STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Honorable Larry Hyman, Circuit Court Judge

Opinion No. 5767 (S.C. Ct. App. Filed August 19, 2020)

2013-CP-08-02121

JUSTIN RYAN HILLERBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001666

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was filed on September 3, 2020 and denied by the Court of Appeals on September 21, 2020. In accordance with this Court's Amended Order Regarding the Operation of the Appellate Courts During the Coronavirus Emergency dated May 29, 2020, an appendix under Rule 242, SCACR, is not being filed.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the PCR court, where trial counsel provided ineffective assistance by failing both to consult with a forensic pathologist and to present the testimony of a forensic pathologist at trial, where the testimony would have shown that Petitioner did not kill the decedent?

STATEMENT OF THE CASE

On December 17, 2008, Petitioner was indicted by a Berkeley County grand jury on the charge of homicide by child abuse. App. 955 – 956. He proceeded to trial before the Honorable Kristi L. Harrington on February 22, 2010. App. 1. J. Michael Bosnak represented Petitioner; Anne Williams and Dori Biagianti appeared on behalf of the state. The jury found Petitioner guilty as indicted. App. 832 ll. 1 – 5. Judge Harrington sentenced him to life imprisonment. App. 841 ll. 13 – 16.

Petitioner's conviction was affirmed. State v. Hillerby, No. 2013-UP-300 (S.C. Ct. App. filed July 19, 2013). He then filed an application for post-conviction relief on September 19, 2013. App. 941. It contained allegations of ineffective assistance of counsel. The state made its Return on or about December 30, 2014. App. 949 – 953. An amended application for post-conviction relief was filed on August 31, 2015. App. 962.

An evidentiary hearing on the PCR application was held on September 8, 2015 before the Honorable Larry Hyman. App. 965. Jeremy Thompson represented Petitioner, and Rutledge Johnson appeared on behalf of the state. Judge Hyman heard from six witnesses, and numerous exhibits were entered into evidence. At the conclusion of the hearing, Judge Hyman requested proposed orders from both parties. App. 1075 l. 25 – 1076 l. 6.

An Order of Dismissal was filed on January 21, 2016. App. 1155. The PCR court found that Petitioner failed to meet his burden of proof. App. 1167. PCR counsel filed a motion to alter or amend under Rule 59(e), SCRCP, on February 1, 2016. App. 1172. A hearing on the motion occurred on June 13, 2016 with the same counsel before Judge Hyman. App. 1177. The motion was denied at the conclusion of the hearing. App. 1182 ll. 16 – 25. The denial was

reduced to written form by way of an Order Denying Applicant's Motion to Alter or Amend filed July 22, 2016. App. 1185 – 1186.

PCR Counsel Thompson filed a Notice of Appeal on August 9, 2016. A Petition for Writ of Certiorari was filed with this Court on January 30, 2017. The state filed its Return on May 31, 2017. Counsel Thompson filed a Reply on July 6, 2017. This matter was then transferred to the Court of Appeals on October 30, 2017.

Certiorari was granted by the Court of Appeals on February 6, 2019. Counsel Thompson filed the Brief of Petitioner on June 6, 2019. The state filed its Brief of Respondent on October 10, 2019. Counsel Thompson withdrew from the case after accepting employment with the Appellate Division of the Federal Public Defender's Office.

The Court of Appeals issued its opinion affirming the PCR court on August 19, 2020. The undersigned filed a Petition for Rehearing on September 9, 2020 which was denied on September 21, 2020.

This petition follows.

ARGUMENT

The Court of Appeals erred in affirming the PCR court, where trial counsel provided ineffective assistance by failing both to consult with a forensic pathologist and to present the testimony of a forensic pathologist at trial, where the testimony would have shown that Petitioner did not kill the decedent.

Relevant facts

In September 2008, Petitioner lived with his girlfriend, Jennifer, in her home and with her two children: an eight-year-old daughter and an almost two-year-old son. Two other individuals also lived with them: Brandi Mihill and Eric Riggins. Petitioner was indicted following the son's death.

On September 14, 2008, Petitioner, Jennifer, and Jennifer's children went to a pool for several hours. Jennifer testified that they returned 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. 301 ll. 2 – 21. When she returned, she woke up Petitioner, who was asleep on the couch. App. 302 l. 22 – 303, l. 2. She checked her son's baby monitor, spoke with the roommates Brandi and Eric, and then went to sleep. App. 303 ll. 14 – 18.

Around 10:00 a.m. the next morning, Jennifer checked on her son. She found that he was cold and stiff and that there was blood on his nose and on his crib mattress. App. 304 l. 3 – 305 l. 25. She then called 911. App. 306 ll. 8 – 22.

Two days later, Dr. Nicholas Batalis conducted the autopsy of the decedent. He concluded that the cause of death was blunt force trauma to the head. App. 523 ll. 20 – 25. Dr. Batalis became board certified in forensic pathology on September 4, 2008, only twelve days prior to the autopsy. App. 1105. He testified that the decedent had at least nine specific points

of impact to his head which caused hemorrhaging, in addition to several bruises on his face. App. 524 l. 15 – 525 l. 8. Dr. Batalis offered possible examples of blunt force trauma: "it could be a book, it could be a fist, and … alternatively, the child could have been pushed against something that the head could have struck against a doorway, a desk, many different ways." App. 525 ll. 9 – 20. Dr. Batalis testified that the child likely died between two and twelve hours before he was found. App. 523 ll. 2 – 19.

Petitioner gave varying accounts of his actions the night the decedent passed. Initially, while at the scene, Petitioner told law enforcement he noticed a bruise on the child's face after leaving the pool and that the child acted drowsy that evening. He did not admit to striking the child. App. 472 ll. 4 – 14. On September 17, 2008, Petitioner told police that he accidentally struck the child's head with his knee and that he also may have accidentally "clipped his head on the way to his crib and maybe again on his crib." App. 478 l. 22 – 479 l. 2. After providing this second statement, Petitioner was arrested for homicide by child abuse. App. 483 ll. 14 – 20.

After his bond hearing, Petitioner gave a third statement wherein he admitted to striking the child with an open hand twice, with one of the blows knocking the child to the floor. App. 484 ll. 6 – 13; App. 490 ll. 4 – 13. Petitioner was recorded on a telephone call with Jennifer while in jail. During that conversation, Petitioner stated:

> 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. 1136 ll. 2 – 6. Petitioner testified in his defense at trial. He admitted to accidentally striking the child's head with his leg.[1] App. 635 l. 25 – 637 l. 15. Notably, he denied hurting the child. App. 672 ll. 4 – 24.

Petitioner was convicted largely upon his statements. There was little to no forensic evidence recovered at the home. A paint roller handle was recovered from the floor near the child's crib. App. 364 l. 23 – 365 l. 14. The handle was tested for blood, but the test was negative. App. 412 l. 4 – 414 l. 21. No DNA tests were performed on the handle. App. 424 ll. 8 – 18.

In Petitioner's amended application for post-conviction relief, he contended that trial 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 Petitioner killed the child. App. 962. At the PCR evidentiary hearing, Petitioner presented the testimony of Dr. Michael Baden, a renowned forensic pathologist.[2] Without objection, he was qualified as an expert in the field of forensic pathology. App. 974 l. 25 – 975 l. 5. 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.

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[1] Petitioner offered a different version of what transpired at the PCR evidentiary hearing. There, he suggested that his trial testimony was partially untrue in that he did not strike the child in any way the night of the child's death. App. 1033 ll. 2 – 17; App. 1036 ll. 8 – 22.

[2] Dr. Baden is the former chief medical examiner for New York City and has held many prestigious positions, including Chairman of the Forensic Pathology Panel of the U.S. Congress Select Committees on Assassinations, which reinvestigated the deaths of President John F. Kennedy and Dr. Martin Luther King, Jr, in the 1970's. He has conducted over 20,000 autopsies. App. 1078 – 1101.

Dr. Baden's ultimate conclusion was that the child was not killed by an adult, but rather 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.

App. 999 ll. 19 – 24.

It was Dr. Baden's opinion that the child's injuries were caused by a narrow object which struck the child more than fifty times, rather than a fist or large object. App. 977 l. 12 – 978 l. 6. He testified that, "based on hundreds of child abuse cases [he has] investigated," the child's injures were most consisted with an older child striking the younger child repeatedly. The child's older sister was also present in the home with Petitioner and the child the night of the child's death.

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.

Dr. Baden also testified that the paint roller handle would have left marks consistent with the injuries shown in the child's autopsy. App. 996 l. 8 – 997 l. 15. He pointed out that Dr. Batalis should have compared the handle to the child's injuries. Id.

Dr. Baden also testified that the child's injuries were not consistent with the punch of an adult male, the slap of an adult male, a strike by the knee of an adult male, or the striking of the child's head on a wall by an adult male. App. 1007 ll. 2 – 24. Additionally, Dr. Baden refuted Dr. Batalis' conclusion that the markings on the child's body were caused by settling in a cooler, noting that such markings would be much larger and would not result in "local circular bruises." App. 998 l. 23 – 999 l. 7.

At the PCR hearing, both Petitioner and his mother, Vicki Williams, indicated that they were under the impression that trial counsel was going to retain a medical expert to challenge Dr. Batalis' conclusions, and they believed this was going to be an essential aspect of Petitioner's defense at trial. App. 1031 l. 17 – 1032 l. 10; App. 1044 l. 18 – 1045 l. 20. Ms. Williams confirmed her son's testimony that trial counsel was supposed to consult with a forensic pathologist:

> 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).

Even though Petitioner provided funding, trial counsel admitted that he did not consult with a forensic pathologist prior to trial. App. 1031 l. 17 - 1032 l. 10; App. 1067 ll. 17 – 20. He consulted with a pediatrician, Dr. Betsy Gibbs, who allegedly concluded that the child's injuries were caused by Petitioner. App. 1054 l. 20 – 1056 l. 11. 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.

He hired a DNA expert, Dr. Ronald Orlowski. App. 1052 l. 16 – 1057 l. 24. Trial counsel provided some of the evidence to Dr. Orlowski via FedEx. App. 1052 l. 18 – 1054 l. 21. According to trial counsel, Dr. Orlowski provided favorable feedback. App. 1058 l. 17 – 1059 l. 1. Seemingly foregoing any applicable defenses derived from conversations with Dr. Orlowski, after listening to the recorded jail call, trial counsel testified that he was convinced the jury would convict Petitioner. App. 1062 l. 17 – 1063 l. 12. Even though the defense put on a case at trial, counsel did not call Dr. Orlowski as a witness or submit a report prepared by him.

The PCR court's Order of Dismissal contained a finding that Dr. Baden's "account of the events of victim's death [was] not credible considering the evidence in the case." App. 1165. The PCR judge appeared to express some skepticism as to Dr. Baden's conclusions at the hearing on Petitioner's Rule 59(e) motion, asking if Dr. Baden is "the guy that said this is not how adults do it?" App. 1181 l. 25 – 1182 l. 1. The Order of Dismissal concluded that Dr. Baden's findings were "simply not plausible based on the evidence." App. 1166.

The PCR court also found that 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. 1167. The PCR court further concluded that Applicant's failure "to produce any witnesses, namely [the older child], which tended to show that anyone other than Applicant caused victim's death" required dismissal of his claim. App. 1167.

In affirming the PCR court, the Court of Appeals held "there is not a reasonable probability that the trial's result would have been different even if the pathology evidence from the PCR hearing has been part of the original case." Regarding the Order of Dismissal, the Court of Appeals pointed out that the PCR court did not employ the "traditional assessment of deficiency and prejudice" and noted the PCR court's findings regarding Dr. Baden's credibility. The Court of Appeals affirmed the denial of PCR based in part on Petitioner's admission that he struck the child. The Court of Appeals "agree[d] with the PCR court that Petitioner's admissions, in conjunction with the evidence presented at trial, constitute[d] overwhelming of guilt." The Court of Appeals held "it is likely the atmosphere at trial would have been different if a forensic pathologist testified in the way Dr. Baden testified at the PCR hearing" but that it was unlikely the outcome would have been different.

Discussion

Trial counsel failed to confer with a forensic pathologist prior to Petitioner's trial. He consulted with a pediatrician who was frequently used by the solicitor's office. He hired a DNA expert who was never utilized at trial. Even though funds were provided by Petitioner and his mother, trial counsel failed to discuss the matter with a forensic pathologist. The Court of Appeals opinion focused on whether the outcome of trial would have been different had trial counsel elicited testimony similar to that of Dr. Baden, but the inquiry should revolve around trial counsel's deficiency to arm himself with the knowledge that could only have been provided by a forensic pathologist. Following an understanding of what someone like Dr. Baden would have testified to, trial counsel could have cross-examined Dr. Batalis better. He could have called a forensic pathologist to testify that Petitioner's admitted conduct, a smack, was inconsistent with the injuries. He could have prepared for trial more efficiently and investigated

the child's sister. Without the theory offered by Dr. Baden, a renowned forensic pathologist, that the child's sister could have caused the child's injuries, there existed no reason to explore such a defense. Without that knowledge, trial counsel provided deficient representation and failed to present a defense that could have explained the child's death.

Trial counsel could have presented an expert to counter the state's findings.[3] Instead, Petitioner was the only witness who testified during the defense's case-in-chief. Consulting with a forensic pathologist 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.

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 688–89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625. To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. 2052; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735.

An understanding of the injuries and subsequent autopsy from an expert forensic pathologist would have allowed trial counsel to investigate, prepare, and try the case armed with

[3] After the state rested, trial counsel indicated his intent to call two experts: Dr. Gibbs and Dr. Ricky Halovich. Neither testified at Petitioner's trial.

the necessary knowledge regarding complicated injuries such that the result would have been different. In particular, an expert forensic pathologist could have explained the inconsistencies between the child's injuries and the conduct admitted by Petitioner during the jail call.

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," thus separating Petitioner's comments from the alleged cause of death 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 illustrated 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. Had counsel prepared the case sufficiently by consulting with a forensic pathologist, he could have incorporated the detailed and exculpatory testimony that such a witness could have offered.

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 belied 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 admits to consuming 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). The state must prove the defendant performed a deliberate act that he or she knew would create a risk of death to the child. A deliberate act in the face of such

knowledge is a reckless disregard of the risk, and thus demonstrates an extreme indifference to the child's life. See State v. McKnight, 352 S.C. 635, 646, 576 S.E.2d 168, 173 (2003).

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,[4] 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 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.

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[4] 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), SCRCP, the PCR judge also asked counsel for the state to "submit a little order" denying the motion. App. 1182 ll. 24 – 25.

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. The Court of Appeals 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 as explored by Dr. Baden. 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.

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.

The Court of Appeals referenced Geter v. State in its discussion of overwhelming evidence of guilt. 305 S.C. 365, 409 S.E.2d 344 (1991). In Geter, this 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. Id. at 367, 409 S.E.2d at 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), this 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, this 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. Trial counsel in the matter at bar failed not only to call an expert, but also failed to consult with the type of expert whose opinions would have altered the trajectory of the case.

In Smalls v. State, this Court noted that "[i]n determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's errors had on the outcome of the trial." 422 S.C 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99) (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case." Following a brief examination of Geter and other cases, this Court held that "the proper consideration of the strength of the State's case" is "one significant factor the court must consider—along with the

specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice." Id at 189-91, 810 S.E.2d at 843-45.

This Court held that in order for evidence to be overwhelming, such that it precludes a finding of prejudice, "the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability … the factfinder would have had a reasonable doubt" cannot possibly be met. Id. at 191, 810 S.E.2d at 845. This case examined Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) in the context of confessions. Id. at 190, 810 S.E.2d 844. Rosemond "admitted to planning the murder of his girlfriend." Id. at 190, 810 S.E.2d at 845. In this case, Petitioner's statement that he "smacked" the child is not conclusive proof of homicide by child abuse. Aided by an explanation offered by a forensic pathologist, this remark could have been mitigated.

This Court has previously held that a statement similar to Petitioner's was not sufficient to result in a determination that the admission of witness testimony was harmless in the light of overwhelming evidence of guilt in a direct appeal. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). An insubstantial error not affecting the result of the trial is harmless where "guilty has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 733 S.E.2d 581, 584 (1989).

In State v. Fletcher, this Court held, in a homicide by child abuse case where the identity of the perpetrator was the essential issue at trial, that a statement by Fletcher that he wrestled with the child, hit him with his elbows, and even punched him, did not make the admission of improper witness testimony harmless beyond a reasonable doubt. 379 S.C. 17, 25-26, 664

S.E.2d 480, 484 (2008). Therefore, the statement was not deemed to have overcome the error in admitting witness testimony. Much like Fletcher's statement to police did not excuse the error such that no other conclusion could be reached, Petitioner's statement does not rise to the level of a confession to the charge of homicide by child abuse.

At trial, Dr. Batalis answered in the affirmative when asked by the solicitor whether a blow from "someone's hand" could have sustained enough force for the child to fall backwards and hit his head on the floor. App. 530 ll. 3 – 12. He testified that the child's injuries could be consistent with strikes to the head. App. 533 ll. 15 – 21; App. 534 l. 25 – 535 l. 8; App. 536 l. 11 – 14. The state argued during it closing argument that the child's injuries were non-accidental: "[i]t's very, very hard to get those kinds of injuries unless someone inflicts them." App. 809 ll. 1 – 24. Viewed solely in the light of the evidence presented by the state, Petitioner's recorded statements during the jail call were undoubtedly damaging to his case. However, they were not an outright confession to the indicted charge, and a defense expert could have explained how those injuries, if they occurred, did not result in the child's death.

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. Instead of just offering Petitioner's testimony, an expert witness could have debunked many of Dr. Batalis' theories, as Dr. Baden did at PCR. 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, however. 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.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to the Court of Appeals to allow full briefing on the issue presented.

Respectfully Submitted,

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of October, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Honorable Larry Hyman, Circuit Court Judge

Opinion No. 5767 (S.C. Ct. App. Filed August 19, 2020)

2013-CP-08-02121

JUSTIN RYAN HILLERBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Writ of Certioari to the Court of Appeals has been served upon opposing counsel this 21st day of October, 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; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER