

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Gustavo Torres-Medel — PETITIONER
(Your Name)

vs.

Kimberly Butler — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals - Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gustavo Torres-Medel
(Your Name)

P.O. Box 1000
(Address)

Menard, IL 62259
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

A. Were defendant's Sixth Amendment rights violated when

1) trial counsel failed to utilize an expert witness

2) trial counsel failed to present defense witnesses and effectively cross-examine state witnesses

3) trial counsel failed to obtain full discovery before trial.

B. Did the District Court err in ruling defendant's ineffective assistance claims were procedurally defaulted

LIST OF PARTIES

- ☐ All parties appear in the caption of the case on the cover page.
- ☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Kimberly Butler, Warden

Attorney General of the State of Illinois

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 14, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

STATEMENT OF THE CASE

On April 28, 2009, the defendant-petitioner, Gustavo Torres-Medel, Sr., was charged by complaint with first degree murder in connection with the death of his son, Gustavo Torres-Medel, Jr., in West Chicago on April 27, 2009. The defendant had been arrested on that charge on April 27, 2009, and he was remanded to jail the next day.

A superceding information was filed on May 27, 2009. That amendment charged the defendant with five counts of first degree murder based on the death of his son on April 27, 2009. The counts differed only with regard to the alleged mental state. Count 1 alleged that the defendant acted "with the intent to kill." Count 2 alleged that he acted "with the intent to do great bodily harm." Count 3 alleged that he committed certain acts "knowing said acts would cause the death" of his son. Count 4 alleged that he committed the acts "knowing said acts created a strong probability of death" to his son. Count 5 alleged that he committed the acts "knowing said acts created a strong probability of [causing] great bodily harm" to his son.

On July 20, 2009, the State filed a notice stating that it would not seek the death penalty in this case.

On May 31, 2011, the defendant waived his right

to a jury trial both orally and in writing.

A bench trial was held in early June, 2011. Eight witnesses testified for the State. The testimony of each witness will be summarized below.

PERLA SALGADO

In April of 2009, Salgado was living with the defendant and their two children in a basement apartment in West Chicago. The oldest child was a toddler at that time. The youngest child - Gustavo, Jr. ("Jr.") - was about three months old. Salgado was then 24 years of age, and the defendant was 25 years old.

Salgado and the defendant each worked at a nearby grocery store. They worked different shifts so that one of them could be home to care for the children, while the other was at work.

According to Salgado, the defendant came home from work at approximately 10:00 P.M. on April 26, 2009. The entire family then watched television in a bedroom. The defendant was drinking beer.

Salgado woke up at about 6:00 A.M. the next day and got herself ready to go to work. She had changed Jr.'s diaper the night before. Jr. had been in good physical condition at that time, and he was still in good condition when Salgado left for work in the morning.

At about 1:00 P.M., Salgado received a call

from the defendant, who told her to come home and that "something tragic" had happened.

Salgado left work and drove home. When she arrived, she saw the defendant in the bedroom.

Jr's body was sitting in a car seat in that same room; his body was covered with a blanket.

Salgado asked the defendant what had happened. He replied that he would "be responsible for any charges that he received." Salgado then checked on Jr's condition. He was not breathing, and his body was cold and "loose." There were bruises on his cheeks, but otherwise his skin had "no color."

At that point, the defendant asked Salgado if she had any cigarettes. When she said she had no cigarettes, the defendant looked in Salgado's purse and took her keys and some money. Salgado was yelling at the defendant, asking what had happened. The defendant did not respond, except to ask Salgado to be quiet so that nobody would hear her. The defendant left the apartment.

After the defendant left, Salgado telephoned the grocery store and spoke to one of the managers. A short time later, the manager, a cashier, and another manager arrived at the apartment. When they arrived, Salgado was outside, holding Jr's body. The co-workers took the body back inside, and one of them called 911.

A retired firefighter who lived across the street came over and tried to revive the baby. Salgado thought the firefighter performed CPR on Jr.'s body. The store cashier also made some resuscitation efforts, but Salgado was unsure if the cashier performed CPR. Eventually, some police officers and medical personnel arrived at the scene.

ESMERELDA MALDONADO

Maldonado lived in the upstairs portion of the house which included the basement apartment that was rented out to the defendant and his family. In the early afternoon of April 27, 2009, Maldonado had been outside in her garage when she saw Salgado arrive at the house in a car. A few minutes later, she saw the defendant leave in that same car. According to Maldonado, the defendant was "a little in a hurry."

Maldonado did not hear anything unusual coming from the basement apartment that day before she saw the defendant leaving the scene. Maldonado admitted that she had been briefly absent from her residence around 8:30 AM. to take her daughter to school and then again around 11:00 A.M. to pick up her daughter.

OSWALDO SILVA

Silva was one of the managers at the grocery store where the defendant and Salgado worked.

At about 1:00 P.M. on April 27, 2009, Silva and another manager - a man by the name of Lourdes - allowed Salgado to leave work to go home. Later, Silva went to Salgado's apartment with Lourdes and a store cashier, Nancy. While en route, Silva called a West Chicago police officer whom he knew, an Officer Cadena.

When he and the other store employees arrived at Salgado's apartment, Silva saw Salgado standing outside with a "baby coat" and a blanket. Salgado was "crying and screaming." Salgado showed Tris's body to Silva. He noticed some bruises on Tris's cheeks and that Tris's skin was abnormally white. Silva called 911.

Eventually, Officer Cadena arrived at the scene. Cadena - accompanied by Salgado, Lourdes, and Nancy - took Tris's body back into the basement apartment. A retired firefighter who lived across the street came to the apartment. After checking Tris's carotid pulse, doing some mouth to mouth resuscitation, and performing CPR, the retired firefighter took Tris's body outside, where other emergency personnel were arriving.

Silva said that the 911 operator gave him some instructions about how to perform CPR, but that he did not relay those instructions to anyone because Cadena and the retired firefighter were already at the scene.

Silva went outside and noticed Salgado talking to someone on a cell phone. Silva took the phone away from Salgado and had a conversation on the phone with the defendant. Silva asked the defendant, "What have you done?" The defendant answered, "I think I did something wrong." He also told Silva that he would be returning to the apartment so that he could turn himself in to the police. About fifteen minutes later, Silva saw the defendant coming back to the apartment, on foot.

ALFREDO ESCOBAR

Escobar worked as a landscaper at the Pheasant Run Resort in St. Charles. The defendant had previously worked at the resort. Escobar and the defendant had come from the same town in Mexico.

On the afternoon of April 27, 2009, Escobar was driving a golf cart in the parking lot of the resort when he noticed the defendant inside a car. The defendant gestured for Escobar to come over to him. When Escobar approached, the defendant exited the car. After exchanging greetings with Escobar, the defendant became silent for a moment, but then said that a "tragedy" had occurred. Escobar asked the defendant what he meant, and the defendant again became quiet. After a few moments, the defendant told Escobar

to contact his mother in Mexico so that she could inform the defendant's family that he (the defendant) would be "going to jail." The defendant appeared "sad" and looked as though he wanted to cry.

During their conversation, the defendant told Escobar that "the boy was dead." He admitted that he had hit the baby and said that he had done so because the baby was crying. The defendant said he felt "desperate" and that what he had done "is not going to be forgiven."

At some point, the defendant received a cell phone call from Salgado. Escobar heard the defendant tell Salgado that he was "heading over there" and that he would "turn himself in to the police." The defendant left a few minutes later.

That evening Escobar gave a statement to the police. His statement omitted some of the details he had included in his testimony. Escobar said that he had been "caught by surprise" by the incident, that he was "nervous" when he spoke to the police, and that he simply "forgot" to mention all of the details to the police at that time. Escobar claimed that he had told the police that the defendant admitted striking Jr., that he could not be forgiven, and that he was desperate. The only detail he neglected to tell the police on the day of the incident was that the defendant had said the

baby had been crying.

The parties later stipulated that Detective Robbie Peterson of the West Chicago Police Department would testify that he had interviewed Escobar on April 27, 2009, and that during the interview Escobar never disclosed that the defendant admitted hitting the baby, said he had done something unforgivable, or described himself as "desperate."

REX VANWINKLE

Vanwinkle was the retired firefighter who lived across the street from the defendant and Salgado. He was also a former EMT.

On the afternoon of April 27, 2009, Vanwinkle heard a dispatch on his fire department pager requesting for an ambulance to be dispatched to the scene. A few minutes later, Vanwinkle went outside and saw a police car in front of the house across the street.

Vanwinkle saw Officer Cadena exiting a door on the east side of the house. Cadena led Vanwinkle down into the basement apartment, where Vanwinkle saw Tr's body lying on a bed. He recalled two other people being in the bedroom. Vanwinkle tried to tell if the baby was breathing and also checked for a carotid pulse, but he did not hear any respiration or find a pulse. The baby's body was "limp" and "extremely cold."

There were "black and blue marks" on the baby's cheeks, but otherwise his skin was "rather pale."

Vanvinkle took the baby outside and put the baby in the back seat of Cadena's squad car. A fire department unit soon arrived, and the fire department personnel assumed responsibility for taking care of the baby. The paramedics put the baby in an ambulance.

Vanvinkle denied that he tried to perform CPR on the baby and said that he did not see anyone else do that, although he said it was possible that the paramedics had done so. He did not recall telling the police that he had seen the paramedics perform CPR. He did not recall hearing anyone calling out instructions on how to do CPR.

JEFFREY KEEFE

Keefe was a Firefighter/paramedic with West Chicago. He went to the scene on the afternoon of April 27, 2009. When he arrived, he saw the baby lying in the back seat of a police car. His "initial impression" was that the baby "had been dead for quite some time." The baby's skin was "white and ash" in color, but there were some bruises on the baby's cheeks.

After an ambulance arrived, the medical personnel at the scene decided to move the body

to the ambulance. VonWinkle carried the body from the squad car to the ambulance. Although the baby seemed to be dead, the medical personnel followed standard operating procedures and tried to revive the baby by using CPR, a bag-valve mask, and other means. The personnel used "proper CPR" techniques. A heart monitor showed that the baby's heart was not working. Keefe himself did not perform any life-saving measures, including CPR.

The personnel at the scene communicated with Central DuPage Hospital via phone. After speaking to someone at the hospital, the personnel at the scene stopped their life-saving efforts. They left the baby's body in the ambulance and turned the ambulance over to the police.

DET. KEVIN FARLEY

Farley was with the DuPage County Sheriff's Department. In April of 2009, he was an investigator and evidence technician with the forensic investigation unit. Around 2:00 P.M. on April 27, 2009, Farley and other members of the unit were sent to the scene.

One of the other members of the forensic unit took photos of the scene. Another member of the unit made a video of the scene. Farley was the supervising member of the unit.

Farley identified several photos that had been taken at the scene and authenticated a video tape taken by one of the other evidence technicians. The video was played during Farley's testimony.

In the basement apartment, Farley saw a bedroom with a shelf that ran the length of the bedroom. On the shelf there were 12 empty beer cans and "a dried up baby wipe that had some red stains on it." Farley took those items into evidence.

The parties stipulated that forensic analysis was done on both the baby wipe and a "onesie" that Jr. had been wearing when he was found at the scene. Both items tested positive for blood, and DNA testing showed that it was the baby's blood. Salgado had testified that she had not seen the wipe - which she described as a "towel" - before she left for work on the morning of the incident.

On April 28, 2009, Dr. Jeffrey Harkey autopsied Jr.'s body, and Farley attended the autopsy. He collected evidence recovered during the autopsy and also took photos.

The photos taken at the scene, the video taken at the scene, the evidence photos taken during the autopsy, and the evidence collected at the scene and during the autopsy were all

admitted into evidence

DR. JEFFREY HARKEY

Dr. Harkey's relevant Findings at the autopsy were as follows:

External Exam

- 1) the baby was approximately 3.5 months old and of normal weight and height
- 2) there was soft tissue swelling at the back of the baby's skull
- 3) there was a "confluence" of bruises on each of the baby's cheeks.
- 4) "minute" abrasions were observed on the baby's face
- 5) small bruises were found on the baby's chest/abdomen and between shoulder blades
- 6) there were inverted U-shaped bruises and abrasions on both sides of the baby's buttocks

Internal Exam

- 1) hemorrhaging was found beneath skin on the baby's chest
- 2) this hemorrhaging was associated with seven "fresh" fractures to the baby's left ribs
- 3) hemorrhaging was also found beneath the skin on the baby's buttocks
- 4) there was edema / hemorrhaging on the back of the baby's skull, indicative of blunt force trauma
- 5) cranial bleeding (specifically a subdural

hematoma and subarachnoid hemorrhaging) was observed, likely caused by blunt force trauma and possibly resulting in seizures

In Dr. Hartkey's opinion, the cause of death was "abusive traumatic injuries of the head and chest," indicating that the baby had been "beaten and crushed." Either the head injuries or the injuries to the chest would have been sufficient to cause death. The rib fractures alone would not have been fatal, but they could indicate compression strong enough to cause asphyxiation. Dr. Hartkey could not conclude that Jr. had died of asphyxiation.

The subdural hematoma could have been caused by the facial injuries, but the "best candidate" to explain the subdural hematoma was the traumatic injury to the back of the skull. An injury to the back of the skull was "consistent" with striking the baby, with dropping the baby, and with the baby accidentally falling. However, Dr. Hartkey had no reason to suspect that the subdural hematoma was caused by anything other than head trauma. He described the hematoma as "fresh," i.e. not "chronic."

An accidental fall could account for the bruises on the buttocks, but not the facial

bruises or the rib fractures. Also, a single accidental fall would not account for all of the injuries, given their multiple locations on the body.

Dr. Harkey could not determine whether the baby's head was at rest when it was struck or if the baby's head was in motion and suddenly stopped when it struck another object.

Dr. Harkey said that CPR could have caused the rib fractures only if the CPR were done in an "extremely improper" way. He had never seen rib fractures associated with CPR. Improper CPR could not have caused the facial bruises, the bruises on the buttocks, or the cranial hemorrhaging.

Dr. Harkey determined that the baby was alive when his ribs were fractured. He did not observe any evidence of post-mortem injuries.

The State presented no other evidence. The defense presented no evidence, except for the stipulation regarding Detective Peterson's testimony describing what Alfredo Escobar had said when he was interviewed on the day of the incident.

The trial court found the defendant guilty on all five counts of first degree murder.

Defense counsel filed a timely post-trial motion, arguing only that the evidence was

insufficient to sustain the conviction. That motion was heard and denied on July 13, 2011. On that same date, the trial court conducted a preliminary inquiry into a pro se motion that the defendant had filed prior to trial alleging ineffective assistance of trial counsel. During the hearing, the defendant conceded that his counsel had "done everything right" at trial, that counsel had answered all of his questions prior to trial, and that he was satisfied with counsel's performance. Accordingly, the trial court took no further action on the pro se motion.

A sentencing hearing was held on July 14, 2011. The presentence investigation report (PSI) showed that the defendant was not in the United States legally and that he had used an alias and a false social security number to obtain work. The PSI also showed that the defendant had no prior convictions, except for a 2008 conviction for not having a valid driver's license.

According to the PSI, the defendant admitted that he had been drinking beer and using crack cocaine when this incident occurred, although it also said that the defendant denied ever hitting Salgado or his children. The PSI indicated that the defendant described himself as having a "short temper" and expressed concerns that he

might "hurt someone."

Perla Salgado testified at the sentencing hearing. She described an incident that occurred on Christmas Day of 2007, when the defendant hit her in the mouth with his fist.

Carmen Easton, an investigator with the DuPage Children's Center, testified that she and another investigator interviewed the defendant on April 27, 2009, regarding Jr.'s death. During that interview, the investigators asked the defendant about the incident involving Salgado on Christmas Day in 2007. The defendant initially denied that he had ever hit anyone, but eventually admitted that he had argued with Salgado that day and struck her in the mouth.

The defendant made a statement in allocution. He asked Salgado for "forgiveness" and said he had "drugged himself" with beer and other substances prior to the incident. According to the defendant, Jr. had been crying and he responded by hitting Jr. on his cheeks and buttocks.

The defendant denied hitting Jr. If he had hit Jr., the defendant said, his injuries would have been "harsher." The defendant said that he merely "grabbed" the baby and put him in the car seat, but that the baby hit the back of his head against the handle of the seat. The defendant also said that he fell asleep and that when he woke up he realized

that he had "harm[ed] the child." The defendant described himself as "very repentant" and denied that he had any intent to kill the baby. He admitted he had "squeezed" the baby.

The trial court sentenced the defendant to a 45-year prison term, plus three years of mandatory supervised release. The sentence was imposed only on Count 1, which alleged that the defendant acted with the "intent to kill." At sentencing, the State had asked for a 50-year term, and the defense had asked for a 27-year term.

The trial court gave the defendant credit for time spent in custody from April 28, 2009, to July 14, 2011.

After imposing the sentence, the court admonished the defendant regarding his right to appeal. The court told the defendant that he could not appeal from the sentence unless he first filed a timely written motion to reconsider the sentence. The defendant said he understood the admonishments.

No post-sentencing motion was filed, but a notice of appeal was timely filed on July 18, 2011.

The defendant raised two issues on appeal: 1) that the defendant's sentence under Count 1 of the information should be vacated because the

state failed to prove defendant guilty beyond a reasonable doubt of intent to kill, and 2) that the defendant should be granted an additional day of sentence credit against his 45-year prison term.

On December 20, 2012, the appellate court issued its ruling affirming the defendant's conviction, but modifying the defendant's sentence to allow one additional day of sentence credit.

The defendant subsequently filed a timely petition for leave to appeal to the Illinois Supreme Court. The court denied the defendant's petition on March 27, 2013.

The defendant then began collateral proceedings in the state court. On August 8, 2013, the defendant filed his post-conviction petition alleging ineffective assistance of trial counsel.

On October 10, 2013, the court dismissed the defendant's petition. The defendant timely appealed, and on December 19, 2014, the appellate court affirmed the dismissal. The defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on May 27, 2015.

The defendant then began collateral proceedings in the federal court. On March 3, 2016, the defendant filed a petition for writ of habeas Corpus alleging ineffective assistance by trial counsel, that the state failed to prove

defendant guilty of the intent to kill, and that his 45-year sentence was excessive. The defendant, here, addresses only the claims of ineffective assistance of counsel, as discussed below.

A. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO UTILIZE AN EXPERT WITNESS

The defendant asserted three specific instances under this claim:

1) Trial counsel was ineffective for failing to investigate whether an expert pathologist could have offered a determination as to the injuries of the victim favorable to the defense's assertion that defendant's actions led to the accidental death of the victim.

2) Trial counsel was ineffective for failing to hire an expert to rebut the state's medical evidence suggesting the cause of death was caused by the victim being beaten, crushed, and thrown.

3) Trial counsel failed to call an expert to testify that the victim's broken ribs and multiple bruises could have been caused by the improper application of CPR.

In finding the defendant guilty, the trial court made several determinations based on

the medical testimony presented by the state. The key findings include:

1) That there was an inference that, due to the nature of the injuries, the victim's ribs were broken antemortem, and not as a result of the improper administration of CPR.

2) That the testimony of several witnesses was in conflict in regards to whether anyone had attempted CPR on the victim, but that even if it was found that CPR was applied, it still wouldn't explain the "diffuse bruising all over the trunk of the victim."

3) That the extent of the injuries observed on the victim were inconsistent with a single accidental fall or drop.

The court also made specific note of the extensive injuries to the victim's "face, chest, front, back, hip area, and the back of the head." The court concluded, based on the medical evidence, that the victim was "savagely beaten," and that he "died as a result of knowing and intentional blows," and not as the "result of a tragic accident."

In support of his assertion that defense counsel was ineffective for failing to utilize an expert, the defendant cited several inconsistencies contained in the medical, investigative, and police reports. The following summarizes the

defendant's arguments presented in his habeas corpus petition.

1. The Postmortem Examination Report

In the Postmortem Examination Report (Appendix C) authored by the state's expert pathologist, Dr. Jeff Hartley, it is noted under the "Evidence of Treatment" section (p.2) that Dr. Hartley had observed "numerous small Bruises on the chest and on the uppermost part of the abdomen." The report states that Dr. Hartley was unable to make a determination as to whether the bruises were the result of CPR, or if they were injuries that were caused by the defendant. In a footnote Dr. Hartley states that testimony of the first-responder caregivers would be helpful in making such determinations." This directly contradicted Dr. Hartley's testimony at trial when he testified that he did not believe the chest injuries could have been caused by CPR.

(Appendix D, p.147) This also directly contradicted the court's finding that the "diffuse bruising" could not have been caused by CPR. (Appendix E, p.6)

Additionally, testimony presented at trial showed that chest compressions, as during CPR, could circulate blood through the body, enough so for bruising to appear postmortem.

(Appendix D, pp.146-47)

Dr. Harkey's report also notes that the victim suffered seven fractured ribs. It was the belief of Dr. Harkey, and the conclusion of the court, that these injuries occurred antemortem due to hemorrhaging which indicated that "circulation was present at the time of the injury." (Appendix C, p.8 ; Appendix D, pp. 146-47)

However, as noted, chest compressions can circulate blood, causing injuries to appear postmortem. Improper CPR applied to an infant can cause ribs to fracture or break. The defendant's contention was, had Dr. Harkey properly relied on first-responder reports in making his determinations, he would have noted that Nanci Ramirez, and possibly Rex Vanwinkle, had performed CPR on the infant. (Appendix F ; Appendix G, p.6) In addition, paramedics performed CPR at the scene. (Appendix H, p.2)

The defendant contended that many of these findings were unreliable because Dr. Harkey's conclusions were based on insufficient evidence. Primarily, by Dr. Harkey's own admission, he did not consider the testimony of the first-responder caregivers in making his determinations.

2. Report of West Chicago Police Officer Robbi Peterson

In Officer Robbi Peterson's report

(Appendix H), Officer Peterson notes that he interviewed WCFPD firefighter/paramedic Jeff Keefe, who told Peterson that, after having examined the victim, "he did not observe any obvious signs of physical trauma."

Keefe then led Officer Peterson to the ambulance to observe the victim. Despite noting some discoloration in the victim's cheeks, and small abrasions to the right eye and right cheek, Officer Peterson makes no note of any other injuries.

Upon interviewing Rex Vanwinkle at the scene, Officer Peterson noted the following.

After being led into the basement by Officer Cadena, Vanwinkle examined the victim. He noted that he could not find a pulse, that the victim was cool to the touch, and that he observed "a lot of blood pooling around the mouth and in the cheeks." Vanwinkle stated that based on his experience as a former WCFPD firefighter, the pooling blood "would indicate the infant was originally lying on its face or stomach."

At trial, Dr. Harkey opined that, had the blow to the back of the head not caused the internal bleeding in the victim's brain, then the facial injuries could have caused the bleeding. However, Dr. Harkey discounted the facial

injuries due to the existence of the head injury. (Appendix I)

The defendant contended that, due to the blood pooling in the victim's cheeks, as noted by Vanwinkle, and the observations made by Peterson and Keefe, the victim's reported facial injuries were merely discoloration caused by the accumulation of pooled blood. This contradicts the court's finding that the victim was "repeatedly battered on the face." (Appendix E, p. 6)

3. Investigative Report of Aden Eike

In the investigative report of Aden Eike (Appendix G) the defendant noted two items of significance.

First, upon being notified by WCPD detective Julio Calabrese of the situation, who was calling to request the assistance of the Major Crimes Task Force (MCTF), Deputy Eike instructed Detective Calabrese to leave the victim's body as it was. In the time between this instruction and the arrival of the MCTF, it is noted in numerous reports that the victim's body was moved several times, by several different people.

In reading the Postmortem Examination Report (Appendix C, p. 7 - Summary of Autopsy Findings), most of the additional marks and bruises noted on the victim's body measure only

centimeters in size. It was the opinion of Dr. Harkey that these marks were the result of the defendant squeezing the victim. However, as the defendant had noted, chest compressions performed during CPR could cause bruising to appear postmortem. The handling of the victim's body in such close proximity to CPR efforts could have caused many of the marks observed during the autopsy.

Second, Eike noted that, upon examining the victim, the body was still warm to the touch in some areas. (p. 5) The defendant's contention was that this contradicted the testimony of Rex Vanwinkle, who stated that the body was cool to the touch upon examination. (Appendix H) This also contradicted the trial court's findings. (Appendix E, p. 7) This information put into doubt the actual time of death, and the testimony of Vanwinkle, who claimed he did not perform CPR because he believed the victim was beyond resuscitation. (Appendix E, p. 5)

B. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT DEFENSE WITNESSES AND IN INEFFECTIVELY CROSS-EXAMINING STATE'S WITNESSES

The defendant presented three specific claims:

1) Trial counsel failed to call Officer Federico Cadena as a defense witness.

2) Trial counsel failed to effectively cross-examine the state's expert pathologist Dr. Jeff Hartney.

3) Trial counsel failed to effectively cross-examine state's witness Alfredo Escobar.

The following summarizes defendant's arguments as contained in his habeas corpus petition.

1. Failure to Call Officer Cadena

In the investigative report of Deputy Aden Eike (Appendix G) it's noted that WCPD Officer Federico Cadena was the first responder on the scene. Cadena informed Deputy Eike that, upon his arrival, he observed two of Perla Salgado's co-workers performing CPR on the victim. The report states that "Cadena observed Nanci [Ramirez] performing CPR, while being instructed by Lourdes [Martinez], who was on the phone with 911." (Appendix G, p. 6; see also Appendix C, p. 1)

Significantly, none of the other witnesses to this event, who testified at trial, admitted to witnessing this occur (with the exception of Perla Salgado). This is an important point of contention because, as previously noted, the injuries to the victim were a primary factor in the trial court's determination that the defendant acted with the requisite intent to kill. By failing

to present Cadena as a witness to the CPR efforts that were performed by Ramirez and Martinez, the court was left with an incomplete picture of the events.

According to the transcripts (Appendix E, p. 5-6) the court concluded that, "Oswaldo [Silva] said he saw only Vanwinkle try to revive the baby, not Nancy (sic) [Ramirez], and that Vanwinkle used compressions a couple of times." And further, "Perla [Salgado] also said that Nancy (sic) had attempted CPR before Vanwinkle arrived. I don't know if that's true. There was no other testimony, in addition to hers." As noted, it wasn't clear whether improper CPR had caused the fractures seen in the victim's body.

The trial court directly stated that additional testimony would have been required for the court to gain a complete understanding of the incident.

2. Counsel's Cross-Examination of Dr. Harkey

The most significant issue was the defendant's contention that trial counsel failed to sufficiently challenge Dr. Harkey's opinions as to the cause and extent of the injuries.

Dr. Harkey stated in the Postmortem Examination Report (Appendix C, p. 8) and in the Certificate of Death Worksheet (Appendix J) that the victim was killed as a result of being "beaten, squeezed, and

thrown." However, at trial, Dr. Harkey testified that he did not believe that the victim's injuries could have occurred from an accidental fall or drop. (Appendix E, p.6)

The defendant contended that an accidental fall or drop would have been of significantly less force than the victim being intentionally thrown, as was the assertion of Dr. Harkey. If the victim was thrown, presumably there would have also been injuries to the extremities, and far more severe than would have occurred from one drop or fall.

3. Counsel's Cross-Examination of Alfredo Escobar

The defendant noted that Alfredo Escobar contradicted his original statement to the police, and that trial counsel failed to impeach Escobar based on his inconsistent statements. Escobar stated that the defendant had admitted to striking the victim because it was crying. (Appendix E, p.8) However, his original statement to police did not contain this information.

This testimony was directly relied on by the trial court in rendering its verdict, the court noting that "those are the statements of a guilty man." (id.) The defendant contended that it was trial counsel's duty to impeach Escobar.

C. TRIAL COUNSEL WAS INEFFECTIVE IN

FAILING TO OBTAIN REPORTS RELEVANT TO THE CASE

In communication with appellate counsel, the defendant inquired into several reports as containing grounds for presenting arguments to the appellate court. Appellate counsel noted that the death certificate, the defendant's signed statement to the police, and reports from Major Crimes Task Force officers were never admitted into evidence. (Appendix K, p. 2)

The defendant contended that trial counsel had a duty to obtain and review all of the discovery relevant to the defendant's case.

In rendering its decision on November 13, 2017, the District Court ruled that the defendant's ineffective assistance claims were procedurally defaulted because he failed to fairly present his ineffective assistance claims to the Illinois Supreme Court in his post-conviction PLA. (Appendix A, p. 14)

The defendant timely appealed to the U.S. Court of Appeals for the Seventh Circuit. On June 14, 2018, the court denied the defendant's request for a certificate of appealability.

This Petition for Writ of Certiorari to the United States Supreme Court follows.

REASONS FOR GRANTING THE WRIT

Mr. Torres was convicted based on complex medical evidence and the testimony of an expert forensic pathologist with years of experience in his field. In rebuttal of this evidence presented by the state, Mr. Torres' trial counsel presented not a single witness for the defense. Counsel didn't even consult with an expert before deciding not to utilize one. Counsel's representation did not meet the standards under prevailing professional norms, and this violated Mr. Torres' right to effective assistance of counsel.

This Court established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed2d 674 (1984).

An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687, 104 S. Ct. 2052.

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.*, at 688, 104 S. Ct. 2052.

In assessing counsel's investigation into whether an expert should have been consulted, the Court must conduct an objective review of his performance, measured for "reasonableness

under prevailing professional norms." Strickland, 466 U.S., at 688, 104 S.Ct. 2052.

That review includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." Id., at 689, 104 S.Ct. 2052

To consider counsel's perspective, one need only read the Postmortem Examination Report to glean what counsel had to contend with.

(Appendix C) In viewing the list of internal injuries on page 7, the same injuries Dr. Hartney determined were the cause of death, one finds the following:

B. Internal

1. Head

a. subdural hematoma, at least 39 gm

b. subarachnoid hemorrhages

2. Chest

a. lateral fractures of multiple left ribs (numbers 3 through 9)

b. hemorrhages in association with the rib fractures

i. in the subcutaneous fat lateral to the ribs

ii. beneath the parietal pleura medial to the ribs

iii. in the intercostal muscles

c. hemorrhage, 1-cm, in the anterior portion of the right first intercostal space

This case breaks no new ground. In 2003, this Court found that counsel had fallen short of prevailing professional standards because he failed to follow through with an investigation which could have revealed mitigating evidence for his client, Kevin Wiggins. *Wiggins v. Smith*, 593 U.S. 510, 123 S.Ct. 2327, 156 L.Ed.2d 471

In a case in which complex medical evidence was utilized to prove Mr. Torres requisite mind state, and to find him guilty, counsel owed a duty to investigate any possible and plausible defenses he could have presented, along with any exculpatory or mitigating evidence. Trial counsel did not even begin to try to do this. This deprived Mr. Torres of a fair trial. *Strickland*, 466 U.S. at 693

Likewise for counsel's duty to call witnesses on behalf of Mr. Torres, and effectively cross-examine state witnesses. Failure in this regard left the Court's determination of facts solely reliant on the state's presentation of evidence. This negatively impacted Mr. Torres' trial and robbed him of the constitutional protections of the Sixth and Fourteenth Amendments.

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to object to it in the first instance. In that circumstance, the prisoner likely could invoke Martinez or Coleman to obtain review of trial counsel's failure to object. Similarly, if the underlying, defaulted claim of trial error was ineffective assistance of trial counsel premised on something other than the failure to object, then Martinez and Coleman again already provide a vehicle for obtaining review of that error in most circumstances." Davila v. Davis, 137 S. Ct. 2058, 2067-8, 198 L. Ed. 2d 603 (citing Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991))

Trial counsel made multiple errors that affected the outcome of Mr. Torres' trial negatively. The heinousness of the crime notwithstanding, every person deserves a fair trial, and the effective assistance of counsel as secured by our constitution. Mr. Torres did not receive a fair trial, or the effective assistance of counsel, and this Most Honorable Court should grant his petition for a writ of certiorari.

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, at 690-691, 104 S. Ct. 2052.

As regards the procedurally defaulted claims, the District Court gave three reasons why Mr. Torres could not present his claims:

1) In his Illinois Supreme Court PLA, Mr. Torres alleged only that he had received Gailer plate representation as opposed to vigorous defending. This did not give the court the opportunity to adjudicate squarely the federal issues. (Appendix B, p. 14)

2) He failed to attach affidavits or other evidence to support his claims. (Id., at 15)

3) He can not argue actual innocence because he waived that claim in his response to appellate counsel's motion to withdraw by stating he was not innocent of the crime. (Id., p. 16)

However, it was never Mr. Torres' responsibility to preserve those issues. Mr. Torres' appellate counsel failed to properly preserve the issues when he did not present them in Mr. Torres' direct appeal.

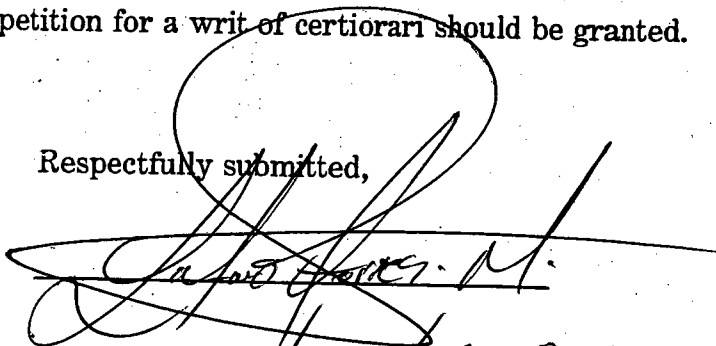
In a 2017 case regarding when a claim of ineffective assistance of counsel can defeat procedural default, the Court stated:

"If an unpreserved trial error was so obvious that appellate counsel was constitutionally

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Date: 09/07/2018