ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Berkeley County
Appeal from Berkeley County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2016-001666

JUSTIN RYAN HILLERBY,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Berkeley County
Appeal from Berkeley County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2016-001666

JUSTIN RYAN HILLERBY,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

STATEMENT OF ISSUE ON APPEAL

Did the post-conviction relief judge err by concluding trial counsel was not ineffective for failing to consult with and present the testimony of a forensic pathologist at trial inasmuch as such testimony would have shown Petitioner did not kill the victim?

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the post-conviction relief judge err by determining Petitioner failed to establish his ineffective assistance of trial counsel claim where: (1) trial counsel was neither deficient nor objectively unreasonable for choosing to investigate and defend Petitioner's case in a manner other than by consulting with and presenting the testimony of a forensic pathologist on behalf of the defense; and (2) no prejudice resulted from trial counsel's actions since there was not a reasonable probability the result of Petitioner's trial would have been different had trial counsel presented the testimony of an additional forensic pathologist in light of the substantial evidence of Petitioner's guilt presented during trial, which included numerous confessions by Petitioner to having repeatedly struck his twenty-two-month-old victim shortly before the baby's body was found, coupled with the fact even Petitioner's expert witness, who conducted only a limited review of the record, confirmed the victim's fatal blunt force trauma injuries absolutely could have been inflicted by an adult such as Petitioner?

STATEMENT OF THE CASE

In September of 2008, Petitioner Justin Ryan Hillerby was arrested following an investigation into the violent death of his girlfriend's twenty-two-month-old child. In December of 2008, the Berkeley County Grand Jury indicted Petitioner for homicide by child abuse. On February 22, 2010, a jury trial was commenced in the Berkeley County Court of General Sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Petitioner as indicted. Following the verdict, the trial judge sentenced Petitioner to life imprisonment without the possibility of parole. Thereafter, Petitioner filed a motion seeking reconsideration of his sentence, and the trial judge denied that motion following a hearing on the matter. Petitioner then timely initiated an appeal.

On appeal, the Court of Appeals—after briefing and oral argument—issued an unpublished opinion in which it unanimously affirmed Petitioner's conviction. State v. Hillerby, Op. No. 2013-UP-300 (S.C. Ct. App. filed July 3, 2013). Following that decision, Petitioner did not file a petition for rehearing, and a remittitur was issued.

Subsequent to the issuance of the remittitur, Petitioner timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing. Petitioner then filed an amended PCR application. On September 8, 2015, an evidentiary hearing was conducted in the Charleston County Court of Common Pleas with the Honorable Larry B. Hyman, Jr., circuit court judge, presiding. At the conclusion of the hearing, the PCR judge requested the submission of proposed orders by counsel. Thereafter, the PCR judge issued an order denying and dismissing the PCR application with prejudice. Following the issuance of the order of dismissal, Petitioner filed a motion to alter or amend, and the PCR judge conducted a hearing on the matter. At the conclusion of the hearing, the PCR judge denied

Petitioner's motion, and that ruling was subsequently confirmed through the filing of a written order. Petitioner then timely initiated an appeal of the PCR judge's decision.

On appeal, Petitioner filed a petition for a writ of certiorari in the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals. Following the transfer of the case, the Court of Appeals granted Petitioner's petition in part on February 6, 2019.

STATEMENT OF FACTS

Summary of Petitioner's Crime and the Events Following It

In September of 2008, a twenty-two-month-old child ("Victim") and his mother ("Mother") were living in a home located in Summerville, South Carolina, along with the child's eight-year-old sister, Serena; two unrelated roommates, Eric Riggins and Brandi Mihill; and Petitioner, who had been dating the children's mother for approximately a year or so by that time. (App'x pp. 253-254; p. 276; pp. 295-296; p. 316; p. 572). Around 6:15 a.m. on the morning of September 15, 2008, Mother got up, left Petitioner in bed, sent her daughter to school, and then returned to bed and went back to sleep. (App'x p. 303). Thereafter, Mother got back out of bed at approximately 10:45 a.m. and went to check on Victim because she had not yet heard him awaken for the day, and, as she did so, Petitioner got up and followed her to Victim's bedroom.[1] (App'x p. 224; p. 304; p. 325). When Mother opened Victim's bedroom door, Petitioner stopped her and suggested they let Victim continue sleeping until Victim woke up naturally. (App'x p. 304). In response, Mother started to close the door but noticed something on Victim's face. (App'x p. 304). She then walked over to Victim's crib to investigate, discovered he was cold to the touch, rolled him over, and observed blood coming from his mouth and nose. (App'x pp. 304-305).

---

[1] By that point in time, Mother had not seen Victim since she left him in Petitioner's exclusive care at approximately 7:00 p.m. to 7:30 p.m. on the preceding evening when she went out with a friend to socialize. (App'x pp. 290-291; p. 293; p. 301; p. 321; p. 327). After leaving Victim in Petitioner's care, Mother subsequently returned home between 1:00 a.m. and 1:30 a.m., and, upon arriving home, she did not go into Victim's room to check on him so as to avoid disturbing his sleep and, instead, checked on him by using a baby monitor she kept in her bedroom. (App'x pp. 301-303; p. 321; p. 325). When she did so, Mother did not hear anything through the monitor, which would have picked up any sounds Victim would have been making had he been "stirring." (App'x p. 325). At that point, Mother did not do anything further to check on Victim because she had no reason to think anything was amiss. (App'x p. 325).

Upon making that horrifying discovery, Mother became hysterical. (App'x p. 224; p. 306). Meanwhile, Petitioner responded by calling 911 and reporting Victim was "fucking dead." (App'x p. 224; p. 263; p. 282; p. 707). At that point, firefighters and paramedics from the Summerville Fire Department rushed to the residence along with law enforcement officers. (App'x pp. 395-396; pp. 399-400). Once there, the medical personnel attempted to treat Victim, but they were unable to do anything to help him as he was already deceased by that time. (App'x pp. 396-397; pp. 399-402). Meanwhile, the officers who responded to the scene secured the residence while Petitioner, Mother, Mother's parents, Mihill, and Riggins all waited outside.[2] (App'x p. 213; pp. 339-340; p. 342; pp. 345-346). During that time period, Petitioner did not appear to be upset or exhibit any outward signs of an emotional response, repeatedly told Mother he was sorry, and oddly inquired of one of the firefighters as to when they would know what had happened. (App'x p. 213; pp. 341-342; p. 347; p. 397; pp. 402-403; p. 407).

Based on Victim's death, an investigation was commenced, and Mother, Petitioner, Mihill, and Riggins were all taken to the police department and separately interviewed. (App'x pp. 282-283; p. 308). During his interview, Petitioner—after being advised of and waiving his rights—spoke with Detective Shannon Sharp and another officer from the Summerville Police Department about the events leading up to Victim's death. (App'x pp. 10-11; p. 25; pp. 28-30; p. 459-467). During the course of the interview, Petitioner provided the following statement:

> [W]ent to pick up Rory. Stopped by Melissa's first to see my son. Me and her argued a little bit. Went to Rory's. [P]icked him up.

---

[2] Before the law enforcement officers and medical personnel had arrived at the scene, Mother called her parents in a panic, and her father ("Grandfather"), who was Victim's grandfather, quickly headed to Mother's nearby residence to find out what was happening. (App'x pp. 205-206; pp. 211-212; p. 247; p. 306). Upon arriving, Grandfather ran into the house, went to check on Victim, and discovered he was not breathing. (App'x p. 212; p. 306). Grandfather then picked up Victim to try and resuscitate him but immediately realized his grandson was no longer alive as Victim was stiff and cold by that point. (App'x pp. 212-213).

> Came home. First grabbed [Victim] to go to the pool. I drove, [Mother] walked. Stayed at the pool all day. About 2:00 or 3:00. Noticed a bruise on his face. Figured he hit his head on the pool somehow. Came home. I started to feed the kids. Fed [Victim] first, then Serena. I told Serena to go to bed. I let [Victim] stay up with me. He spilt my drink on the table. I grabbed him and pointed to the corner for -- pointed to the corner for ten minutes. I let him out. He played for a while still. I didn't have any milk, so I gave him some corn-dog bites. He started to bob his head. I tried to get him to stand up but he wouldn't, so I put him to bed. He was fine then. We woke up this morning to check on him and it looked like he was sleeping. [Mother] tried to shake him but he didn't move. She rolled him over and he was already gone. I called 911, and tried to keep her away.[3]

(App'x p. 468; pp. 471-472). After that, Petitioner reported he felt dizzy and was having chest pains, and he terminated the interview. (App'x pp. 29-31; p. 42; pp. 472-473). Petitioner then left the police department on his own volition after being briefly examined by paramedics.[4] (App'x p. 29; p. 473).

On the following day, Dr. Nicholas Batalis, a forensic pathologist and an expert in forensic pathology, performed an autopsy on Victim. (App'x p. 518; pp. 521-522). As a result of the autopsy and the numerous injuries he found during it, Dr. Batalis determined Victim's death was a non-accidental homicide resulting from blunt force trauma to the head that caused fatal hemorrhaging in Victim's brain. (App'x pp. 523-525; p. 533; pp. 538-539).

Thereafter, the next morning, Petitioner, Mother, Mihill, and Riggins drove themselves to the Dorchester County Sheriff's Office in order to take polygraph examinations in regard to

---

[3] In the actual written statement itself, Petitioner did not use capitalization or proper punctuation. (App'x pp. 39-40).

[4] After leaving the police department, Petitioner eventually returned home and, once there, behaved in a nervous manner, appeared to be angry instead of upset, and researched secondary drowning with Mother as a possible non-violent explanation for Victim's death. (App'x p. 218; pp. 249-250; p. 264; p. 283; p. 308). Furthermore, Petitioner informed his roommates he was waiting to be arrested in connection to Victim's death because he believed boyfriends were always blamed in such situations. (App'x p. 264; p. 283).

Victim's death. (App'x pp. 32-34; p. 45; p. 473; pp. 724-725). After they arrived, Sergeant Raymond Dixson, a polygraph examiner with the Dorchester County Sheriff's Office, met with Petitioner, advised him of his rights, explained the polygraph examination process, and attempted to begin the examination. (App'x p. 84; pp. 87-93; pp. 725-726). However, when asked if he inflicted any injury to Victim that would have caused his death, Petitioner declined to proceed any further with the examination and indicated he only wished to speak with the officer.[5] (App'x p. 34; pp. 89-96; pp. 726-730; pp. 735-736; p. 739). The two then simply spoke with one another, and, during their conversation, Petitioner informed Sergeant Dixson he unintentionally hit Victim with his knee and may have grabbed and shaken Victim a little bit. (App'x p. 94; p. 99; pp. 739-740).

Following those admissions, Petitioner asked to speak with Detective Sharp again, and the detective met with him for another interview. (App'x pp. 34-35; p. 60; pp. 474-475). During the course of that interview, Petitioner—after again being informed of and waiving his rights—provided a new account of what happened to Victim that differed from his earlier one. (App'x p. 35; p. 59; pp. 474-477). Specifically, in his latest statement, Petitioner recounted:

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

[5] Unlike Petitioner, Mother and her roommates freely submitted to polygraph examinations. (App'x p. 33; p. 46).

> intoxicated and t[ri]ed, t[ri]ed to [remember] everything that happened when I put him to sleep and the last time I saw him alive.

(App'x pp. 478-479). After that, Detective Sharp asked Petitioner several follow-up questions, and, during that questioning, Petitioner repeated his comments about striking Victim with his knee, which he stated caused Victim to begin behaving "like a zombie," and further admitted he grabbed Victim's shoulder and neck after Victim spilled a drink.[6] [7] (App'x pp. 479-482). At that point, Petitioner was swiftly arrested for homicide by child abuse and incarcerated. (App'x p. 53; p. 483).

On the following day, Petitioner was transported for a bond hearing and was denied bond. (App'x pp. 483-484; p. 501). After the bond hearing, Officer Richard Darling of the Dorchester County Sheriff's Office returned Petitioner back to the detention center. (App'x pp. 62-63). However, during the drive, Petitioner initiated a conversation with the officer, began discussing his case, claimed Victim ran into his knee, indicated he believed he should have been charged with a less serious offense, and requested to again speak with the detectives investigating the matter. (App'x pp. 63-64; pp. 66-67; p. 72; pp. 76-79). Based on that request, Officer Darling transported Petitioner back to the police department one more time. (App'x p. 63; pp. 65-67; pp. 78-79; p. 484; pp. 502-503).

Once there, Petitioner yet again met with Detective Sharp and—after again being advised of and waiving his rights—indicated he wished to tell the truth due to the fact he believed he was

---

[6] While Victim was in the zombie-like state following the blow to his head, Petitioner candidly admitted he smoked a cigarette and watched the Comedy Central channel on television for a little bit. (App'x p. 480).

[7] Regarding Victim's sister, Petitioner stated she was already asleep in her bedroom by the time the events he described were transpiring. (App'x p. 482).

being portrayed unfairly by the media. (App'x pp. 484-488). At that point, Petitioner provided the following account of the events leading to Victim's death:

> [H]e spilled my drink. I called him in the kitchen. I knelt down and said, what is wrong with you. I smacked him openhanded a couple of times. The last time, his head hit the floor. I went and cleaned up the mess. When I came back, he was still laying there with his eyes open. I put him on the futon and made another glass of tea. When I looked at him, he looked like he was falling asleep.

(App'x p. 489). Detective Sharp then again asked Petitioner a series of follow-up questions, and, during that questioning, Petitioner acknowledged he hit Victim all over the head and struck him "so hard" it knocked him to the floor. (App'x pp. 490-492). Moreover, Petitioner confirmed his previous statements were untruthful and apologized for waiting so long to reveal the truth. (App'x p. 488; pp. 491-492).

Following that incriminating confession, Petitioner was subsequently indicted for homicide by child abuse. (App'x pp. 955-959). He then elected to proceed forward to trial. (App'x pp. 129-130).

Relevant Details from Petitioner's Trial

Towards the outset of trial, the parties presented their opening statements to the jury and set out their respective theories of the case. (App'x pp. 196-204). Through his opening statement, Petitioner's trial counsel explained to the jury the State was required to prove beyond a reasonable doubt who inflicted Victim's injuries and noted Petitioner was not required to prove anything.[8] (App'x p. 202). Furthermore, trial counsel asserted there would be no physical evidence presented to link Petitioner to the crime, such as DNA evidence or evidence of injuries

[8] Prior to that point, trial counsel raised several in limine motions in an attempt to prevent the admission of Petitioner's incriminating statements along with other damaging evidence regarding Petitioner's treatment of Victim prior to his death, but those efforts ultimately were unsuccessful. (App'x p. 6; p. 10; pp. 107-111; p. 113; pp. 115-118; pp. 120-121; pp. 123-124).

to Petitioner's hands, and argued to the jury Petitioner's statements resulted from continuous law enforcement interrogations that did not yield anything except "bits and pieces of things" that were purportedly being taken out of context. (App'x pp. 202-203).

Thereafter, the trial proceeded into the evidentiary phase, and evidence and testimony was presented establishing Victim was tragically found cold and lifeless in his crib by emergency responders following Petitioner's 911 call reporting—in a callous manner—the baby's death. (App'x pp. 212-213; pp. 223-227; pp. 357-358; p. 362; pp. 401-402). Additionally, testimony was presented establishing Petitioner behaved in an unusual and unemotional manner at the scene following Victim's death. (App'x p. 213; p. 219; p. 397; pp. 402-403; p. 407). Moreover, testimony was presented establishing Petitioner acted cruelly towards Victim during a trip to the pool that occurred earlier on the day before Victim's body was found.[9] (App'x pp. 229-242; p. 296). Furthermore, testimony and evidence was presented establishing various items were collected from the scene of Victim's death, including a paint roller handle that was secured from the floor near Victim's crib, and subsequent testing merely revealed Victim's blood was found solely on his mattress and pajamas.[10] (App'x pp. 361-377; pp. 411-414; pp. 427-453).

Likewise, the roommates living in Mother's home at the time of Victim's death recounted the events that occurred around the time of the incident. (App'x pp. 253-286). During their testimony, both Riggins and Mihill denied inflicting any injuries to Victim, whom they said looked like he had been crying when they last saw him alive around 7:00 p.m. or 8:00 p.m. on

---

[9] Specifically, several witnesses recounted Petitioner yelled at Victim during the pool trip, yanked him by the arm, called him a "pussy," told him he was unwanted, and directed other troubling remarks at him. (App'x pp. 229-242; p. 296).

[10] Notably, regarding the paint roller handle, testimony was presented during trial establishing no blood was observed or found during a forensic examination and analysis of that object. (App'x p. 409; pp. 411-414).

the night before his body was found. (App'x pp. 256-260; p. 262; pp. 277-280; p. 284). Furthermore, Riggins stated Petitioner's approach to Victim was "tough love without the love," and Mihill characterized Petitioner as the disciplinarian of Mother's children. (App'x p. 277). Beyond that, both individuals recounted how Petitioner seemed nervous and paranoid after Victim's death was uncovered. (App'x p. 264; p. 283).

Similarly, Mother denied personally inflicting Victim's fatal injuries, recounted the events leading up to Victim's death, confirmed she left Victim in Petitioner's care on the evening before the death was discovered, and explained she did not see Victim again until she found him deceased in his crib the following morning after Petitioner suggested she not disturb the baby's slumber. (App'x pp. 295-306; p. 325; p. 328). Additionally, she testified Petitioner admitted to her he hit Victim while simply claiming he did not believe it was what killed him. (App'x p. 308; p. 313). Furthermore, she indicated Petitioner called her several times from jail after he was arrested in connection to Victim's death, and a recording of a highly-incriminating call Petitioner placed to her on September 26, 2008, was admitted into evidence and played for the jury. (App'x pp. 308-313; pp. 1132-1146). In that recording, Petitioner—in response to a straightforward question as to "what happened"—candidly informed Mother:

> Baby, I smacked him, I didn't smack him that hard, but when he hit the floor is when, I guess, it started. And, I didn't notice it because I was drunk, I guess. And, I put him on the futon. I gave a true statement on Thursday, the day I got fucking jumped, and I guess they put it on the news that night, and when everyone saw it, that was it.[11] [12]

---

[11] Significantly, the day of Petitioner's trip to the pool with Victim was Sunday, September 14, 2008, while Petitioner gave his final written statement to law enforcement four days later on Thursday, September 18, 2008. (App'x p. 298; pp. 794-796).

[12] Regarding his claim about being "jumped," Petitioner reported he was assaulted by a number of other prisoners at the jail after news of his terrible crime spread. (App'x p. 1136; p. 1138).

(App'x p. 313; pp. 1135-1136). Moreover, Petitioner professed to Mother he was sorry it happened and promised to spend the rest of his life making it up to her.[13] (App'x p. 1144).

In addition to that testimony and evidence, Detective Sharp testified about his investigation into Victim's death and about the various incriminating statements Petitioner made to him about what had occurred, and Petitioner's written statements were admitted into evidence and published to the jury. (App'x pp. 459-515). Through those statements, the jury learned Petitioner initially claimed to have had no idea how Victim's injuries were sustained, later pivoted to a version of events in which he may have merely unintentionally hit Victim, and finally confessed to repeatedly and intentionally striking Victim in the head while admitting his earlier accounts were false. (App'x pp. 468-472; pp. 478-482; pp. 487-492). Furthermore, Sergeant Dixon also testified about his interview of Petitioner that occurred after Petitioner came in for a polygraph examination that he ultimately declined to take, and the sergeant affirmed Petitioner admitted during their conversation to grabbing and shaking Victim after initially claiming he only unintentionally hit Victim with his knee.[14] (App'x pp. 724-740).

Beyond that testimony and evidence, Dr. Batalis offered expert testimony about the findings he made as a result of his autopsy of Victim. (App'x pp. 518-565). Specifically, the forensic pathologist recounted he discovered Victim had suffered fourteen facial injuries, including numerous fresh bruises, along with nine skull injuries. (App'x p. 524; p. 528; p. 548). Additionally, he stated he located subdural hemorrhages and subarachnoid hemorrhages in

---

[13] During the call, Petitioner also suggested to Mother he might be able to avoid a life sentence by engaging in plea bargaining. (App'x p. 1141).

[14] Significantly, Sergeant Dixon's testimony was only presented in response to Petitioner's suggestion he tried to participate in a polygraph examination but was never actually hooked up to the testing equipment. (App'x pp. 657-658).

Victim's brain, a bruise inside Victim's ear cavity, and retinal hemorrhages in Victim's eyes.[15] (App'x p. 533; pp. 538-539). Due to the severity and number of the injuries, Dr. Batalis opined Victim's wounds were caused by a significant amount of force and were not consistent with an accident. (App'x p. 524; pp. 526-527; p. 530; p. 533). Based on his findings, he indicated he concluded Victim would have displayed immediate symptoms after sustaining the injuries, would likely have appeared unsteady or groggy, and died at some point between 9:00 p.m. on September 14, 2008, and 9:00 a.m. on September 15, 2008.[16] [17] (App'x p. 524; pp. 542-543; pp. 564-565). Ultimately, Dr. Batalis reported his conclusion was Victim's death was a non-accidental homicide resulting from blunt force trauma, which he explained could have been inflicted by Victim being hit with a fist or hard object or Victim's head colliding with something like a floor or doorway.[18] (App'x pp. 523-525; p. 530; pp. 549-550; p. 558). However, in response to trial counsel's thorough questioning, Dr. Batalis acknowledged the fatal injuries Victim suffered could not have been caused by a strike to the top of his head with an open hand, which would have resulted in dispersal of the force being applied, due to the bruising present inside Victim's scalp. (App'x p. 549). Furthermore, when answering another of trial counsel's

---

[15] In response to questioning from trial counsel, Dr. Batalis further indicated he located marks on Victim's body in addition to the injuries to Victim's face and skull. (App'x p. 543; pp. 552-554). However, he stated he concluded those marks were not bruises after cutting into a "representative sample" of them during the course of the autopsy. (App'x pp. 552-554).

[16] At other points in his testimony, Dr. Batalis offered his opinion as to Victim's time of death by explaining it occurred somewhere between two or three hours before his body was found up to ten or twelve hours before that point in time. (App'x p. 523; pp. 564-565).

[17] Consistent with Dr. Batalis's findings, Dr. Michelle Amaya, an expert in forensic pediatrics, testified during trial Victim's brain injuries would have prevented him from speaking, yelling, walking, or holding his head up, and she opined he would not have been able to function normally after the brain injuries were inflicted. (App'x pp. 566-567; p. 571; pp. 581-583).

[18] In response to a question from trial counsel, Dr. Batalis went so far as to admit the hypothetical possibilities of how Victim's injuries could have been inflicted were "endless." (App'x p. 558).

questions, Dr. Batalis admitted it was possible Victim's assailant could have sustained hand injuries if a hand had been used to inflict Victim's injuries.[19] (App'x pp. 551-552).

Finally, following the State's presentation of its substantial evidence against him, Petitioner testified in his own defense. (App'x p. 624). Through his testimony, Petitioner offered yet another version of the events leading up to Victim's death in which he accidently hit Victim just a single time with his knee, claimed Victim "giggled a little" after the knee strike, denied hurting Victim, and insisted his incriminating statements to the contrary during the various law enforcement interviews he participated in resulted from improper actions on the part of the interviewing officers. (App'x pp. 631-672). Additionally, when confronted about the incriminating statements he made during his jailhouse call to Mother, Petitioner insisted those statements were not actually true and were simply designed to "make sure [his] story matched." (App'x pp. 680-681). Furthermore, Petitioner acknowledged he wrote numerous letters to Mother while incarcerated, including letters in which he indicated he "popped" Victim and in which he stated he was going to "beat" his charge. (App'x p. 682; pp. 685-688; p. 708).

At the conclusion of the evidentiary phase of the trial, the parties presented their closing arguments to the jury. (App'x pp. 753-811). Through his lengthy closing argument, trial counsel called the jury's attention to the fact Dr. Batalis did not specifically know where Victim's bruises came from or what caused them. (App'x pp. 759-760). Additionally, he suggested Petitioner would have had no reason to kill Victim while also contending it did not make sense for Petitioner not to have fled if he had actually inflicted Victim's injuries. (App'x p. 759; pp. 764-765). He further expressed concern about the manner in which Petitioner was

[19] Earlier during trial, trial counsel had elicited testimony establishing neither Petitioner's hands nor the hands of any of the other people in the residence at the time Victim's death was discovered were photographed to document any injuries that may have been present at that time. (App'x pp. 375-376).

interviewed, insisted Petitioner's confessions were false, and even affirmed he personally believed Petitioner was telling the truth when he testified. (App'x pp. 756-759; pp. 783-784). Finally, trial counsel challenged the sufficiency of the State's investigation, pointed out some perceived flaws with the manner in which the investigation was conducted, and insisted the State's case was an "illusion" based solely on Petitioner's confessions coupled with the fact there was a deceased child with injuries. (App'x pp. 756-759; p. 773; p. 789).

Subsequently, the case was submitted to the jury, and the jury ultimately convicted Petitioner as indicted after just over an hour of deliberations. (App'x p. 824; pp. 831-832). The trial judge then sentenced Petitioner to life without the possibility of parole for his heinous crime. (App'x p. 841; p. 957).

Summary of the Post-Conviction Relief Proceedings

Following his trial and a subsequent unsuccessful appeal, Petitioner—through counsel—filed a PCR application seeking a new trial based in part on claims of ineffective assistance of trial counsel. (App'x pp. 935-948). In response to the application, an evidentiary hearing on the matter was scheduled, and, shortly before the hearing took place, Petitioner—again through counsel—submitted an amended PCR application raising several new and more specific claims. (App'x pp. 962-965; p. 970). Amongst the new claims raised, Petitioner asserted trial counsel was ineffective for failing to consult with and present the testimony of a forensic pathologist during trial. (App'x p. 962; p. 971).

During the ensuing evidentiary hearing, Petitioner attempted to support his claim related to trial counsel's failure to retain a forensic pathologist by offering the expert testimony of Dr. Michael Baden, who was an experienced physician, medical examiner, and forensic pathologist that was currently running a private forensic pathology practice. (App'x pp. 972-975; pp. 1078-

1101). During his testimony, Dr. Baden indicated he generated a report for Petitioner's case after being retained by Petitioner and reviewing the report from Victim's autopsy, photographs from the autopsy and crime scene, x-rays, and the trial testimony of Dr. Batalis. (App'x pp. 975-976; pp. 980-981; p. 1004). Based on his limited review, Dr. Baden indicated his opinion was Victim died as the result of numerous blunt force impact injuries causing fatal hemorrhaging in Victim's brain, which was consistent with Dr. Batalis's opinion as to the cause of Victim's death.[20] [21] (App'x pp. 523-525; pp. 976-977; p. 983; pp. 1008-1009). He further opined Victim's fatal injuries were inflicted at least eight to twelve hours before his body was found.[22] (App'x pp. 992-993; p. 1010). Beyond that, Dr. Baden conceded blunt force trauma could be inflicted by contact with a floor, a wall, or *an adult's hand*. (App'x pp. 1002-1003). However, in light of his experience from other unrelated cases, Dr. Baden explained he believed the "pattern" of injuries he saw in Victim was atypical of adults, whom he claimed usually used hands or fists to hurt children, and, instead, was consistent with the "pattern" of injuries he had

---

[20] Interestingly, Dr. Baden did not even review Petitioner's trial testimony about the events that purportedly preceded Victim's death. (App'x pp. 1000-1001).

[21] Although Dr. Baden agreed with Dr. Batalis's opinion regarding the actual cause of Victim's death, he indicated he disagreed with Dr. Batalis's determination some of the marks found on Victim's body were not bruises. (App'x pp. 987-989). He opined the marks, which he acknowledged did not lead to Victim's death, were actually bruises, which he said could have been determined through microscopic analysis of the tissue. (App'x pp. 987-991; pp. 1008-1009). Obviously though, Dr. Baden did not conduct the analysis necessary to determine whether the marks were truly bruises since he did not conduct Victim's autopsy, and he readily acknowledged such an analysis was not done. (App'x p. 989; p. 1001).

[22] Oddly, based on the information contained in Dr. Baden's written report, the apparent reason Dr. Baden believed the time of Victim's death was important to his conclusions in Petitioner's case appeared to be based on his belief Mother stated Victim was fine when she saw him at approximately 9:30 a.m. on the date his death was discovered. (App'x pp. 1102-1104). However, no evidence was ever presented to suggest Mother made such a claim, and Dr. Baden's belief regarding when Mother last saw Victim alive was totally inconsistent with Mother's trial testimony, which the doctor—by his own admission—never reviewed before rendering his expert opinion. (App'x pp. 301-303; p. 321; p. 325; p. 976).

seen inflicted by children, such as in "sibling rivalry-type deaths."[23] [24] (App'x pp. 977-978; pp. 986-987; pp. 998-1000). As a result, Dr. Baden asserted he believed Victim was killed by another child and opined the injuries were caused by repeated pokes with an object like the paint roller handle found near Victim's crib, which he claimed appeared to be "bloodied."[25] (App'x pp. 996-997; p. 1004). He further opined "on the scientific basis of forensic pathology" Petitioner could *not* have produced Victim's injuries. (App'x p. 1004). Critically though, Dr. Baden—in response to a pointed follow-up question from the PCR judge—candidly conceded an adult, in fact, actually could have inflicted Victim's fatal injuries, which was totally inconsistent with the claim he had just made, and indicated he must have "misspoke" if his testimony had suggested an adult was not capable of inflicting Victim's injuries.[26] [27] (App'x p. 1008).

---

[23] Interestingly, in his written report, Dr. Baden went even further regarding the age of Victim's possible assailant and stated it was his opinion "to a reasonable degree of medical certainty" Victim's injuries were consistent with injuries having been inflicted by an eight-year-old—as opposed to, for example, a seven-year-old or nine-year-old—child. (App'x p. 1104). Meanwhile, Victim's sister was exactly eight years old at the time of Victim's death, which is a circumstance that is certainly too improbable for Dr. Baden's exceedingly-precise theory regarding the true perpetrator's age to have merely been coincidental. (App'x p. 197; p. 295).

[24] Specifically, in an effort to explain his testimony, Dr. Baden stated: "[I[t is not likely that any adult caused the death of the child and, in my opinion, and my experience, it is typical for a sibling or for another child to injure a child in this fashion and it is not at all the pattern of injuries that I have seen in 50 years caused by an adult." (App'x p. 999).

[25] In his written report, Dr. Baden characterized the paint roller handle found near Victim's crib as "blood smeared" when offering his expert opinion. (App'x p. 1103). Having not reviewed any testimony from the trial other than Dr. Batalis's, Dr. Baden might not have been aware the paint roller handle had been collected from the scene, thoroughly analyzed, and found to be completely free of any blood from any source. (App'x pp. 409-414; p. 976; p. 1102).

[26] Specifically, when the PCR judge asked him whether he was suggesting "an adult could not physically do" the type of injuries Victim suffered, Dr. Baden responded: "No, I'm sorry, then I misspoke. It could be done by an adult. I just said I've never seen it." (App'x p. 1008).

[27] Significantly, Dr. Baden also conceded an adult would have been just as capable as a child of using an object to inflict Victim's injuries. (App'x p. 1002). Specifically, he stated: "An adult

Following that testimony, the State presented the testimony of J. Michael Bosnak, Esquire, who represented Petitioner during trial, to rebut the claims of ineffective assistance of trial counsel. (App'x pp. 1048-1049). During his testimony, Bosnak explained he met with Petitioner "numerous, numerous" times when preparing the case for trial, filed several motions on Petitioner's behalf, and consulted with multiple experts to aid in the preparation of the defense.[28] (App'x pp. 1049-1052). Specifically, he indicated he retained one expert to reanalyze the physical evidence collected and analyzed by the State, and he confirmed his expert's analysis yielded identical conclusions to those reached by the State's experts. (App'x pp. 1052-1053; p. 1058). Likewise, he indicated he consulted Dr. Betsy Gibbs, who was a pediatrician and leading expert in the area of child abuse, to obtain an expert review of the medical evidence related to Victim's autopsy. (App'x pp. 1054-1055; p. 1067). Through that consultation, Bosnak stated he was able to have the doctor explain the medical evidence to him. (App'x p. 1055). He further indicated he considered presenting her as a witness due to the fact she disagreed with Dr. Batalis's conclusion some of the marks on Victim's body were not bruises. (App'x pp. 1055-1056). Ultimately though, he stated he elected not to use Dr. Gibbs as a witness because her review led her to conclude Petitioner was guilty as charged.[29] (App'x pp. 1055-1056). Beyond that, Bosnak conceded he did not consult with a forensic pathologist in preparing Petitioner's

---

can use an object the same as a child, but I have never seen that happen in my 50 years." (App'x p. 1002).

[28] Earlier during the evidentiary hearing, Petitioner, who—by his own admission—was a liar, claimed Bosnak only met with him roughly four times while preparing the case for trial. (App'x p. 1028; p. 1033; p. 1037). Incredibly, Petitioner also offered yet another account of the events leading up to Victim's death and now claimed he did not even unintentionally hit Victim in any manner on the night before Victim's body was found. (App'x p. 1033; p. 1038). Ultimately though, the PCR judge rejected Petitioner's testimony as lacking in credibility. (App'x p. 1157).

[29] Consistent with Bosnak's testimony, Petitioner himself affirmed during the hearing Bosnak reported he did not like what he heard after consulting with a medical expert. (App'x p. 1032).

defense, but he explained he did not do so because he did not believe further information would have helped with Petitioner's defense in light of the fact Victim's death was indisputably caused by blunt force trauma. (App'x p. 1067; p. 1075). Moreover, Bosnak explained he focused on using the lack of DNA evidence linking Petitioner to the crime in his defense, and he further asserted he believed Petitioner's case became unwinnable once Petitioner's recorded confession to Mother surfaced. (App'x pp. 1057-1058; p. 1063). Regarding that confession, Bosnak noted it was damning for Petitioner's case and appeared clear as to what it conveyed.[30] (App'x p. 1063). Furthermore, he indicated he first heard of any attempt to suggest Victim's eight-year-old sister was the real killer during that very hearing. (App'x p. 1062).

At the conclusion of the evidentiary hearing, neither of the parties presented any arguments to the PCR judge, and the PCR judge requested the submission of proposed orders. (App'x pp. 1075-1076). Thereafter, upon considering the matter, the PCR judge issued an order denying Petitioner's PCR application and dismissing it with prejudice. (App'x pp. 1155-1170). Through that order of dismissal, the PCR judge specifically rejected Petitioner's claim trial counsel was ineffective for failing to consult with or present the testimony of a forensic pathologist. (App'x p. 1156; pp. 1165-1169). In doing so, the PCR judge found Dr. Baden's testimony not to be credible or compelling in light of the evidence of Petitioner's guilt that was presented during trial while noting Dr. Baden expressly conceded Victim's injuries could, in fact, have been inflicted by an adult despite the fact he opined Victim's injuries were likely inflicted by a child based on what he had seen in other unrelated cases. (App'x pp. 1157-1159; pp. 1165-1166). He further found Dr. Baden's conclusions were speculative, based on only limited

[30] To reiterate, Petitioner responded to a question from Mother as to "what happened" by confessing: "Baby, I smacked him, I didn't smack him that hard, but when he hit the floor is when, I guess, it started." (App'x pp. 1135-1136).

information, and implausible under the circumstances. (App'x pp. 1165-1166). Moreover, even assuming for argument's sake deficiency could have somehow been found on the part of trial counsel based on Dr. Baden's testimony, the PCR judge determined Petitioner failed to establish the necessary level of resulting prejudice in light of Petitioner's incriminating statements and the fact no evidence of any kind was presented to support Dr. Baden's theory the real killer was an eight-year-old child. (App'x pp. 1167-1168).

Subsequently, Petitioner filed a motion seeking for the PCR judge to alter or amend his ruling, but that motion contained no challenges to the PCR judge's conclusions on the claim related to trial counsel's failure to consult with or present the testimony of a forensic pathologist. (App'x pp. 1172-1174). Ultimately, following a hearing on the matter, the PCR judge declined to change his ruling rejecting Petitioner's claims.[31] (App'x pp. 1179-1183; pp. 1185-1186).

[31] During that hearing, PCR counsel briefly referenced Dr. Baden, and the PCR judge queried counsel if he was referring to "the guy that says this is not how adults do it." (App'x pp. 1181-1182). PCR counsel responded: "That's correct." (App'x p. 1182).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief judge correctly determined Petitioner failed to establish his ineffective assistance of trial counsel claim because: (1) trial counsel was neither deficient nor objectively unreasonable for choosing to investigate and defend Petitioner's case in a manner other than by consulting with and presenting the testimony of a forensic pathologist on behalf of the defense; and (2) no prejudice resulted from trial counsel's actions since there was not a reasonable probability the result of Petitioner's trial would have been different had trial counsel presented the testimony of an additional forensic pathologist in light of the substantial evidence of Petitioner's guilt presented during trial, which included numerous confessions by Petitioner to having repeatedly struck his twenty-two-month-old victim shortly before the baby's body was found, coupled with the fact even Petitioner's expert witness, who conducted only a limited review of the record, confirmed the victim's fatal blunt force trauma injuries absolutely could have been inflicted by an adult such as Petitioner.

Petitioner contends the PCR judge's determination trial counsel was not constitutionally ineffective was "manifestly erroneous." In support of that contention, Petitioner maintains trial counsel engaged in "unquestionable" deficient representation by failing to consult with and present the testimony of a forensic pathologist because such testimony purportedly would have shown he did not kill Victim.[32] Furthermore, Petitioner maintains he was prejudiced by trial counsel's deficient representation because the testimony of Dr. Baden, whom he appears to suggest could not reasonably be disbelieved under any circumstances due to the witness's renown, established a child actually caused Victim's death. Contrary to Petitioner's contention,

---

[32] In seeking a reversal of the PCR judge's ruling, Petitioner also appears to fault the PCR judge for not analyzing the question of whether trial counsel's performance was deficient "in great detail" in the order of dismissal. (App. Br. p. 13). Notably though, Petitioner did not raise such a claim to the PCR judge or seek a more detailed ruling on that particular matter through his motion to alter or amend or during the hearing conducted on that motion. (App'x pp. 1172-1174; pp. 1180-1182). Instead, PCR counsel did the opposite and informed the PCR judge the claim related to the issue of forensic pathology testimony was "squarely addressed" in the order of dismissal. (App'x p. 1181). Accordingly, to the extent Petitioner now contends the PCR judge's deficiency findings were insufficient or not adequately detailed, that particular contention was not properly preserved for appellate review and should not be considered or addressed on appeal. See Mangal v. State, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017) ("In most PCR cases, . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases."); see also State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing a matter conceded in the circuit court cannot subsequently be argued on appeal).

the PCR judge committed no error whatsoever by concluding trial counsel was not constitutionally ineffective for failing to consult with or present the testimony of a forensic pathologist, and his conclusion in that regard was fully supported by both the evidence contained in the trial record and the evidence presented during the evidentiary hearing. Critically, that evidence established trial counsel thoroughly investigated Petitioner's case and prepared for Petitioner's trial, including by consulting with a qualified medical expert to obtain an independent opinion as to the cause of Victim's death. Likewise, it established trial counsel pursued a reasonable trial strategy to attack the State's medical evidence regarding Victim's death through pointed cross-examination as opposed to the presentation of expert testimony. Furthermore, it established even Dr. Baden agreed Victim died as a result of blunt force trauma from injuries that absolutely could have been inflicted by an adult, which meant Dr. Baden's testimony would not have in any way established Petitioner could not and did not inflict Victim's fatal injuries. Under those circumstances, the substantial evidence before the PCR judge supported a conclusion trial counsel was not deficient for failing to consult with and present the testimony of a forensic pathologist like Dr. Baden and there was no reasonable probability the result of Petitioner's trial would have been different even if he had done so. As a result, Petitioner failed to meet his burden of overcoming the strong presumption trial counsel provided adequate representation to him, and the PCR judge correctly determined with evidentiary support trial counsel was not constitutionally ineffective. The PCR judge's ruling rejecting Petitioner's ineffective assistance of trial counsel claim should be affirmed.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the

United States Constitution guarantee a defendant a fair trial[.]"). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly, effective assistance of counsel does not mean perfect representation. See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when

the applicant has overcome that presumption by establishing both deficiency and prejudice); see also United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb").

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Harrington v. Richter, 562 U.S. 86, 110 (2011) (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at

105; see also State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff' before a conviction will be reversed on the basis of ineffective assistance." (citations omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In the case sub judice, Petitioner—based on the evidence presented during both his trial and the subsequent evidentiary hearing—failed to meet his burden of establishing trial counsel's representation objectively fell below the prevailing standard of professional norms by not consulting with or presenting the testimony of a forensic pathologist. Likewise, Petitioner further failed to meet his heavy burden of establishing there was a reasonable probability the

result of his trial would have been different had trial counsel consulted with or presented the testimony of an expert like Dr. Baden.

Initially, as to Petitioner's failure to establish deficiency, he failed to do so because the evidence presented showed trial counsel recognized the need for independent investigation into Victim's cause of death *and* reasonably conducted such an investigation. Specifically, in preparing Petitioner's defense to a homicide by child abuse charge, trial counsel consulted with an expert pediatrician who specialized in *child abuse*, and that expert explained the medical evidence to him while also confirming she believed the evidence supported a conclusion Petitioner was actually guilty as charged. See Strickland, 466 U.S. at 690-691 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). Thus, although trial counsel did not specifically consult with a forensic pathologist, he reasonably investigated the medical evidence and obtained an independent child abuse expert's opinion, which suggested the only possible flaw with the conclusions of the doctor who conducted Victim's autopsy related to collateral marks or bruises that were distinct from the injuries that actually caused Victim's death. See Pinholster, 563 U.S. at 195-196 (explaining trial counsel is entitled to constitutionally-protected independence and wide latitude in making tactical decisions and instructing there will rarely be just one technique or approach that would be considered constitutionally reasonable for trial counsel to undertake in representing a defendant); see also Strickland, 466 U.S. at 691 (recognizing investigatory decisions must be assessed with "a heavy measure of deference to counsel's judgments"). In light of the results of his consultation with a relevant expert coupled with the fact his client

repeatedly made incriminating admissions about striking Victim in several of the statements he made after Victim was brutally killed, trial counsel decided not to conduct any further investigation into the medical evidence, and that decision was not an objectively unreasonable one as would be necessary to support a finding of deficiency.[33] See Strickland, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."); see also Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where . . . counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); Tate v. State, 308 S.C. 163, 166, 417 S.E.2d 553, 555 (1992) ("Where a defendant's own testimony establishes the inapplicability of a defense, failure of counsel to secure expert testimony regarding that defense does not constitute ineffective assistance.").

Likewise, trial counsel provided effective representation to Petitioner by challenging the State's medical evidence related to Victim's death through extensive cross-examination of Dr. Batalis during trial.[34] See Strickland, 466 U.S. at 688-689 (recognizing there typically exists a "range of legitimate decisions regarding how best to represent a criminal defendant" and instructing defense counsel must have "wide latitude" in making tactical decisions); see also Richter, 562 U.S. at 111 ("[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy."). Critically, through that cross-examination, trial counsel elicited testimony from Dr. Batalis explaining a mere slap could *not*

---

[33] As to why he did not believe the information he obtained from his expert warranted further investigation into the medical evidence, trial counsel aptly noted: "[W]e knew that the child had been killed by blunt -- blunt trauma of some type to the head. A bruise on the leg that could have been at a swimming pool or a child playing in the house, fell down, how is that going to show that [Petitioner] is not guilty of anything?" (App'x pp. 1074-1075).

[34] Notably, trial counsel thoroughly questioned Dr. Batalis through both cross-examination and re-cross-examination. (App'x pp. 543-555; pp. 563-565).

have caused Victim's fatal injuries, and the expert further acknowledged during trial counsel's questioning there were countless possibilities as to how Victim's injuries could have been inflicted.[35] See Richter, 562 U.S. at 111 ("In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict."). Since he was able to effectively attack the State's medical evidence through cross-examination, trial counsel's decision not to present an expert forensic pathologist of his own could not be fairly characterized as objectively unreasonable or incompetent under the circumstances. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) ("[C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); see also Richter, 562 U.S. at 111 ("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense."); cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (concluding trial counsel's decision not to present an expert witness to rebut the testimony of the State's expert witness constituted a legitimate trial strategy under the circumstances and reversing a ruling reaching a contrary conclusion), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Frasier v. State, 306 S.C. 158, 160-161, 410 S.E.2d 572, 573 (1991) ("Petitioner . . . argues that trial counsel was deficient in failing to procure an

[35] Significantly, since trial counsel was able to elicit testimony through Dr. Batalis establishing an openhanded slap—which was the manner in which Petitioner claimed at various points to have struck Victim—could not have caused Victim's injuries, the substance of much of the key testimony Petitioner claims Dr. Baden was needed to elicit was, in fact, elicited without him. (App. Br. p. 17).

expert witness to challenge the DNA evidence presented at trial. We disagree. The record reveals that trial counsel vigorously cross-examined the state's DNA experts and attacked the accuracy of the evidence. We cannot say that his performance was unreasonable under prevailing professional norms.").

Furthermore, beyond the inherent reasonableness of trial counsel's actions under the circumstances, Dr. Baden's testimony—just as the PCR judge concluded—was not sufficiently compelling or plausible to render trial counsel's performance unreasonable.[36] Looking to that testimony, Dr. Baden, who only conducted a limited review in Petitioner's case, largely substantiated the critical conclusions of Dr. Batalis by confirming Victim died as the result of blunt force trauma injuries that caused fatal hemorrhaging in Victim's brain and were inflicted as many as twelve hours before the baby's body was found. See, e.g., State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) (recognizing as "well settled" evidence being cumulative in nature to other evidence can render issues related to that evidence harmless beyond a reasonable doubt). Likewise, after seemingly attempting to suggest something to the contrary, Dr. Baden directly confirmed Victim's injuries could have, in fact, been inflicted by an adult,

---

[36] Specifically, in finding Dr. Baden's testimony not to be credible or sufficient to establish trial counsel was constitutionally ineffective, the PCR judge explained: "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 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 [Petitioner] claims Dr. Baden testified the victim's time of death could not have occurred within 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." (App'x p. 1166).

including by an adult using a paint roller handle like the one found near Victim's crib.[37] Thus, Dr. Baden's testimony—had it been presented—would *not* have established Petitioner was not or could not have been responsible for inflicting Victim's injuries, which greatly minimized its potential to have impacted Petitioner's trial in a manner favorable to Petitioner. Cf. United States v. Gabaldon, 389 F.3d 1090, 1099 (10th Cir. 2004) (concluding the trial judge did not abuse his discretion by excluding expert testimony from a defense witness who wanted to opine the blows delivered to the victim could have been inflicted by someone smaller than Gabaldon, who was very large, based on the fact the victim did not suffer any facial fractures and noting that speculative testimony *could only have been relevant* if "the conclusion reached was that Gabaldon could *not* have delivered the blows to [the victim]'s face").

Meanwhile, to the extent Dr. Baden offered an opinion Victim's injuries were likely inflicted by a child as opposed to an adult, his opinion in that regard was speculative in nature as it was largely based on *the typical "pattern" of injuries he had observed in other cases* instead of on any actual scientific or medical factors arising from the specific case before him.[38] See

---

[37] Significantly, by initially offering an opinion an adult could not have inflicted Victim's injuries and then contradicting that opinion just moments later by conceding an adult actually could have inflicted Victim's injuries, Dr. Baden testified in such a manner a reasonable fact-finder could validly question the credibility, neutrality, and value of his testimony. See Rutland v. State, 415 S.C. 570, 577-578, 785 S.E.2d 350, 353 (2016) (recognizing the existence of a prior inconsistent statement can discredit a witness and cause his or her credibility to suffer during trial); State v. Suber, 82 S.C. 159, __, 63 S.E. 684, 685 (1909) (explaining the existence of contradictory statements by a witness can constitute important evidence tending to discredit the witness's testimony).

[38] Similarly, Dr. Baden's reference to "sibling rivalry-type deaths" as part of his opinion in Petitioner's case would have been of highly-questionable admissibility during an actual criminal trial. Cf. State v. Prather, 422 S.C. 96, 110, n. 5, 810 S.E.2d 419, 426 (Ct. App. 2017) ("[W]e find expert testimony *that speculates on the motives and mindset of a perpetrator* to be suspect, particularly when based on crime scene photographs, instead of viewing the crime scene in person, 'some' of a codefendant's prior statements, and none of the mental health histories of the parties." (emphasis added)).

Edmonds v. State, 955 So. 2d 787, 792 (Miss. 2007) ("While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses. There was no showing that Dr. Hayne's testimony was based, not on opinion or speculation, but rather on scientific methods and procedures. The State made no proffer of any scientific testing performed to support Dr. Hayne's two-shooter theory. Therefore, the testimony pertaining to the two-shooter theory should not have been admitted under our standards." (citation omitted)); see also State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017) ("Criminal profiling testimony is not probative of an individual defendant's guilt in a particular case."). Beyond that, due to his limited review of the record, Dr. Baden's opinion was undermined to a large degree due to the fact it was in part shaped by faulty assumptions, such as his incorrect assumption the paint roller handle was stained with blood.[39] See Pace v. Capobianco, 283 F.3d 1275, 1281, n. 11 (11th Cir. 2002) ("Opinions, be they expert or lay, are only as good as the evidence upon which they are based."). Furthermore, since the only evidence presented regarding Victim's sister merely established she was eight years old and—according to Petitioner himself—already asleep before Victim's fatal injuries were inflicted, Dr. Baden's opinion a child actually inflicted Victim's injuries despite the fact an adult absolutely could have done so amounted to little more than rank conjecture that was in no way inconsistent with Petitioner having committed the crime, which meant it would not have supported a legitimate claim of third-party guilt under South Carolina law. See State v. Cope, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) ("[E]vidence of third-party guilt that only tends

[39] Moreover, Dr. Baden's suggestion the murder weapon was an object like the paint roller handle, which he conceded could have been used by an adult in the exact same manner it could have been used by a child, had the potential to undermine trial counsel's strategy of defending Petitioner's case by attempting to sow doubt through the evidence establishing Petitioner's hands were not examined or found to be injured following the killing. (App'x pp. 202-203; pp. 375-376; pp. 551-552; pp. 773-774).

to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded."); State v. Gregory, 198 S.C. 98, __, 16 S.E.2d 532, 534 (1941) ("[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[.]" (citation and internal quotations omitted)); cf. State v. Burgess, 391 S.C. 15, 23, 703 S.E.2d 512, 516 (Ct. App. 2010) (holding third-party guilt evidence was properly excluded over Burgess's objection where the trial judge found "none of the evidence was inconsistent with Burgess's guilt and concluded 'it's mere conjecture or surmise' "). As a result, the PCR judge's conclusion Dr. Baden's speculative testimony was not sufficient to warrant a finding of constitutional deficiency on the part of trial counsel was entirely reasonable and fully supported by the evidence presented despite Dr. Baden's substantial experience and renown. See Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 671 (6th Cir. 2010) (conducting a thorough analysis regarding the admissibility of expert medical testimony regarding causation and noting an expert is not permitted to speculate *no matter how good the expert's credentials may be*).; cf. Richter, 562 U.S. at 112 ("It would not have been unreasonable for the California Supreme Court to conclude Richter's evidence of prejudice fell short of [the Strickland] standard. His expert serology evidence established nothing more than *a theoretical possibility* that, in addition to blood of Johnson's type, Klein's blood may also have been present in a blood sample taken near the bedroom doorway pool. At trial, defense counsel extracted a concession along these lines from the prosecution's expert. The pathology expert's claim about the size of the blood pool could be taken to suggest only that the wounded and hysterical Johnson erred in his assessment of time or that he bled more profusely than estimated. And the

analysis of the purported blood pattern expert indicated no more than that Johnson was not standing up when the blood pool formed." (emphasis added)).

Finally, notwithstanding Petitioner failure to establish deficiency on the part of trial counsel, Petitioner additionally failed to establish he suffered any actual prejudice as a result of trial counsel's actions. That is true because—just as the PCR judge recognized and found—Dr. Baden's testimony simply was not sufficiently compelling or plausible to create a "substantial" likelihood the result of Petitioner's trial would have been different had it been introduced when considered in juxtaposition with the other evidence of Petitioner's guilt presented during trial. See Richter, 562 U.S. at 111-112 ("[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable." (citations and internal quotations omitted)). Critically, *substantial* evidence of Petitioner's guilt was presented during trial, including evidence establishing he acted in a nervous manner, engaged in guilty behavior, and provided numerous shifting accounts of what occurred after Victim's body was found following a period of time in which the baby was largely in his exclusive care. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt."); see also State v. Stokes, 381 S.C. 390, 398-399, 673 S.E.2d 434, 438 (2009) (recognizing prior inconsistent statements constitute *substantive* evidence). However though, the most powerful evidence of Petitioner's guilt came from Petitioner's own mouth as Petitioner repeatedly confessed to—and apologized for—assaulting Victim shortly before he died, including in an a self-initiated call to

Victim's mother. See Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (citations, internal quotations, brackets, and ellipsis omitted)). Meanwhile, Dr. Baden merely would have offered testimony on Petitioner's behalf that would have *in no way* ruled out Petitioner as having inflicted Victim's injuries. See Nesbit v. State, 452 S.W.3d 779, 800 (Tenn. 2014) (affirming the PCR judge's conclusion Nesbit did not meet his burden of establishing trial counsel was constitutionally ineffective for failing to present the testimony of a forensic pathologist on the behalf of the defense because there was not a reasonable probability Nesbit's expert's testimony would have affected the outcome of trial since it was largely consistent with the testimony of the State's expert, offered alternative explanations for the victim's injuries that were speculative in nature, and *did not rule out the possibility the injuries were inflicted from a beating as argued by the State*); cf. Pierce v. State, 686 S.E.2d 656, 660 (Ga. 2009) (holding the State's failure to disclose color autopsy photographs in a case involving the death of a child did *not* result in a reasonable probability the results of the trial would have been different had the photographs been disclosed because Pierce's expert forensic pathologist's opinion based on the color photographs would not have ruled out the possibility Pierce inflicted the child's fatal injuries). Under such circumstances, trial counsel's failure to present a witness such as Dr. Baden—even if that failure could have somehow been deficient—simply could not have created a substantial likelihood the result of Petitioner's trial would have been different, which was manifestly required in order for

Petitioner to successfully establish his ineffective assistance of trial counsel claim. See Strickland, 466 U.S. at 693-694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); cf. Richter, 562 U.S. at 113 ("There was ample basis for the California Supreme Court to think any real possibility of Richter's being acquitted was eclipsed by the remaining evidence pointing to guilt.").

Because trial counsel was not deficient for choosing to investigate and defend Petitioner's case in a manner other than by consulting with and presenting the testimony of a forensic pathologist and no prejudice resulted from trial counsel's valid strategic choices as to how to best present Petitioner's defense, the PCR judge correctly concluded Petitioner failed to meet his required burden of establishing both deficiency and prejudice, and that ruling was neither unsupported by the evidence appearing in the record nor legally erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a PCR judge's factual finding will be upheld if supported by any evidence and a PCR judge's decisions will only be reversed where controlled by an error of law); see also Strickland, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."). Accordingly, Petitioner's ineffective assistance of trial counsel claim was properly rebuffed by the PCR judge. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). The PCR judge's ruling rejecting Petitioner's ineffective assistance of trial counsel claim should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

BY: _____
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 10, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Berkeley County
Appeal from Berkeley County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2016-001666

JUSTIN RYAN HILLERBY,

Petitioner,

vs.

THE STATE,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

BY: _____
Mark R. Farthing
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT

October 10, 2019