

IN THE 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

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SC Court of Appeals

JUSTIN R. HILLERBY, #339543,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

I.

Whether the PCR court erred in concluding that defense counsel was not ineffective for failing to consult with a forensic pathologist and present the testimony of a forensic pathologist at trial inasmuch as such testimony would have shown that the Petitioner did not kill the victim?

STATEMENT OF THE CASE

The Petitioner, Justin R. Hillerby, was charged in Berkeley County for homicide by child abuse. On February 20-25, 2010, the Petitioner proceeded to trial on this charge. The Petitioner was represented at this proceeding by J. Michael Bosnak, Esquire.¹ At the conclusion of the trial, the jury found the Petitioner guilty as charged. The Honorable Kristi L. Harrington, presiding circuit judge, sentenced the Petitioner to life imprisonment.

The Petitioner timely appealed his conviction and sentence to the South Carolina Court of Appeals. He was represented on appeal by Tricia A. Blanchette, Esquire. In an unpublished opinion, this Court affirmed the Petitioner's conviction and sentence. State v. Hillerby, 2013-UP-300 (S.C. Ct. App. filed July 3, 2013). The Petitioner did not pursue a further appeal to the Supreme Court.

On September 19, 2013, the Petitioner filed an Application for Post-Conviction Relief with the Berkeley County Clerk of Court. An evidentiary hearing into the matter was convened on September 8, 2015, before the Honorable Larry B. Hyman, Jr., presiding circuit judge. On January 21, 2016, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims.

The Petitioner filed a Rule 59(e), SCRCP, motion to alter or amend the Order of Dismissal on February 1, 2016. A hearing was convened on this motion on June 13, 2016, before Judge Hyman. On July 16, 2016, the PCR court filed an Order Denying Applicant's Motion to Alter or Amend. The Petitioner served his Notice of Appeal from both of the PCR court's orders on August 9, 2016, and the Supreme Court received the notice on August 11, 2016.

¹ On February 2, 2016, the Supreme Court issued an order placing defense counsel on interim suspension. In re Bosnak, 415 S.C. 332, 782 S.E.2d 123 (2016).

The Petitioner filed a Petition for a Writ of Certiorari with the Supreme Court on January 30, 2017. The State served its Return on May 31, 2017. The Supreme Court subsequently transferred the appeal to this Court. By order filed February 6, 2019, this Court granted the certiorari petition in part. The Petitioner now submits this Brief in support of his argument that the PCR court improperly denied his Application for Post-Conviction Relief.

STATEMENT OF FACTS PRESENTED AT TRIAL

In September 2008, the Petitioner lived with his girlfriend Jennifer in her home and with her two children: an eight-year-old daughter named Serena, and an almost two-year-old son (“the victim”). There were two other roommates who lived in Jennifer’s home: Brandi Mihill and Eric Riggins. The charge in this case arose out of Jennifer’s son’s death.

On September 14, 2008, the Petitioner, Jennifer, and Jennifer’s children went to the pool for several hours.² Jennifer testified that they returned to her home between 6:00 and 6:30 P.M., and that she went out after 7:00 P.M. with a friend named Jennifer Angel for several hours. App. p. 301, lines 2-21. When she returned, she woke up the Petitioner, who was sleeping on the couch. App. p. 302, line 22-p. 303, line 2. She checked on the victim’s baby monitor but did not go into his room. App. p. 303, lines 2-13. After checking on the victim’s baby monitor, she got into an argument with Brandi and Eric and then went to bed. App. p. 303, lines 14-18.

At approximately 10:00 A.M. the following morning, Jennifer checked on the victim for the first time. She found that he was cold and stiff and that there was blood on his nose and on his crib mattress. App. p. 304, line 3-p. 305, line 25. The Petitioner then called 9-1-1. App. p. 306, lines 8-22.

Dr. Nicholas Batalis conducted the autopsy of the victim on September 16, 2008. He concluded that the victim died of blunt force trauma to his head. App. p. 523, lines 20-25. Specifically, he testified that the victim had at least nine specific points of impact to his head that caused hemorrhaging, in addition to several other bruises to his face. App. p. 524, line 14-p. 525,

² The State presented testimony from several witnesses that the Petitioner yelled at and berated the victim while at the pool, and that neither the Petitioner nor Jennifer were paying attention to the victim at the pool. As a result, the victim fell into the pool repeatedly. See generally App. p. 230, line 6-p. 232, line 25; p. 238, line 6-p. 239, line 19. These actions did not cause the victim’s death; however, they did result in a charge of unlawful neglect of a child against Jennifer.

line 8. Dr. Batalis further testified that the injuries could have been caused by “a book, ... a fist ... or, alternatively, the child could have been pushed against something that the head could have struck against a doorway, a desk, many different ways.” App. p. 525, lines 16-20. The victim also had numerous markings over his entire body, but Dr. Batalis testified that these markings were not bruises but were likely caused by placing the victim’s body in a cooler or due to the victim’s eczema. App. p. 556, line 3-p. 558, line 8. Finally, Dr. Batalis testified that the victim died between two to twelve hours prior to the time when he was found. App. p. 523, lines 2-16.

The Petitioner gave varying accounts of his actions the night of the victim’s death. Initially, while at the scene, the Petitioner told the authorities that he noticed a bruise on the victim’s face after they left the pool and that the victim acted drowsy that evening, but he did not admit to striking the victim. App. p. 472, lines 4-14. Two days later, on September 17, 2008, the Petitioner told police that he struck the victim’s head with his knee by accident and that he may have also accidentally “clipped his head on the way to his crib and maybe again on his crib.” App. p. 478, line 22-p. 479, line 2. After he gave this second statement, the Petitioner was arrested for homicide by child abuse. App. 483, lines 14-20. The following day, after his bond hearing, the Petitioner gave a third statement where he admitted to striking the victim openhanded twice, with one of the blows knocking the victim to the floor. App. p. 484, lines 6-13; p. 490, lines 4-13. In a recorded jail phone call the Petitioner made to Jennifer on September 26, 2008, the Petitioner told Jennifer

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.

App. p. 1136, lines 2-6. At trial, the Petitioner testified that he did accidentally hit the victim's head with his leg.³ App. p. 635, line 25-p. 637, line 15. The Petitioner denied hurting the victim. App. p. 672, lines 4-24.

There was little to no forensic evidence recovered at Jennifer's home. However, of note, a paint roller handle was recovered from the floor in front of the victim's crib. App. p. 364, line 23-p. 365, line 14. The paint roller handle was tested for the presence of blood, but the test was negative. App. p. 412, line 4-p. 414, line 21. The paint roller handle was not tested for the presence of any other DNA. App. p. 424, lines 8-18.

The Petitioner's testimony was the focal point of the defense, as the only other witnesses that were called by the defense were John Williams, the Petitioner's stepfather and Roy Shoup, a friend of the Petitioner. The Petitioner's stepfather testified that the Petitioner was in off-and-on-again relationships with Jennifer and Melissa Georgoulis, who is the mother of the Petitioner's children. App. p. 606, line 18-p. 607, line 23. Shoup testified that he was present at the pool until approximately 3:15 P.M. and that the Petitioner appeared to be in a good mood that afternoon. App. p. 594, line 3-p. 595, line 6.

³ The Petitioner also gave another version of events during the PCR hearing. During that hearing, the Petitioner testified that the testimony he had given at the trial was false in part in that he did not strike the victim in any way the night of the victim's death. The Petitioner further testified that defense counsel convinced him to admit to striking the victim with his knee so his testimony would match at least one of the statements that he gave to police.

ARGUMENT

- I. The PCR court erred in concluding that defense counsel was not ineffective to investigate and present the testimony of a forensic pathologist inasmuch as the testimony of such an expert would have shown that the Petitioner did not kill the victim.**

A. How the Issue Arose Below

As noted above, Dr. Batalis, the forensic pathologist who conducted the autopsy of the victim, testified at trial that the victim died as a result of repeated blunt force trauma to his head and that these injuries could have been caused by a large object or a fist. App. p. 525, lines 16-20. He also testified that the additional markings all over the victim's body were not bruises but resulted either from placing the victim's body in a cooler or due to the victim's eczema. App. p. 556, line 3-p. 558, line 8. Dr. Batalis conducted the autopsy on September 16, 2008. App. p. 521, lines 23-25. He was board certified in forensic pathology on September 4, 2008, which was only twelve days prior to date of the autopsy. App. p. 1105.

In the Petitioner's Amended Application for Post-Conviction Relief, he argued that defense counsel was ineffective for failing to consult with a forensic pathologist prior to trial and for failing to investigate a defense that someone other than the Petitioner killed the victim. App. p. 962. In support of this allegation, the Petitioner presented the testimony of Dr. Michael Baden, a renowned forensic pathologist.⁴ Dr. Baden's ultimate conclusion was that the victim was not killed by an adult, but rather by a child:

[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.

⁴ Dr. Baden is the former chief medical examiner for New York City and has held many prestigious posts, including appointment as Chairman of the Forensic Pathology Panel of the U.S. Congress Select Committee on Assassinations, which reinvestigated the deaths of President John F. Kennedy and Dr. Martin Luther King, Jr., in the 1970s. He has conducted over 20,000 autopsies. See App. pp. 1078-1101.

App. p. 999, lines 19-24. Dr. Baden reached this conclusion because it was his opinion that the victim's injuries were caused by a narrow object that struck the victim more than fifty times, instead of being caused by the striking of a fist or of a large object. App. p. 977, line 12-p. 978, line 6. He further testified that these injuries were most consistent with an older child striking the victim repeatedly, "based on hundreds of child abuse cases I've investigated." App. p. 978, lines 11-14. Serena, the victim's older sister, was also present in the home with the Petitioner and the victim the night the victim suffered his injuries. Dr. Baden also testified that a paint roller handle found near the victim's crib would have been the type of object that could have caused those injuries, and that he felt that Dr. Batalis should have compared the paint roller handle to the victim's injuries. App. p. 996, line 8-p. 997, line 15. Moreover, Dr. Baden testified that the injuries to the victim were inconsistent with any of the various methods of striking the victim given by the Petitioner in his statements and in his testimony at trial. Specifically, Dr. Baden testified that the injuries to the victim were not caused by any of the following: (1) an open strike with a palm; (2) a fist; (3) a blow from a large object such as a door; or (4) a strike by an adult's knee. App. p. 1007, lines 2-15. Finally, Dr. Baden testified that Dr. Batalis' was incorrect to conclude that the markings on the victim's body were caused by settling in a cooler, as such markings would be much larger and would not result in "local circular bruises." App. p. 998, line 23-p. 999, line 7.

Both the Petitioner and his mother Vicki Williams testified that they believed that defense counsel was going to retain a medical expert to challenge Dr. Batalis' conclusions, and that they thought this would be an essential aspect of the Petitioner's defense at trial. App. p. 1031, line 17-p. 1032, line 10 (Petitioner); p. 1044, line 18-p. 1045, line 20 (Williams). Defense counsel testified that he did not consult with a forensic pathologist prior to trial. App. p. 1067, lines 17-20. He further testified that he consulted with a pediatrician, Dr. Betsy Gibbs, who told him that she

believed that the markings on the victim's body were bruises, but that she believed that the Petitioner caused the bruising. App. p. 1054, line 20-p. 1056, line 11. Defense counsel testified that he was convinced after he heard the Petitioner's recorded phone call with Jennifer that the Petitioner would be convicted if he proceeded to trial. App. p. 1062, line 17-p. 1063, line 12.

The PCR court denied relief on the Petitioner's allegations, concluding that Dr. Baden's "account of the events of victim's death [was] not credible considering the evidence in the case." App. p. 1165. The PCR court then detailed Dr. Batalis' findings before stating that Dr. Baden's findings were "simply not plausible based on the evidence" 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 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 death could not have occurred within the two hours, "as testified to by Dr. Batalis," a review of the record shows Dr. Batalis actually testified that it could have been twelve hours before victim's body was found. Based on the aforementioned, this Court finds counsel was not ineffective for not retaining or calling a forensic expert, such as Dr. Baden, in this case because this Court does not find that victim's death could have been caused by anything other than the blunt force trauma to the head, which both experts agreed upon.

App. pp. 1166. The PCR court also found that the Petitioner could not demonstrate prejudice because Dr. Baden's testimony only "alluded to the conclusion that these injuries were caused by a small child, not an adult" and "Applicant presented no evidence whatsoever at the PCR hearing

that anyone other than Applicant injured the child.” App. p. 1167. The PCR court further concluded that the Applicant’s failure “to produce any witnesses, namely Serena, which tended to show that anyone other than Applicant caused victim’s death” required dismissal of his claim. App. p. 1167. The Petitioner now claims that these findings are manifestly erroneous and should be reversed by this Court.

B. Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the petitioning party must show that but for counsel’s errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court’s factual findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). A PCR court’s legal findings are afforded no deference and questions of law are reviewed *de novo*. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018). “The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law.” Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

C. Discussion

As with any claim of ineffective assistance of counsel, the Petitioner must meet both prongs of Strickland in order to be entitled to relief: deficient performance by defense counsel and prejudice resulting from that deficient performance. The Petitioner will address each prong in turn.

1. Defense Counsel's Performance Was Deficient

As a general rule, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, *supra*, 446 U.S. at 691. Both this Court and the Supreme Court have recognized that the failure to investigate and to present favorable expert witness testimony at trial constitutes ineffective assistance of counsel. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008); Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

Initially, the Petitioner would note that the PCR court did not discuss Strickland's performance prong in great detail in its order. Instead, the PCR court's findings appear to concentrate largely on Strickland's prejudice prong because the PCR court's focus was on Dr. Baden's findings and whether or not they would have benefited the defense at trial.⁵ The PCR court's findings do not include any discussion of defense counsel's performance prior to or during trial, nor do they address the sufficiency or insufficiency of defense counsel's efforts to challenge the forensic evidence that the State intended to offer at trial. Nevertheless, the Petitioner submits that the PCR court's findings on the performance prong, such as they are, are unsupported by any probative evidence.

⁵ The Petitioner would note that the PCR court appeared to conflate the terms "deficient" and "ineffective" in its order. See App. p. 1166 ("[E]ven 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 prove no resulting prejudice in this case.")

Defense counsel was under a duty to investigate through consulting with a forensic pathologist for several reasons. First, this case involved a homicide where there were several potential individuals—at least four adults and one child—in the home who could have killed the victim that night. Consultation with a forensic pathologist would have been necessary to confirm or deny Dr. Batalis’ findings. This is particularly important given the nature of the offense charged, as any offense that carries a life sentence obviously imposes significant obligations on defense counsel. Second, defense counsel was aware that the Applicant’s various statements to the authorities regarding the injuries that he caused to the victim were inconsistent with Dr. Batalis’ findings. Defense counsel should have consulted with a forensic pathologist to determine if there was any defensive avenue available to show that the Petitioner gave a false confession, particularly since arguing that the Petitioner gave a false confession was part and parcel of defense counsel’s defense strategy. See App. p. 783, lines 9-12 (“And then we’ve got these bits and pieces of these false confessions that are all over the place, you’ll convict him. That’s what this case is based on from the State. That’s all.”) Third, defense counsel should have known that the autopsy report would be central to the State’s case, given that the State needed to prove that the victim died from blunt force trauma committed by the Petitioner. It is axiomatic that an attorney is under a duty to investigate matters that form the heart of the State’s case. See generally Rompilla v. Beard, 545 U.S. 374, 394 (2005) (O’Connor, J., concurring) (concluding that the defense attorneys’ performance was deficient for failing to investigate a matter that “would be at the very heart of the *prosecution’s* case”) (emphasis in original).

Despite his duty to consult with a forensic pathologist, defense counsel did not do so. As he admitted before the PCR court, he never spoke to a forensic pathologist prior to trial. See App. p. 1067, lines 17-20. While defense counsel did consult with a pediatrician—Dr. Gibbs—prior to

trial, a pediatrician is not a forensic pathologist. Forensic pathologists are specifically trained to determine how injuries occurred in a way that other medical practitioners, such as pediatricians, are not. Furthermore, the necessity for consultation with a forensic pathologist was only heightened, not lessened, by what Dr. Gibbs told defense counsel. Defense counsel testified that Dr. Gibbs informed him that the injuries to the victim's body were bruises. App. p. 1056, lines 1-4 ("She had some disagreements—probably got along a little bit more with Dr. Baden—about some of these bruises. [Dr. Batalis] claimed they weren't bruises, she said they were bruises.") Once he was armed with that information, it was imperative for defense counsel to investigate how further to discredit Dr. Batalis' opinions. This is particularly true because defense counsel knew that the Petitioner's various statements were already inconsistent with Dr. Batalis' opinion of how many bruises had been inflicted on the victim. It would be exceptionally difficult to reconcile the Petitioner's statements with over fifty bruises to the victim. Instead of conducting any further investigation; specifically, instead of consulting with an expert in Dr. Batalis' field, defense counsel did nothing. Defense counsel's lack of action and investigation constituted deficient performance. Consequently, to the extent that the PCR court concluded that defense counsel was not deficient for failing to consult with a forensic pathologist prior to trial, this conclusion is unsupported by any probative evidence.

2. Defense Counsel's Deficient Performance Prejudiced the Petitioner

Turning to Strickland's prejudice prong, the Petitioner contends that the PCR court's findings are both controlled by an error of law and unsupported by any probative evidence. It is important to note initially that the PCR court found that Dr. Baden's explanation of the victim's death not credible, and that the PCR court did not find that Dr. Baden was not credible. Indeed, the PCR court noted repeatedly that Dr. Baden was a "renowned expert forensic pathologist." PCR

App. p. 1165. Therefore, although this Court must give “great deference to a PCR judge’s findings where matters of credibility are involved,” the PCR court’s findings are not centered on the credibility of Dr. Baden, only whether or not Dr. Baden’s account of the victim’s death was believable. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). Even if the PCR court’s conclusion could be construed as a finding that the Dr. Baden was not credible, the Petitioner submits that, for the reasons that follow, those findings should be reversed. See id. at 271, 701 S.E.2d at 740 (reversing the denial of PCR “[e]ven considering the PCR judge’s credibility findings”); see also Garren v. State, 423 S.C. 1, 16, 813 S.E.2d 704, 712 (2018) (footnote 4) (“While we acknowledge the deference owed the PCR court, deference to a credibility finding is not the issue. The lack of evidence is.”)

In this case, the PCR court essentially concluded that the Petitioner could not demonstrate prejudice because Dr. Baden’s testimony was different from Dr. Batalis’ findings, and the PCR court believed Dr. Batalis over Dr. Baden. However, this was not a proper Strickland prejudice analysis. Instead, the PCR court’s role was to determine whether or not there was a reasonable probability that the result of the trial would have been different had Dr. Baden testified. See McKnight, 378 S.C. at 43-46, 661 S.E.2d at 359-360 (finding prejudice where a defense expert refuted the cause of the victim’s death for homicide by child abuse but was not called by the defense). The proper inquiry requires a review of Dr. Baden’s testimony in the context of the State’s case at trial. The PCR court did not perform that inquiry because it simply substituted its opinion of the medical evidence for Dr. Baden’s, thereby abdicating its role in properly applying Strickland’s prejudice prong.

Reviewing Dr. Baden’s testimony in the context of the case, it is clear that the Petitioner was prejudiced by defense counsel’s failure to consult with a forensic pathologist. The State’s case

against the Petitioner was premised on the theory that the Petitioner beat the victim to death. Dr. Baden's testimony comprehensively defeats that theory in two ways. First, according to Dr. Baden, all of the injuries to the victim were consistent with an individual repeatedly poking the victim with a blunt object. He concluded that the individual who poked the victim was most likely a small child, given his vast experience dealing with such injuries. There was a small child—Serena, the victim's sister—who lived in the home with the victim. Second, according to Dr. Baden, none of the injuries the Petitioner confessed to inflicting were consistent with the injuries to the victim. App. p. 1007, lines 2-15. This testimony would have refuted one of the strongest aspects of the State's case: that the Petitioner admitted to killing the victim.

The Petitioner would also note that this State's jurisprudence on circumstantial evidence marshals in favor of a finding of prejudice. As the Supreme Court has explained, "circumstantial evidence carries the same weight as direct evidence." State v. Logan, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013); see also State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). Moreover, circumstantial evidence requires that the jury conduct the following critical inquiry:

We have previously observed that this process requires two steps: "After concluding that a particular fact is true, the individual juror is called upon to ask: First, can I infer guilt from that fact? Second, if so, is there any reasonable explanation other than guilt?"

Logan, 405 S.C. at 98, 747 S.E.2d at 451 (quoting Grippon, 327 S.C. at 87-88, 489 S.E.2d at 466). Here, the only explanation provided at trial to the jury for the victim's death was the Petitioner's actions. There were no other explanations that the jury could have seized upon to conclude that there was "any reasonable explanation other than guilt" for the injury. Id. By contrast, Dr. Baden's testimony would have provided a readily available alternative explanation for the jury: that the Petitioner was innocent of the charges against him because the victim's sister killed the victim.

Additionally, several of the PCR court's findings regarding prejudice and third-party guilt are directly refuted by the record. The PCR court held that the Petitioner could not show prejudice because he did not present Serena's testimony "to show that anyone other than Applicant caused victim's death." App. p. 1167. This finding is incorrect, as Dr. Baden's testimony shows that a child caused the victim's death. It was not necessary to present Serena's testimony on this point since "circumstantial evidence carries the same weight as direct evidence." Logan, 405 S.C. at 97, 747 S.E.2d at 451. Similarly, the PCR court concluded that "Applicant presented no evidence whatsoever at the PCR hearing that anyone other than Applicant injured the child." App. p. 1167. Again, this finding is directly contradicted by Dr. Baden's testimony that "it is not likely that any adult caused the death of the child." App. p. 999, lines 19-20. Since the Petitioner was an adult at the time of the victim's death, Dr. Baden's testimony is clearly evidence that the Applicant did not injure the victim. Lastly, the PCR court concluded that "Dr. Baden's testimony that these injuries were caused by a 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." App. p. 1168. Here, the PCR court actually included the information that directly refuted its conclusion within its finding, as Dr. Baden's testimony is the evidence that tended "to show someone other than Applicant caused the victim's death." App. p. 1168.

3. Relief Is Warranted

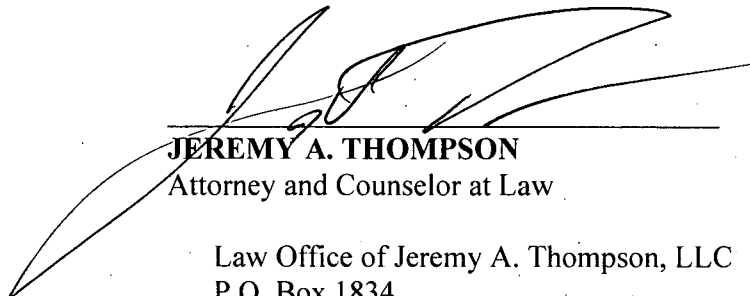
In conclusion, defense counsel failed to consult with, and present the testimony of, a forensic pathologist. His failure to do so constitutes unquestionable deficient conduct. It is Dr. Baden's expert opinion that the Petitioner is innocent of the offense he is charged with committing. The importance of Dr. Baden's testimony to a jury cannot be understated. He is perhaps the world's foremost forensic pathologist and he believes that the Petitioner did not even strike, much less kill,

the victim. There is certainly a reasonable probability that the jury would have acquitted the Petitioner instead of convicting him had the jury heard that an expert of Dr. Baden's renown found that the Petitioner did not kill the victim. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694. The Petitioner respectfully submits that no reviewing court could be confident in a jury's conviction of the Petitioner were Dr. Baden's testimony to be presented. This is especially true given that Dr. Batalis had been board-certified in forensic pathology for only twelve days prior to conducting the autopsy of the victim. Instead of reaching this conclusion, the PCR court substituted its own disbelief of Dr. Baden's testimony for a proper Strickland prejudice analysis, and chose to ignore Dr. Baden's testimony when considering whether or not the Petitioner presented evidence that he did not kill the victim. These findings were unquestionably erroneous. Consequently, the PCR court's conclusions are controlled by an error of law, unsupported by any probative evidence, and should be reversed by this Court.

CONCLUSION

The lower court's decision denying Post-Conviction Relief should be reversed. The Petitioner's conviction for homicide by child abuse should be vacated, and this case should be remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully submitted,



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