.

24 JUSTIN: No, you can just write it to me,
25 I'll have a number. But Big John has got the

1 address and everything and all of that information
2 and Grandma is supposed to be sending it, but I
3 don't -- we don't get mail like we are supposed to
4 in here so if it takes me a while to get you back.

5 But you want me to call you every time I
6 get to use the phone?

7 UNIDENTIFIED FEMALE SPEAKER: Yeah, but I
8 don't know if I'm going to be able to, I mean -- I
9 don't know if I'm -- Justin, I've gotten death
10 threats myself, in the mail.

11 JUSTIN: Just ignore it, okay. Stay with
12 your parents if you can. Stay at your parents'
13 house as much as possible.

14 UNIDENTIFIED FEMALE SPEAKER: Brandy and
15 Eric moved out.

16 JUSTIN: Did they?

17 UNIDENTIFIED FEMALE SPEAKER: Before I got
18 the -- the eviction notice. Isn't that weird?

19 JUSTIN: Eviction notice?

20 UNIDENTIFIED FEMALE SPEAKER: Yeah. I got
21 an eviction notice.

22 JUSTIN: They moved out because of what is
23 going on, Baby, you got to just --

24 UNIDENTIFIED FEMALE SPEAKER: They never
25 even came to the fucking funeral.

1 JUSTIN: Baby, I'm sorry. I tried to ask
2 if I could go and they wouldn't let me, I'm sorry --

3 UNIDENTIFIED FEMALE SPEAKER: Are you sure
4 that they didn't do anything too?

5 JUSTIN: I don't -- Baby, I don't know. I
6 really don't.

7 I just want to make sure that I've got
8 your support. I can make it work where I don't do
9 fucking life. I can plea bargain for a less time,
10 but we're going to make it through this, right?

11 UNIDENTIFIED FEMALE SPEAKER: Uhm.

12 JUSTIN: That's the only thing that keeps
13 me going is knowing that when all of this is said
14 and done it is going to be fine, and we are going to
15 continue to have a family and the shit will blow
16 over, and okay.

17 UNIDENTIFIED FEMALE SPEAKER: I got my
18 period.

19 JUSTIN: Damn.

20 We got plenty of time for that, okay.

21 UNIDENTIFIED FEMALE SPEAKER: I think I, I
22 think I miscarried.

23 Melissa is going after me right now.

24 JUSTIN: For what?

25 UNIDENTIFIED FEMALE SPEAKER: She keeps on

1 calling the cops on me. She keeps on calling the
2 paper and telling them shit. She went on fucking
3 the news.

4 JUSTIN: I know my Dad told me, I don't
5 know what to do. Just don't fucking worry about her
6 you just make sure that you stay okay; all right?

7 Okay?

8 UNIDENTIFIED FEMALE SPEAKER: Uh-huh.

9 JUSTIN: Stay safe, stay with your parents
10 as much as possible; all right.

11 UNIDENTIFIED FEMALE SPEAKER: Uh-huh.

12 JUSTIN: My mom is going to be here this
13 weekend, so I --

14 UNIDENTIFIED FEMALE SPEAKER: Shut up --
15 she is supposed to be here today.

16 JUSTIN: Huh?

17 UNIDENTIFIED FEMALE SPEAKER: She is
18 supposed to be here today.

19 JUSTIN: All right. Talk to her. I want
20 y'all to spend some time together while she is here;
21 okay? She will make you feel better, okay.

22 UNIDENTIFIED FEMALE SPEAKER: Uh-huh.

23 JUSTIN: All right.

24 I got to get off here.

25 UNIDENTIFIED FEMALE SPEAKER: All right.

1 JUSTIN: I'll call you Monday, all right.
2 I'll call your cell phone. I'll have money on my
3 account by then.

4 UNIDENTIFIED FEMALE SPEAKER: I already --
5 I -- the money you told me to take out, I made an
6 account with. I didn't use it for myself I made an
7 account with it.

8 JUSTIN: Okay. That's fine do whatever
9 you have got to do with it, Baby.

10 But we are going to make it through this,
11 right? I got your support and you have mine, okay.

12 UNIDENTIFIED FEMALE SPEAKER: Okay.

13 JUSTIN: All right. I don't want to lose
14 contact, okay.

15 UNIDENTIFIED FEMALE SPEAKER: I'm not
16 planning on doing that.

17 JUSTIN: Good.

18 Soulmates, right?

19 UNIDENTIFIED FEMALE SPEAKER: Uh-huh.

20 JUSTIN: Love you.

21 UNIDENTIFIED FEMALE SPEAKER: Love you,
22 too.

23 JUSTIN: Stay safe, okay. And I'll be out
24 -- and I'll survive --

25 UNIDENTIFIED FEMALE SPEAKER: You better

1 fucking stay safe.

2 JUSTIN: I will.

3 You are the only reason I am even worried
4 about it, okay.

5 UNIDENTIFIED FEMALE SPEAKER: Okay.

6 JUSTIN: Otherwise, I would just go to
7 general population and get it over with.

8 UNIDENTIFIED FEMALE SPEAKER: No.

9 JUSTIN: Okay.

10 Thank you, Baby. And, I'm going to be
11 able to make it for the next two weeks because I was
12 able to talk to you.

13 UNIDENTIFIED FEMALE SPEAKER: I love you.

14 JUSTIN: Stay with your parents, okay.

15 UNIDENTIFIED FEMALE SPEAKER: Huh?

16 JUSTIN: Love you.

17 UNIDENTIFIED FEMALE SPEAKER: Love you.

18 JUSTIN: I love you, too. My life is you.

19 UNIDENTIFIED FEMALE SPEAKER: Love you.

20 JUSTIN: I love you, too. I love you so
21 much. I'm sorry this happened. I'll spend the rest
22 of my life making it up to you, okay.

23 UNIDENTIFIED FEMALE SPEAKER: Uh-huh.

24 JUSTIN: This will blow over, it will be
25 gone soon enough, all right.

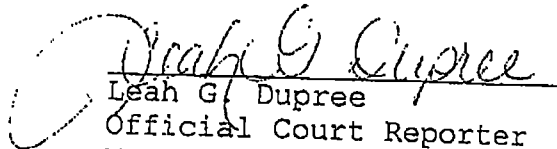
1 UNIDENTIFIED FEMALE SPEAKER: Uh-huh.
2 JUSTIN: All right, I'm going to write to
3 you today, okay.
4 UNIDENTIFIED FEMALE SPEAKER: Okay.
5 JUSTIN: All right, I love you.
6 UNIDENTIFIED FEMALE SPEAKER: Love you,
7 too.
8 JUSTIN: Spend some time with my mom when
9 she gets here.
10 UNIDENTIFIED FEMALE SPEAKER: All right.
11 JUSTIN: As much time as you can.
12 UNIDENTIFIED FEMALE SPEAKER: All right.
13 JUSTIN: All right. I love you.
14 UNIDENTIFIED FEMALE SPEAKER: I love you,
15 too.
16 JUSTIN: Bye.
17 UNIDENTIFIED FEMALE SPEAKER: Bye.
18 (Call terminated.)
19 (Call length 09m:27s)
20 *****END OF TRANSCRIPT*****
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

I, Leah G. Dupree, Court Reporter, do hereby
certify that the foregoing is a true, accurate and complete
transcript of an audion recording transcribed to the best
of my abilities, on the 17th day of February, 2010.


Leah G. Dupree
Official Court Reporter
My Commission Expires: 6-4-13

2010 - 06 - 03111971

Sol Anne Williams, PCSO
2 of 2

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
)
)

IN THE GENERAL SESSIONS COURT
FOR THE NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)
)
)

WARRANT#: J-093150

Plaintiff,)
)
)

MOTION TO COMPEL

vs.)
)
)

JUSTIN RYAN HILLERBY,)
)
)

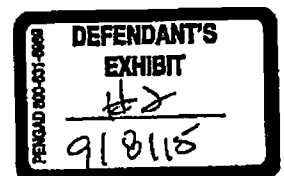
Defendant,)
)
)

**TO: ASSISTANT SOLICITOR ANNE WILLIAMS
NINTH JUDICIAL CIRCUIT**

Defendant, Justin Ryan Hillerby, by his attorney, hereby moves this Honorable Court to order the Summerville Police Department and The Ninth Judicial Solicitors Office to produce the following discovery within thirty (30) days, with each request specific to (1) each item tested , and (2) each type of test conducted, including but not limited to restricted fragment length polymorphism ("RFLP") test or any polymerase chain reaction ("PCR") test, including HLA-DQ ALPHA, Polymarker, STR, D1S80, or any other such DNA test:

COLLECTION AND CHAIN OF CUSTODY

- A. Identify every item of evidence collected in reference to this case, and indicate Which items were tested by any Police Crime Laboratory, SLED Laboratories, or any other laboratory.
- B. Provide any and all photographs, notes, reports, memoranda, inventories, chain of custody document records and other documents relating to or documenting the location, collection, packaging, transportation and storage of all evidence taken from the crime scene and all biological samples taken in connecting with this case. including in your response all writings prepared by personnel of the aforementioned laboratories, any police agencies involved, and any other personnel who;
1. identified, photographed, and/or collected evidence from the crime scene;
 2. witnessed the collection of evidence purportedly taken from the defendant that was subjected to testing; and
 3. received biological samples taken from the crime scene, the victim, or the defendant, whether tested or not;



4. and all information concerning whether any persons handling biological samples, have been typed using a DNA protocol, and if so, the name of the protocol or kit, the dates of such typing and the results of each typing.
- C. For each item of evidence tested, identify the following:
1. the item/s of evidence tested;
 2. the date of testing;
 3. the testing facility;
 4. the type of testing conducted and the particular reason for such testing, including but not limited to whether the testing on a particular piece of sample conducted to search for evidence or was conducted as a control;
 5. the name and manufactures of any testing "kits", which were used;
 6. The names, titles, and addresses of each individual who conducted the testing, interpreted or analyzed the test results; and
 7. the test results.
- D. With respect to DNA analysis on biological samples collected in this case and conducted by SLED laboratories, or any other laboratory, provide the following documents, information, and items:
1. a complete copy of the case file or folder, including but not limited to, notes reflecting any communications with any persons in connection with the testing of the samples submitted in this case;
 2. copies of any and all records, charts, or worksheets documenting evidence transfers, extractions, dilutions and/or spins;
 3. any and all documents, charts or worksheets relating to gel loading, membrane flooding, and if applicable, hybridization and autoradiography;
 4. if applicable, any and all records pertaining to computer imaging, bio-imaging or scanning of autoradiographs produced in connection with the samples submitted for testing in this case;
 5. any and all editing documents, charts, or worksheets detailing dot blot information or dot patterning detected, added, deleted or altered whether in connection with computer imaging or visual measurement systems;
 6. any and all documents, charts, graphs or worksheets concerning the interpretation of dot blot test results;
 7. any and all documentation, charts, graphs or worksheets detailing or calculating the pattern and significance of the dot interpreted, the frequency of the occurrence of the dot blots, the resolution concentration, and the database used in connection with the samples submitted for testing in this case, including information as to each probe applied and the calculated confidence intervals;
 8. legible color copies of photographs taken of evidence submitted for DNA testing;

9. any documents, charts or worksheets describing the evidence received and the chain or custody for each evidentiary sample received for DNA testing, and
 10. color photographs, as clear and detailed as the originals, of all slot blots, and if applicable, electrophoretic patterns and autoradiograph
- E. With respect to each item of evidence subjected to DNA testing, specify the following:
1. the amount of DNA extracted;
 2. the amount of extracted DNA which was utilized for each of the typing procedures; and
 3. the amount of extracted DNA remaining after the test procedures were completed.
- F. For each item of evidence subjected to DNA testing, provide the following:
1. any and all documents, charts, bench notes and other materials pertinent to the conduct of the dot blot analysis;
 2. a legible copy of any photographs taken of the dot blot membrane; and
 3. the final results of any dot blot tests conducted.
- G. Provide copies of all documents and data relating to the DNA polymerase utilized in this case, including but not limited to the protocols for handling, maintaining and using such polymerase, the methods by which the polymerase was used, the DNA sequence of the polymerase, any publication relating to this polymerase, and any and all validation research on such polymerase.
- H. Provide copies of all documents and data relating to the DNA primers utilized in this case, including but not limited to the protocols for handling, maintaining and using such primers, the methods by which the primers were used the DNA sequence of the primers, any publications relating to this primer, and any and all validation research on such primer or primers.
- I. Provide any studies, whether published or unpublished, conducted to calculate the resolution capacity of the gel or membrane and of the particular dot blot method utilized in the DNA tests conducted in this matter.

EXPERTS, QUALIFICATIONS AND LITERATURE

- J. For the DNA testing conducted in this case, provide the following:
1. identify the particular DNA tests conducted by the laboratory in connection with this case, the number of times and the length of time that laboratory has used this

- method in connection with biological crime scene evidence, include in your answer a designation of the number of times each type of testing has been conducted on behalf of criminal prosecutors and/or criminal defendants, respectively;
2. the curricula vitae or professional qualifications of all individuals who participated in the testing or analysis of biological samples or will be called to testify at any hearing in connection with this case;
 3. list all accreditations and/or certifications of the laboratories themselves and all personnel who conducted testing or analyzed test results;
 4. any promotional material produced, published or disseminated which describes the laboratory in questions, the services provided thereby, or the background of personnel employed at that laboratory;
 5. a list of the names, states, counties and docket number of all proceedings in which an employee or representative of the laboratory in question has testified on the issue of forensic analysis of biologic evidence;
 6. copies of all transcripts of testimony given by any employee or representative of SLED Laboratories, in any legal proceeding regarding expert qualifications or the admissibility of DNA test results into evidence;
 7. list any money, grant, award, training or scholarship received by the laboratory in question or any of its personnel who are expected to testify on this matter, from any law enforcement agency, including but not limited to the Department of Justice, SLED, the Summerville Police Department, Ninth Judicial Circuit Solicitors Office of the State of South Carolina; and
 8. all laboratory records for quality control for materials and equipment utilized for testing or analysis of biological evidence materials in this case.
- K. Provide copies of any and all scientific publications, including articles published by the manufactures of the test kits used, the laboratories conducting the tests, and by any expert the Ninth Judicial Circuit Solicitors Office expects to call as witness concerning the DNA test conducted in this matter.
- L. For the period from 1990 to the present, list the cases in which SLED Laboratories or any other expert involved in the testing, evaluation or consultation of these samples has/have been retained by the Ninth Judicial Circuit Solicitors Office to conduct or analyze biological specimens, including the amount of compensation paid by the State of South Carolina in each case and in the aggregate.
- M. Provide a copy of any contract in force between the Ninth Judicial Circuit Solicitors Office and SLED laboratories, with respect to the conduct of DNA testing in this case whether such testing is covered by a separate contract or falls under the rubric of a general service between the parties.

PROFICIENCY AND ERROR RATES

- N. Provide any and all documents, reports, notes, or correspondence concerning any

internal or external proficiency tests, conducted or taken by SLED Laboratory, whether results, either preliminary or final were obtained, reported or published. include in your response to this item all results of proficiency testing which was conducted.

O. Provide information concerning

1. the laboratory error rate for each type DNA test conducted in this case,
2. the laboratory's overall error rate, and
3. case specific errors in any DNA related testing conducted by SLED laboratories, including but not limited to the case name, case number, and the particular error.

P. Provide any and all documentation pertaining to the calculation of laboratory error rates reported in response to the discovery requests, including in your response any and all documents, studies, notes or summaries which form the basis for the calculation of laboratory error rate.

Q. Provide copies of any and all correspondence to or from the SLED Laboratories, concerning the laboratories compliance or non-compliance with any proposed or established standards, recommendations or protocols for DNA testing.

R. Any and all documents, studies, notes, or summaries conducted or used in this case pertaining to match criteria, including but not limited to the likelihood of a false positive or a coincidental match between different individuals with the same DNA profile.

S. Any documents, reports, studies, experiments or notes regarding any environmental insult studies conducted on the gels, membranes or probes of the type used in the testing of the samples in this case, including but not limited to those regarding the effects of heat, light, humidity and time.

T. Any documents, reports, studies, experiments or notes regarding any environmental insult studies conducted on the gels, membranes or probes of the type used in the testing of the samples in this case, including but not limited to those regarding the effects of dyes, varnishes, bacteria and other substrata variations.

U. Any and all documents, reports, studies, experiments or notes pertaining to misincorporation, differential amplification, cross-contamination or degradation noted in connection with enzymes, probes, membranes and gels of the type used in this case.

- EE. Provide copies of any and all unpublished data reports or learned treatises on which the Ninth Judicial Circuit Solicitor's Office experts have relied in interpreting test results in this case or upon which they intend to rely at trial.
- FF. Provide copies of any and all unpublished validation studies pertaining to the testing methodology employed by any laboratory conducting forensic testing on biological samples in this case.
- GG. With respect to the DNA testing and/or interpretation, provide copies of all materials related to the databases used, including but not limited to the following:
1. records of the sources of all samples, including the race, gender, nationally, and geographic origin of the sample individuals;
 2. the procedure or protocol for DNA typing of all samples in the database;
 3. high-quality, legible prints of ten randomly-selected dot blot test results of the samples in the database;
 4. the computer printout of all genotypes and all of the probes used by SLED Laboratory; and
 5. copies of all match criteria utilized in testing samples for the database.

Respectfully submitted,

J. Michael Bosnak
Attorney for Defendant
5675 Woodbine Avenue (Suite H)
North Charleston, S.C. 29406
(843) 225 - 6232 (office)
(843) 225 - 6233 (fax)

Berkeley, South Carolina
Dated: May 1, 2009

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1 From Please print and press hard.
 Date 10/23/01 Sender's FedEx Account Number 1995-6085-9
 Sender's Name SULLIVAN, LYNDIA J. ATTY AT LAW
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 3 To Recipient's Name DR. RONALD OSTROWSKI Phone 704, 483-5375
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☒ FedEx Envelope
☐ FedEx Pak
☐ FedEx Box
☐ FedEx Tube
☐ Other
 6 Special Handling
☐ SATURDAY Delivery
☐ HOLD Weekday
☐ HOLD Saturday
 7 Payment Bill to:
☒ Sender
☐ Recipient
☐ Third Party
☐ Credit Card
☐ Cash/Check
 Total Packages Total Weight Total Declared Value \$.00
 8 Residential Delivery Signature Options
 Signature required
 519

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

FILED IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

16 JAN 21 AM 11:39

Justin Ryan Hillerby, #339543,

Applicant,

v.

State of South Carolina,

Respondent.

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

2013-CP-08-2121

ORDER OF DISMISSAL

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

PROCEDURAL HISTORY

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

CCJR
JAT

VB

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

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

II. ALLEGATIONS RAISED

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

SUMMARY OF TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

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

interrogation tactics.

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

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

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

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

helpful.

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

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

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

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

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

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

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

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

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

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

Ineffective Assistance of Counsel

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

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

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

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

Failure to consult and call a Forensic Pathologist at trial

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

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

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

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

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

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

An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Further, to establish a third-party guilty claim:

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

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

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

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

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

All other allegations

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

CONCLUSION

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

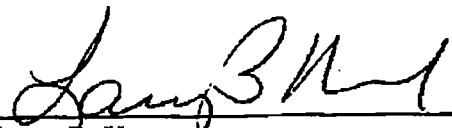
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has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

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED!


Larry B. Hyman
Presiding Circuit Court Judge
Ninth Judicial Circuit

1-7-, 2016

Georgetown, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUSTIN RYAN HILLERBY, #339543,

Applicant,

v.

STATE OF SOUTH CAROLINA,

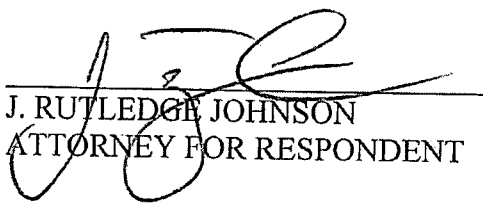
Respondent.

CERTIFICATE OF SERVICE

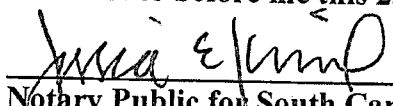
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thompson, LLC
PO Box 12891
Columbia, SC 29211

This 25th day of January, 2016.


J. RUTLEDGE JOHNSON
ATTORNEY FOR RESPONDENT

SWORN to before me this 25th day of January, 2016.


Notary Public for South Carolina.

My Commission Expires: 4/27/2019

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

JUSTIN RYAN HILLERBY, #339543

☒ Applicant,

v.

THE STATE OF SOUTH CAROLINA

☐ Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-08-2121

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

RECEIVED
2/2/14

Applicant's Attorney:
Jeremy A. Thompson, Bar No. 76091
Address:
P.O. Box 12891
Columbia, SC 29211
phone: 803-779-2555 fax: 803-779-2556
e-mail: jeremyatlaw@yahoo.com other:

Respondent's Attorney:
J. Rutledge Johnson, Asst. Deputy Attorney General
Bar No.
Address: Office of the Attorney General
P.O. Box 11549 Columbia, South Carolina
phone: 803-734-3737 fax: 734-4113
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Applicant / ☐ Respondent

January 28, 2014
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

JUSTIN RYAN HILLERBY, #339543)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-08-2121

**RULE 59(e), SCRPC, MOTION TO
ALTER OR AMEND**

NOW COMES the Applicant in the above-captioned matter, acting by and through undersigned counsel, hereby moving this Court to alter or amend its Order of Dismissal filed on January 21, 2016,¹ pursuant to Rule 59(e), SCRPC. In support of this motion, the Applicant would show unto this Honorable Court the following:

In his Amended Application for Post-Conviction Relief, the Applicant set forth the following specific 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 (p. 544, lines 2-25).

¹ This order was not received by counsel for the Applicant until January 22, 2016. Inasmuch as this motion is filed within ten days of receipt of this order, this motion is timely. See Rule 59(e), SCRPC ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order") (emphasis added).

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 (p. 822, line 22-p. 823, line 1).
6. Trial counsel was ineffective for failing to renew his objection to the admission of the Applicant's statements into evidence.

While the majority of the evidence presented at the PCR hearing pertained to grounds one and three, the Applicant proceeded forward on all six claims at the PCR hearing. The Order of Dismissal directly addresses grounds one and three. With regard to grounds two, four, five, and six, however, the Order of Dismissal states the following:

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

Order of Dismissal at 14.

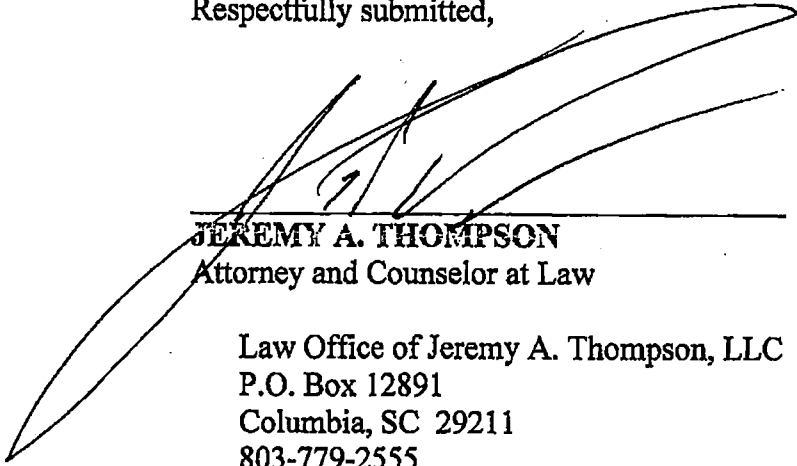
"Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues." Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007). "[A] Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review." Id. at 410, 653 S.E.2d at 267.

The Applicant believes that the Order of Dismissal does not sufficiently rule on grounds two, four, five, or six because the Order of Dismissal makes no findings of fact, and summary conclusions of law, with regard to each issue. Consequently, the Applicant is concerned that an appellate court would find that grounds two, four, five, and six are not preserved for appellate review pursuant to Marlar. Accordingly, in order to preserve these claims for appellate review, the

Applicant respectfully requests that this Court issue full findings of fact and conclusions of law on these claims.

WHEREFORE, having set forth his grounds, the Applicant respectfully requests that this Court alter or amend its Order of Dismissal pursuant to the arguments made above.

Respectfully submitted,



JEREMY A. THOMPSON
Attorney and Counselor at Law

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

ATTORNEY FOR APPLICANT.

This 28th day of January, 2016.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JUSTIN RYAN HILLERBY, #339543,)

CASE NO.: 2013-CP-08-2121

Applicant,)

CERTIFICATE OF SERVICE

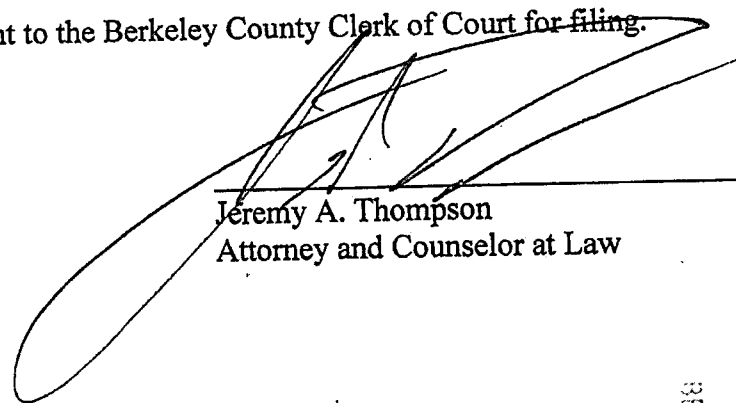
STATE OF SOUTH CAROLINA,)

Respondent.)

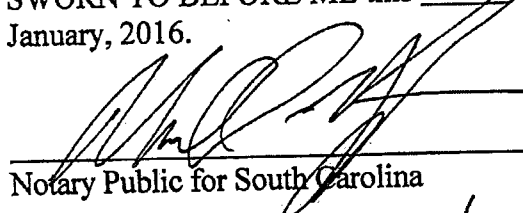
The undersigned hereby certifies that a true copy of the Rule 59(e), SCRCP, Motion to Alter or Amend in the above matter has been served on the presiding judge this 28th day of January, 2016, by mailing one (1) copy in a stamped envelope properly addressed to:

The Honorable Larry B. Hyman, Jr.
Presiding Judge, Ninth Judicial Circuit
1301 Second Avenue, Suite 3B76
Conway, SC 29526

The original having been sent to the Berkeley County Clerk of Court for filing.


Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE ME this 28th day of
January, 2016.


Notary Public for South Carolina

(L.S.)

My Commission Expires: 7/10/2022

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED
2016 FEB -1 PM 2:48

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
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JUSTIN RYAN HILLERBY, #339543,)
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Applicant,)
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STATE OF SOUTH CAROLINA,)
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Respondent.)
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IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

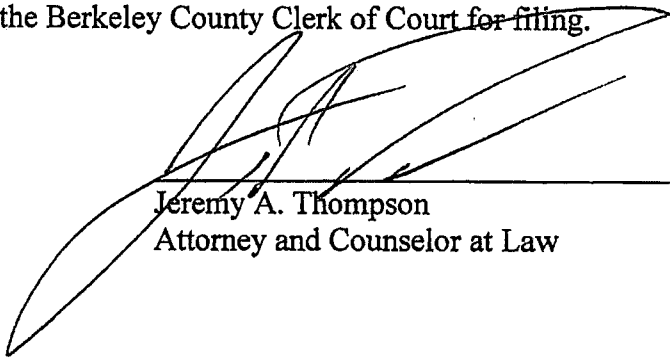
CASE NO.: 2013-CP-08-2121

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Rule 59(e), SCRCP, Motion to Alter or Amend in the above matter has been served on opposing counsel this 28th day of January, 2016, by mailing one (1) copy in a stamped envelope properly addressed to:

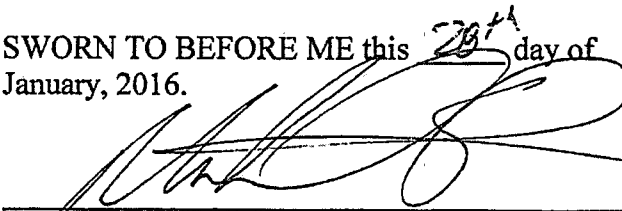
J. Rutledge Johnson, Assistant Deputy Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Berkeley County Clerk of Court for filing.



Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE ME this 28th day of
January, 2016.



Notary Public for South Carolina

(L.S.)

My Commission Expires: 7/10/2022

FILED
2016 FEB -1 PM 2:48
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY)

2013-CP-08-02121

JUSTIN R. HILLERBY,)
#339543,)

Plaintiff,)

Transcript of Record

vs.)

June 13, 2016

STATE OF SOUTH CAROLINA,)

Defendants.)

B E F O R E:

Honorable Larry B. Hyman, Jr.
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Jeremy A. Thompson, Esquire
Attorney for Plaintiff

J. Rutledge Johnson, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

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I N D E X

JUNE 13, 2015

Pg.

Motion	3
Certificate of Court Reporter	8

E X H I B I T S

No.

ID EV

(No Exhibits were marked or admitted.)

1 (JUNE 13, 2016)

2 THE COURT: Okay. This is a motion to reconsider a PCR
3 that I denied back in Berkeley County, was it Berkeley or
4 Charleston. Where did I hear this at?

5 MR. THOMPSON: It was Berkeley, Your Honor.

6 THE COURT: All right. Yes, sir?

7 MR. THOMPSON: I guess since it's my motion, I'll go
8 first, Your Honor, and I would note that my client is not
9 here. The Attorney General informed me yesterday, I believe,
10 that through inadvertence that he had not been ---

11 THE COURT: Well, if he hadn't waived, how we gonna have
12 this?

13 MR. THOMPSON: I met with my client at his institution a
14 couple of weeks ago, Your Honor, and discussed the fact that
15 this hearing had been called. And he informed me he did not
16 want to come. He didn't -- he did not -- he did not want to
17 make the trip up here because I told him I didn't think there
18 would be any testimony necessary, that really he'd just be
19 sitting here listening to the arguments and that he could get
20 the transcript afterwards. I told him I thought he'd be
21 transported but that that, you know, that I didn't think his
22 presence would be needed, and he expressed to me, you know, a
23 desire not to come to the hearing. He did not want to be
24 transported because, because he -- I believe what would either
25 happen is he would either be ---

1 THE COURT: Are you telling me that you, as an Officer of
2 the Court, have discussed this with your client, your client
3 has specifically stated to you that he does not wish to appear
4 at this hearing?

5 MR. THOMPSON: That is correct.

6 THE COURT: And he waives his presence?

7 MR. THOMPSON: He does.

8 THE COURT: Counsel, do you want to be heard on that?

9 MR. JOHNSON: Your Honor, I just would agree with that.
10 I let Mr. Thompson know yesterday that through inadvertence
11 that I did not have him transported but, you know, there's
12 been a lot going on personally and professionally right now,
13 and I had talked to Mr. Thompson and he had no problem with it
14 and, you know, I was gonna obviously bring that up to the Your
15 Honor's attention but since ---

16 THE COURT: Okay. All right. Let me hear from you.

17 MR. JOHNSON: Thank you, Your Honor.

18 MR. THOMPSON: Yes, just briefly, Your Honor, the basis
19 for my motion was -- and let me pull the the order of
20 dismissal back up -- I believe, is on Page 14. There's a
21 paragraph regarding all other allegations. It says, This
22 Court notes that Applicant alleged other allegations such as
23 failure to question Dr. Vitalis regarding his qualifications
24 as a forensic pathologist, introduction of photographs, jury
25 verdict, instructions and objections to Applicant's

1 statements. However, this Court finds the Applicant either
2 failed to meet his burden of proving counsel was ineffective
3 or failed to show how counsel's actions prejudiced Applicant's
4 case, therefore, these allegations are denied. I am concerned
5 that that is -- that those -- that ruling is too summary in
6 nature to permit appellate review of those issues because the
7 -- because the PCR statute requires full findings of facts and
8 conclusions of law regarding each of those issues.

9 Respectfully, Your Honor, I don't think there are any findings
10 of fact with regard to any of those allegations and regarding
11 conclusions of law, there are very summary in nature and, you
12 know, I don't -- you know, obviously, I don't like to have to
13 -- have to argue about how I'm gonna argue issues on appeal.

14 THE COURT: Those are essentially the allegations of the
15 first and second grounds, are they not?

16 MR. THOMPSON: They are -- the first and second grounds
17 are the forensic pathologist -- the first ground is failing to
18 consult with the forensic pathologist prior to trial and
19 failing to present the testimony of the pathologist. The
20 third one is for failing to investigate and to present a
21 defense that an individual other than the Applicant killed the
22 victim. So, those issues, I think are squarely addressed in
23 the order because those are the issues with which we presented
24 Dr. Bond at the PCR hearing.

25 THE COURT: Yeah, the guy that says this is not how

1 adults do it?

2 MR. THOMPSON: That's correct. So, issues 2, 4, 5, and 6
3 that were presented in the amended PCR are the ones that I
4 think are grouped into that paragraph on Page 14 of the order
5 of dismissal. And so what we're essentially requesting, Your
6 Honor, is that Your Honor make a fuller order of dismissal and
7 to rule on those issues so that, if we choose to present them
8 on appeal, we can.

9 THE COURT: All right, counsel. I'll hear you.

10 MR. JOHNSON: If I may, I believe that is a sufficient
11 ruling. It says that he hasn't meet his burden of proof or
12 has failed to show that counsel's actions prejudiced the case.
13 I think that is preserved for appeal and is not -- you know,
14 it doesn't need to be further addressed. I think this is more
15 of an appellate issue not a 59(e) issue, Your Honor.

16 THE COURT: All right. And I agree. I think that is
17 does sufficiently address those issues that says that he
18 essentially failed to make his -- met his burden. I think
19 it's preserved. If not, this particular hearing protects you.
20 Okay?

21 Thank you very much, gentlemen.

22 MR. JOHNSON: Thank you, Your Honor.

23 MR. THOMPSON: Thank you, Judge.

24 THE COURT: Mr. Johnson, submit a little order for me.

25 Okay?

Hillerby v State - 2013-CP-08-2121
MOTION FOR RECONSIDERATION

7

1 MR. JOHNSON: Yes, Your Honor. Thank you.

2 (ADJOURNED - 10:05 A.M.)

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Justin R. Hillerby versus State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on June 13, 2016.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson

Official Court Reporter

August 29, 2016.

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Justin Ryan Hillerby, #339543,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2013-CP-08-2121

ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND

FILED
16 JUL 22 PM 2:59
CLERK OF COURT
BERKELEY COUNTY, S.C.

This post-conviction relief matter came before the Court for an evidentiary hearing at the Charleston County Courthouse on September 8, 2016. The Applicant was present and represented by Jeremy A. Thompson, Esquire. The State was represented by J. Rutledge Johnson, Assistant Deputy Attorney General. After taking the matter under advisement, this Court issued a Final Order of Dismissal dated January 21, 2016. The Applicant was served with the Final Order on January 22, 2016, and he submitted, through counsel, a timely Motion for Rehearing and/or Motion to Alter or Amend the Judgment on January 28, 2016.

The Applicant raises the following issues in his Rule 59 Motion:

1. "the Order of Dismissal does not sufficiently rule on grounds two, four, five and six because the Order of Dismissal makes no findings of fact, and summary conclusions of law, with regard to each issue." (Motion p. 2)

Having carefully reviewed the entire record in this matter, this Court finds that no basis for altering or amending is prior ruling. Therefore, this Court hereby denies the Applicant's Rule 59 Motion in its entirety, and affirms the previous Order of Dismissal.

This Court advises that if the Applicant desires to secure appellate review of this Order and the

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

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



Larry B. Hyman
Presiding Judge
Ninth Judicial Circuit

Concepcion, South Carolina

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Larry B. Hyman, Presiding Judge

2013-CP-08-2121

RECEIVED

AUG 11 2016

S.C. SUPREME COURT

JUSTIN RYAN HILLERBY, #339543,

Petitioner,

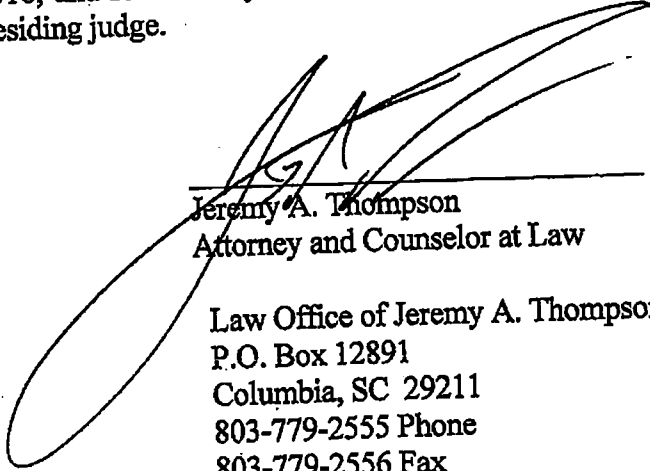
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

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


Jeremy A. Thompson
Attorney and Counselor at Law

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

ATTORNEY FOR PETITIONER

This 9th day of August, 2016.

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

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

AUG 11 2016

Larry B. Hyman, Presiding Judge

S.C. SUPREME COURT

2013-CP-08-2121

JUSTIN RYAN HILLERBY, #339543,

Petitioner,

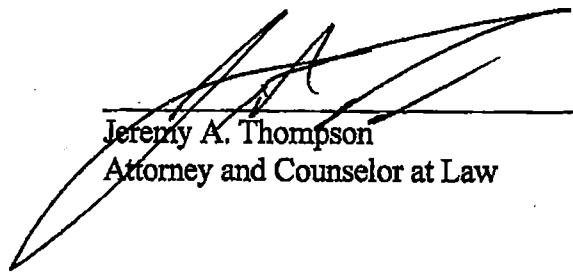
v.

STATE OF SOUTH CAROLINA,

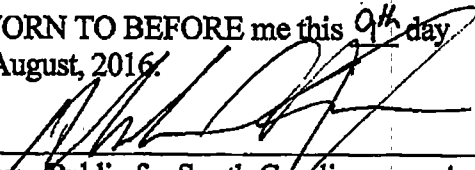
Respondent.

CERTIFICATE OF SERVICE

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


Jeremy A. Thompson
Attorney and Counselor at Law

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


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

(L.S.)