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**Sep 03 2020**  
**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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JUSTIN RYAN HILLERBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001666

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Appeal from Berkeley County

Honorable Larry B. Hyman, Jr., Circuit Court Judge

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Opinion No. 5767

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PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Justin R. Hillerby respectfully petitions the Court for a rehearing of its Opinion No. 5767 issued on August 19, 2020 based upon the following points overlooked or misapprehended by the Court:

**“As to whether trial counsel was ineffective for not consulting with a forensic pathologist and presenting a pathologist’s testimony at trial.”**

Trial counsel freely admitted that he did not confer with a forensic pathologist before Petitioner’s trial. Petitioner provided counsel with funds in order to consult with interrogation and medical experts. App. 1031 l. 17 – 1032 l. 10. Petitioner was advised that counsel spoke

with one individual, presumably Dr. Betsy Gibbs. Id. Trial counsel did mention “that he was going to have [a forensic pathologist],” but Petitioner was never told of any additional details. At trial, Petitioner was surprised that no experts were called on his behalf. App. 1033 l. 18 – 1034 l. 8. He testified that he was his only defense. Id.

Petitioner’s mother reiterated her son’s understanding of what experts would be hired. She discussed with trial counsel the details of his representation:

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

App. 1045 ll. 4 – 9 (emphasis added).

Trial counsel admitted that he never consulted a forensic pathologist, however. App. 1067 ll. 11 – 20. He spoke with Dr. Ronald Orlowski, a DNA expert, and Dr. Betsy Gibbs. App. 88 l. 15 – 93 l. 24. At the time of the evidentiary hearing, counsel was unsure what type of doctor Dr. Gibbs was. App. 1067 ll. 11 – 20. He recalled that Dr. Gibbs was used frequently by the solicitor’s office in child abuse cases. App. 1055 ll. 1 – 12. Unsurprisingly, Dr. Gibbs, who was not a forensic pathologist, would not have served as a favorable witness. App. 1055 l. 14 – 1056 l. 11. After learning that her testimony would not assist Petitioner, it does not appear from the record that trial counsel consulted with any additional medical experts. Doing so would have made a difference in Petitioner’s case, and the failure to consult and call a forensic pathologist at Petitioner’s trial in a homicide by child abuse case constituted deficient performance.

Dr. Michael Baden’s impeccable credentials were noted by this Court. In addition to being qualified and credible, he stated at the outset of his testimony at the PCR evidentiary hearing that his “role is, regardless of whether asked by the prosecution or defense, to give the best scientific evaluation of each death that a forensic pathologist is trained to investigate.” App.

974 ll. 21 – 24. As recognized by this Court, his opinion to a reasonable degree of medical certainty was that the baby died of multiple blunt force impact injuries. App. 976 ll. 15 – 21. Based on his expertise and experience, Dr. Baden opined that the injuries were caused “[n]ot by a hand, not by a fist, but by a narrow object.” App. 977 l. 12 – 978 l. 21; App. 985 ll. 20 – 22. He confirmed that all of the injuries were consistent with poking. App. 986 ll. 8 – 22. Reviewing the photographs from trial, Dr. Baden indicated that the injuries could not have been caused by a fist, for a fist “would have [left] a more diffuse nonspecific bruise.” App. 984 ll. 16 – 22. His testimony was unequivocal:

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

And so, in my opinion, based on hundreds of child abuse cases I’ve investigated, this is not at all the pattern of an adult and is the pattern of a child.

App. 978 ll. 2 – 14.

Notably, Dr. Baden distinguished the decedent’s injuries from the conduct Petitioner mentioned on the telephone during the jail call and in his statements to police. On cross-examination at the evidentiary hearing, Dr. Baden testified that “[n]one of the injuries I think here I would say is typical of a slap.” App. 1002 ll. 10 – 17. When pressed by counsel for the state about blunt force trauma, Dr. Baden proved why Petitioner suffered prejudice based upon counsel’s failure to confer with and call a forensic pathologist at trial:

Q: Do you agree with Dr. Batalis that there is blunt force trauma in this case?

A: Yes

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

A: Yes.

Q: Okay. A hand?

A: Yes.

Q: An adult's hand?

A: Yes. **Blunt force in general, but not this particular blunt force injury.**

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

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

App. 1002 l. 18 – 1003 l. 18 (emphasis added). In addition to reflecting the importance of having an expert witness and proving how useful they can be, Dr. Baden's above remarks illustrate the testimony that a forensic pathologist would have given at Petitioner's trial. The notion that "this particular blunt force injury" is not the result of an adult's hand contravenes the holding of no prejudice based on Petitioner's statements.

Leaving no doubt as to both his conclusion and the benefit of having an expert at trial, Dr. Baden distanced himself from the suggestion that he was an expert-for-hire and instead proved the efficacy of hiring a forensic pathologist in this case:

My purpose in coming here is to testify about the science of what happened here, and ... I think that that Mr. Hillerby could not have done - - produced these injuries, because of the nature of the injuries, **regardless of what he may have said**. And that's my opinion, just on the scientific basis of forensic pathology.

App. 1004 ll. 13 – 19 (emphasis added). Near the conclusion of his testimony, Dr. Baden made it clear that the injuries in this case were inconsistent with the punching, slapping, or striking by a male adult. App. 1007 ll. 2 – 15.

A forensic pathologist such as Dr. Baden would have reviewed Dr. Batalis' report. A forensic pathologist may have suggested that trial counsel determine when Dr. Batalis became certified in forensic pathologist, as a private investigator did for Petitioner at PCR. App. 1011 l. 6 – 1012 l. 19. Questioning Dr. Batalis at trial about how he had not been certified for very long before conducting the autopsy, in addition to having an expert such as Dr. Baden repudiate some of his findings, would have been an effective attack on Dr. Batalis' credibility and more importantly, his findings. App. 988 l. 24. – 999 l. 7. Had an expert such as Dr. Baden been consulted or called to testify at Petitioner's trial, the jury would have been presented with an alternative theory about the child's injuries and cause of death. Rather than jumping straight into who caused the death, testimony like Dr. Baden's which suggested that multiple pokes or prods led to the child's death would have forced the jury to consider what caused the death before it contemplated who was responsible.

Trial counsel's decision to characterize the jail phone call as a confession belies his role as a zealous advocate. App. 1063 ll. 6 – 12. Further, trial counsel's classification as a piece of evidence as harmful to the case does not replace a full discussion of prejudice as it relates to the actual evidence. Although it complicated the case, by no means was Petitioner's statement that "I smacked him, I didn't smack him that hard" a confession to the charge of homicide by child abuse. App. 1136 ll. 2 – 3. Just like buying illegal drugs is not tantamount to trafficking them, a jail phone call wherein Petitioner tells the decedent's mother that he struck the child is not an admission of guilt to the charge of homicide by child abuse, especially in light of Dr. Baden's

testimony. A driver who consumes one beer is not necessarily driving under the influence of alcohol such that a conviction for DUI could be sustained on such an admission alone. Similarly, the statement by Petitioner is not overwhelming evidence of guilt.

A person is guilty of homicide by child abuse if the person:

- (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.

S.C. Code Ann. § 16-3-85(A). Through Dr. Batalis, the state was able to link Petitioner's alleged actions to the child's death. If a forensic pathologist had been called to testify at Petitioner's trial, the injuries causing the child's death would have been explained differently. If a jury had heard testimony similar to Dr. Baden's—namely, that the injuries were inconsistent with being struck by an adult's hand—there is a reasonable likelihood that the outcome of the trial would have been different.

Presumably drafted by counsel for Respondent<sup>1</sup>, the Order of Dismissal applied an incorrect standard regarding Dr. Baden's credibility and the resulting analysis is insufficient to deny Petitioner relief. In the Order of Dismissal, the PCR judge described Dr. Baden's testimony as "not credible" and as expected, found trial counsel "very credible." App. 1157. There was no credibility finding regarding Petitioner's mother's testimony that trial counsel informed her that he was going to speak with a forensic pathologist.

It appears that the PCR court applied an impossible standard to Dr. Baden's credibility. Seemingly suggesting that only the individual who performed the autopsy can have a credible opinion, the PCR court listed as its first reason for not believing Dr. Baden's testimony the fact

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<sup>1</sup> The PCR judge requested proposed orders from both parties at the conclusion of the evidentiary hearing. App. 1075 l. 25 – 1076 l. 6. At the hearing on Petitioner's Motion to Alter or Amend under Rule 59(e), SCRPC, the PCR judge also asked counsel for the state to "submit a little order" denying the motion. App. 1182 ll. 24 – 25.

that “Dr. Baden never performed an autopsy” on the decedent. App. 1166. Failing to recognize Dr. Baden’s own testimony that forensic pathologists routinely operate in that fashion, without performing the autopsy, the PCR court minimized his credibility by finding that Dr. Baden “only relied on pictures and accounts from others, years after the autopsy was performed.” Such a standard implies that no expert, perhaps even one hired for trial purposes, could be credible. Because the PCR court’s first reason for not finding Dr. Baden credible fails to account for the methods and medical expertise employed by Dr. Baden, as discussed at length at the evidentiary hearing, the PCR court erred. The remaining reasons sidestep Dr. Baden’s impressive credentials for the sake of convenience. Notably, there were no cases cited in the Order of Dismissal regarding deficiency. App. 1165 – 1167.

An expert forensic pathologist in this case would have provided findings to counsel and helped him morph his trial strategy. This Court noted “there was no evidence presented at trial that Victim’s sister was ever hostile to Victim.” Counsel had no reason to question any of the witnesses about that, because he was unaware of the actual details of the child’s death. Had counsel consulted with someone such as Dr. Baden, he could have developed his trial strategy around his expert’s opinions. Without expert testimony, there existed no reason to know that evidence such as that should have been elicited.

In Geter v. State, the South Carolina Supreme Court affirmed the denial of PCR based upon overwhelming evidence of guilt after holding that counsel’s failure to object to the repeated reference of Geter’s prior incarceration was deficient performance under an objective standard of reasonableness. 305 S.C. 365, 367, 409 S.E.2d 344, 345-6 (1991). Notably different from that case when compared to Petitioner’s was testimony from multiple witnesses regarding Geter’s actions as well as corroborating medical evidence. Id. at 367-8, 409 S.E.2d at 346.

In Petitioner's case, he provided three statements to police as well as made an incriminating remark during the jail call. Testimony from witnesses at trial who knew Petitioner contradicted the contention that Petitioner would have injured the child. The child's grandmother testified that she heard Petitioner say that the child ran into his knee. App. 219 l. 14 – 220 l. 10. Eric Riggins, one of the roommates living in the home, testified that he never saw Petitioner strike the child. App. 269 ll. 3 – 6. Brandi Mihill, the other roommate, recalled hearing Petitioner tell the child's mother that he put the child in the corner for spilling a drink. App. 279 ll. 13 – 23. The child's mother reiterated that Petitioner disciplined the children that way. App. 317 l. 13 – 318 l. 5. While on the stand, she remarked that their parenting style was to put the children in the corner. Id. Like Riggins, the child's mother never saw Petitioner strike either of her children. Id.; App. 319 ll. 4 – 10.

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), the South Carolina Supreme Court held that counsel was deficient for failing to prepare an adequate defense, including the failure to call an expert witness whose testimony supported the defense. Defense counsel in that case called Dr. Sandra Conradi, a pathologist at MUSC, to testify as to the cause of death in a homicide by child abuse case. Id. at 42, 661 S.E.2d at 358. Dr. Conradi undercut the defense's theory of the case, and the state took advantage of her testimony. Id. at 42-3, 661 S.E.2d at 358-9. When a mistrial was granted following jurors' outside research on medical topics, Dr. Conradi was again utilized for the defense's case. Id. Dr. Conradi again ruled out all natural causes of death. Id. On PCR, McKnight argued that counsel was ineffective for calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense, and the Court agreed. Id. at 43, 661 S.E.2d at 359.

Regarding prejudice, the Court held “that there is a reasonable probability that this deficiency prejudiced McKnight.” Id. at 45, 661 S.E.2d at 360. The reasoning relied on by the Court can be applied here:

The methodology used by the *only* expert witness for the defense in determining the cause of fetal death mimicked that of the State’s star expert, and in this way, Dr. Conradi’s testimony primarily served to bolster the State’s theory of the case excluding all other potential causes of death in order to conclude that cocaine caused the stillbirth.

Id. (emphasis in original). In the matter at hand, Dr. Batalis was the *only* expert the jury heard from in determining the cause of death. The McKnight Court referred to counsel’s error as two-fold, noting that counsel erred “in calling an expert witness whose testimony was known to have previously been used to bolster the State’s case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available.” Id.

Regarding the prejudice prong of a PCR case, an applicant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

Had counsel employed a forensic pathologist at trial, he could have discredited Dr. Batalis and destabilized the state’s theory of the case, thereby weakening the probative value of Petitioner’s statements. The prejudice resulting from counsel’s failure to consult with a forensic pathologist is more than just what would have been conveyed to a jury during the defense’s case-in-chief. In addition to the testimony that an expert would have provided at trial, the knowledge and understanding of complicated medical matters that counsel would have gained from

consulting a forensic pathologist would have changed the defense's strategy entirely. Armed with an expert witness, counsel could have more effectively cross-examined Dr. Batalis. The presentation of medical evidence would not have been as one-sided as it was; the trial would have been more fair. Instead, the jury was presented with medical opinions from only the state. Petitioner and his mother were both under the impression that counsel was going to consult with a forensic pathologist; funds were forwarded to pay that cost. Counsel's failure to do so, especially in a homicide by child abuse case, constituted deficient performance and prejudiced Petitioner.

Respectfully Submitted,

s/Taylor D. Gilliam  
TAYLOR D. GILLIAM  
Appellate Defender

This 3rd day of September, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing has been served upon opposing counsel this 3rd day of September, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and Justin Ryan Hillerby, #339543, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.

s/Taylor D. Gilliam

Taylor D. Gilliam

Appellate Defender

ATTORNEY FOR APPELLANT