IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
November 1, 2022 Session

CURTIS MORRIS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 13-00001 Chris Craft, Judge

No. W2022-00208-CCA-R3-PC

Petitioner, Curtis Morris, appeals the denial of post-conviction relief from his Shelby County convictions for first degree murder during the perpetration of aggravated child abuse, first degree murder during the perpetration of aggravated child neglect, aggravated child abuse of a child eight years of age or less, and aggravated child neglect of a child eight years of age or less, for which he received a sentence of life imprisonment. Petitioner contends that he was denied the effective assistance of counsel based upon counsel's: (1) failure to call an expert witness to rebut the State's experts and bolster Petitioner's testimony that the victim's death was accidental; (2) making "material misstatements" regarding the evidence in counsel's opening statement; (3) failure to adequately prepare to cross-examine one of the State's experts and failure to request a *McDaniel* hearing to challenge the expert's testimony; (4) failure to file any pretrial motions; (5) failure to object, during the prosecutor's cross-examination of Petitioner, to the prosecutor's repeated use of the word "stomping" to characterize Petitioner's direct examination testimony; (6) failure to request proper jury instructions regarding the *mens rea* required for a conviction for aggravated child abuse; and (7) failure to present evidence of child custody proceedings in which Petitioner sought and won custody of his children. Petitioner also contends that he is entitled to post-conviction relief based on cumulative error. Following a thorough review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which J. ROSS DYER and KYLE A. HIXSON, JJ., joined.

Patrick T. McNally (on appeal), Nashville, Tennessee; and Daniel Horwitz and Lindsey Smith (at hearing), Nashville, Tennessee, for the appellant, Curtis Morris.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural History

This case arises from the November 2009 death of Petitioner's seventeen-month-old son from multiple blunt force injuries to his abdomen. The Shelby County Grand Jury indicted Petitioner for aggravated child abuse, aggravated child neglect, and two counts of first degree felony murder under alternate theories—murder in the perpetration of aggravated child abuse and murder in the perpetration of aggravated child neglect. Under the first theory, the State argued at trial that Petitioner had punched or stomped the victim thereby causing his injuries; under the second theory, the State argued that, regardless of how the victim was injured, Petitioner committed an act of neglect by failing to seek immediate life-saving medical treatment for the victim.[1]

At trial, the jury heard proof from the State's expert witnesses indicating that the victim's severe injuries were not consistent with an accident but were purposefully inflicted, resulting in substantial internal bleeding and death. Petitioner testified in his own defense that he accidently landed on the victim when jumping over a baby gate, that he did not knowingly cause the victim's injuries, and that the victim showed no outward signs of severe injury following the accident. Petitioner did not present any expert testimony as part of his defense.

Trial

Due to the nature of Petitioner's claims, it is important to set out relevant facts from the trial proceedings. During opening statement, counsel for Petitioner told the jury:

> This story is about [Petitioner]. Before November 14[], 2009, before that date, this man went to the courts and obtained custody of [the victim]. He took [the victim] because he was worried about [the victim]. He took [the victim] to protect the child from the environment that [the victim] was in and began to care for [the victim] along with his sister as best he knew how. And

[1] To assist in the resolution of this proceeding, we take judicial notice of the record from the Petitioner's direct appeal. *See* Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); *State ex rel. Wilkerson v. Bomar*, 376 S.W.2d 451, 453 (Tenn. 1964).

that's what he did. As a single father he cared for [the victim]. *You won't hear proof about intent. You didn't hear anything now and you won't hear anything during the trial about how it happened except what you hear from [Petitioner]. And he's going to tell you what happened that day.* The State's absolutely right in their opening statement that this is not a who done it. (Indiscernible) be a defense for [Petitioner] that he was involved directly for the accidental death of his son and he's going to explain to you in a way that makes perfect sense. He (indiscernible) the story. The proof is going to show it's a story of panic, of disbelief, and denial. And I'm going to walk you through all that and you're going to see it. After the panic, after the disbelief, after denial, (indiscernible) down another wave of guilt and shame, fear of the fact that he lost his son.

That Saturday they were home. They were playing. There were leaves outside. It was a fall day. It was November the 14th. He's home with . . . his daughter, [and] his son. Things are going pretty good. It's an average day. It's a day of rest. It's a family day. There's no evidence and you won't hear any evidence of fights or arguments or violence or causes. Nothing. You're not going to hear that cause that's not what happened on this day. This day was to be a good day. (Emphasis added).

This court summarized the trial testimony on direct appeal, as follows:

A. State's Evidence

The State initially called Glenda Eddins, the owner of the Creative Christian Learning Center ("the day care"). The victim and his sister were enrolled at the day care at the time of the victim's death and had been for approximately four months. The day care enrollment form listed [Petitioner] as the victim's father. Ms. Eddins testified that the victim had thrown tantrums and injured himself or other children during these incidents. Ms. Eddins noted there were no reported injuries to the victim on November 13, 2009, his last day at the day care prior to his death.

During cross-examination, [Petitioner] attempted to enter three accident reports from the day care detailing the victim's tantrums. The trial court permitted two of the records, finding it clear the persons who completed the forms saw the tantrums and contemporaneously reported them. The trial court, however, did not allow the third record. This record indicated that [on] August 27, 2009, an employee of the day care, Samantha Yates, witnessed the victim throw a tantrum and hit his head on the concrete. During a jury-

out hearing, the trial court determined after questioning Ms. Eddins that another employee, Adrian Fleming, actually witnessed the event. As Ms. Yates, not Ms. Fleming, prepared the report, the trial court found the record inadmissible.

The jury then heard from Shirley Boyland, a 9-1-1 dispatcher with the Germantown Police Department. Ms. Boyland testified she handled the 9-1-1 call made by [Petitioner] when he discovered the victim was not breathing. She dispatched paramedics to the residence. She confirmed the transcript of the 9-1-1 call was accurate and that another dispatcher, Chuck Douglas, instructed [Petitioner] on the performance of CPR on the victim.

The State's next witness, Chief William Beaman, with the Germantown Fire Department, entered [Petitioner's] apartment first. After entering the apartment, Chief Beaman announced "fire department" twice, and [Petitioner] called him upstairs. Once upstairs, Chief Beaman saw [Petitioner] giving the victim CPR. The victim was not breathing and did not have a pulse. The victim's extremities were dark and cool to the touch indicating he had not been breathing for forty-five minutes to an hour. Chief Beaman expected to find the victim's airway blocked and was surprised to find the airway clear.

[Petitioner] told Chief Beaman the victim had been "fine about an hour ago." Chief Beaman began CPR on the victim as the remaining emergency crew came upstairs to assist. [Petitioner] came into the room "a couple of times" and appeared concerned. The emergency personnel then transported the victim to the emergency room, and Lieutenant Mark Carter, another first responder, accompanied [Petitioner] to the hospital.

Then Lieutenant, now Captain, Mark Carter, an EMS coordinator with the Germantown Fire Department, arrived at the scene and went upstairs to join the other paramedics. He found [Petitioner] in the room "standing over" everyone. Captain Carter took [Petitioner] downstairs and interviewed him. [Petitioner] told Captain Carter the victim did not have a medical history and did not take any medication except Tylenol . . . but had not taken any that evening.

Captain Carter asked [Petitioner] to recount the day's events. [Petitioner] told Captain Carter the victim played normally during the day but fell off a bike several times. Captain Carter saw the bike and opined it was large enough for a ten or twelve year-old. [Petitioner] told Captain

Carter that, after riding the bike, the victim ate a snack, watched a movie, and went to bed. Later, [Petitioner] could not wake the victim.

Captain Carter then gave [Petitioner] a ride to the hospital. On the way, Captain Carter asked [Petitioner] to go over the day's events again. This time, [Petitioner] told Captain Carter the victim and his sister got off the bus, had a snack, and took a nap. After Captain Carter heard [Petitioner] recount two different versions of the day's events, he informed a police officer at the hospital that detectives should interview [Petitioner].

Prior to the State's next witness, the trial court conducted a jury-out hearing to determine the admissibility of photos taken during the victim's autopsy. The trial court redacted several photos by trimming those depicting the victim with his eyes open and by covering the victim's genitalia with exhibit stickers. The trial court additionally required the State to convert a photo of a subdural hemorrhage to black and white. Finally, the trial court excluded all photos in which the victim's internal injuries were visible, finding the medical examiner could instead rely on anatomical diagrams when explaining the victim's injuries to the jury.

The State next called an expert witness, Dr. Karen Chancellor, Chief Medical Examiner for Shelby County. Dr. Chancellor performed the autopsy on the victim on November 15, 2009. Dr. Chancellor noted the victim had numerous injuries on his face, scalp, chest, and abdomen. The victim also had either one large bruise or a confluence of bruises on his abdomen. One of the injuries to the victim's head caused a hemorrhage in the deep scalp tissue, which could only occur through the application of severe force. The victim also had numerous abrasions on his body.

Upon conducting the autopsy, Dr. Chancellor discovered the victim had about 150 to 200 cubic centimeters of blood inside his abdomen, which comprised about thirty to forty percent of the victim's total blood volume. Dr. Chancellor stated that level of blood loss would have sent the victim into shock, with death following shortly thereafter. She found fatty tissue from the mesentery floating in the blood removed from the victim's abdominal cavity. Dr. Chancellor noted this was very unusual. The mesentery, the membrane that keeps the bowels in place, was completely torn, resulting in severe internal bleeding. Dr. Chancellor noted the mesentery was a "very tough substance" and would require a severe injury to tear.

In addition to the torn mesentery, Dr. Chancellor found bruised lung tissue; blood outside the esophagus; and hemorrhages on the large and small intestine, transverse colon, and subcutaneous and skeletal muscle tissue in the victim's abdomen. Of note, she also found the psoas muscle, a muscle running from the lower spine to the top of the leg, had been completely torn away from the spine. The psoas muscle was completely "pulpified" and the victim's spine was exposed internally. Dr. Chancellor noted she had never before seen such a severe injury to the psoas muscle. She further stated all the injuries occurred "close in time" to one another.

Dr. Chancellor testified the cause of death was the injury to the abdomen which led to fatal internal bleeding. She did note, had the victim received immediate medical attention, there would have been a possibility of survival. When asked if the injuries could have come from falling off a bicycle, Dr. Chancellor opined such a fall could cause one, but not all, of the injuries. Over [Petitioner's] objection, Dr. Chancellor further opined a seventeen-month-old child could not possess the developmental coordination to ride a bike. The trial court allowed this testimony after the State laid a foundation for Dr. Chancellor's expertise, which included medical training on child development. Dr. Chancellor concluded by stating the victim could not have received these injuries on his own, and the manner of death was homicide.

The State concluded its case-in-chief with testimony from Detective Anthony Kemp, an investigator with the Germantown Police Department. Detective Kemp interviewed [Petitioner] at the hospital shortly after the victim had been pronounced dead. Detective Kemp noted [Petitioner] "rambled" a bit during the interview. During this interview, [Petitioner] stated the victim fell while playing in leaves. It was not until two days later that [Petitioner] admitted he stepped on the victim. Detective Kemp then went to [Petitioner's] apartment where [Petitioner] performed a reenactment of his version of events. Detective Kemp witnessed [Petitioner] place a stuffed animal on the other side of a baby gate and jump over the gate, landing on the stuffed animal's stomach. The State played a video of this reenactment for the jury. Detective Kemp stated [Petitioner] did not accept responsibility for the victim's death.

B. [Petitioner's] Evidence

[Petitioner] testified on his own behalf. He stated that the day the victim died, the victim and his sister were playing outside. He testified the

victim fell off a bike and fell again while playing in a pile of leaves. After this, [Petitioner] placed the victim in a room secured with a baby gate because he was worried the victim might fall down the stairs. According to [Petitioner], the victim often threw tantrums and hit his head. He testified that he heard a "thud" and thought the victim had climbed over the gate and fallen down the stairs. In his rush to determine what happened, [Petitioner] jumped over the gate and landed on the victim, who was lying on the ground behind the gate. [Petitioner's] leg buckled and his hand struck the victim's head. When [Petitioner] landed, he heard the victim make a noise "like he had never heard before."

The victim "looked stunned" but was breathing. [Petitioner] tried to feed the victim who barely ate and then vomited. [Petitioner] thought if the victim relaxed, he would be fine. He put the victim in his playpen and then went downstairs to watch a movie. When [Petitioner] returned an hour later, he found the victim unresponsive. [Petitioner] called the victim's grandmother, who told him to call 9-1-1. He called 9-1-1 and began performing CPR until the paramedics arrived.

[Petitioner] remembered being interviewed at the hospital but "everything was a blur at that point." After approximately two days of interviews, [Petitioner] told investigators he stepped on the victim and explained he did not include this information in his initial accounts of the incident because he was ashamed. [Petitioner] then performed the afore mentioned reenactment for police investigators. [Petitioner] admitted he lied to law enforcement due to his embarrassment and maintained the entire incident was an accident.

C. State's Rebuttal Evidence

In rebuttal, the State first called Detective Ryan Carter of the Germantown Police Department. Detective Carter questioned [Petitioner] at the hospital with Detective Kemp and then interviewed [Petitioner] over the subsequent two days. After two days of questioning, [Petitioner] admitted to stepping on the victim. Detectives Carter and Kemp then witnessed [Petitioner's] reenactment of the jump. [Petitioner] told Detective Carter that after stepping on the victim, he tried to get the victim to play outside and attempted to feed him. Noticing the victim was in distress, [Petitioner] placed the victim in his playpen. When [Petitioner] checked on the victim thirty minutes later, he found the victim unresponsive. According to Detective Carter, [Petitioner's] story remained consistent after he offered this

final version of events. [Petitioner] was cooperative throughout the investigation.

Finally the State called Dr. Karen Lakin, Assistant Professor of Pediatrics at the University of Tennessee, medical director for the Le Bonheur Cares program, and a pediatrician with University Le Bonheur Pediatric Specialists. Dr. Lakin testified that the Pediatric Specialists program focused on traumatic injuries to children and worked with law enforcement and Child Protective Services when there were concerns of child abuse. Prior to Dr. Lakin's testimony, the defense objected because Dr. Lakin reviewed photographs of prior injuries the victim received before November 14 that were excluded before trial. The trial court overruled the objection and instructed Dr. Lakin to base her expert opinions on the evidence presented at trial.

Dr. Lakin testified she was trained in differentiating a diffuse, accidental injury from a specific, direct-force injury. She opined [Petitioner's] "accidental-stepping" account was inconsistent with the injuries listed in the autopsy report. When an "accidental-stepping" injury occurs, the child typically suffers rib fractures, radius fractures, or occasionally femur fractures. She concluded the lack of bone fractures suggested the victim's injuries were not caused by an "accidental stepping."

Additionally, Dr. Lakin had never seen injuries to the intestines or pancreas in similar "accidental-stepping" cases. Severe and traumatic organ ruptures usually result from direct force to a specific area of contact, rather than dissipated force over a wide area. The complete rupture of the psoas muscle, the tearing of the mesentery, and the hemorrhages in multiple parts of the body were not typical "accidental-stepping" injuries. Dr. Lakin noted a rupture of the psoas muscle was highly unusual and the type of injury more often caused by a car accident.

On cross-examination, Dr. Lakin stated a direct blow would likely cause more damage than a 250-pound man falling on an infant. However, Dr. Lakin conceded she did not have the biomechanical training necessary to determine the exact pounds of force required to cause the victim's injuries. According to Dr. Lakin, if [Petitioner] did step on the victim, only an "extremely violent and severe" impact could have caused the injuries.

D. Jury Instructions

> The trial court charged the jury with the four[-]count indictment and instructed the jury on the necessary law. The trial court also instructed the jury on the lesser included offenses for each count, which on at least three occasions included the definition of "knowing." However, the trial court did not provide a definition for "knowing" under count three, aggravated child abuse.
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> The jury found [Petitioner] guilty as charged on all four counts and sentenced him to life imprisonment under count one. The trial court merged count two with count one and count four with count three and sentenced [Petitioner] to twenty-two years at one hundred percent.

State v. Curtis Morris, No. W2017-00393-CCA-R3-CD, 2018 WL 2277404, at *1-5 (Tenn. Crim. App. May 18, 2018), *perm. app. denied* (Tenn. Sept. 14, 2018).[2] This court affirmed Petitioner's convictions, and the Tennessee Supreme Court denied further review.

Post-Conviction Proceedings

Petitioner subsequently filed a timely petition for post-conviction relief, alleging that he was denied the effective assistance of counsel at trial; that he was denied the right to trial and appellate counsel unencumbered by a conflict of interest; that he was deprived of a meaningful right to participate in his defense; and that he was actually innocent of the offenses for which he was convicted.

At an evidentiary hearing,[3] **Petitioner's mother** testified that, on the day of the offense, Petitioner called her and said that the victim was not breathing. Petitioner was upset and in obvious distress on the phone. She told Petitioner to call 9-1-1 and that she would meet him at the hospital. She testified that, at the hospital, Petitioner was "screaming and crying" so loudly that "it probably could be heard on the entire floor[.]"

Petitioner's mother stated that, prior to the victim's death, she saw Petitioner with his children at least once per week and that Petitioner would play with the children, read to them, prepare food for them, and put them to bed. She never saw Petitioner "being hard"

[2] Although this court's opinion issued in Petitioner's direct appeal was designated "not for citation," and thus carries no precedential value regarding other cases, it nonetheless serves as the law of the case with respect to the facts and issues that were raised, adjudicated, and exhausted in Petitioner's direct appeal. *See generally Creech v. Addington*, 281 S.W.3d 363, 383 (Tenn. 2009).

[3] Due to the extensive nature of the testimony at the evidentiary hearing, we have limited our summary of the testimony to that which is relevant to the issues raised on appeal.

on his children, and she had no concerns for their safety when with Petitioner. She opined that Petitioner had taken good care of his children. Petitioner's mother recalled that the children's other grandmother had filed a petition seeking custody of the children from their mother. Petitioner then also sought custody of the children, and he was awarded custody by the court.

Petitioner's mother stated that she received a subpoena from the State before trial but not one from the defense. She recalled that, on the first day of the trial, she was informed by the State that her testimony would not be needed; no one else contacted her about potentially testifying at Petitioner's trial.

Petitioner's mother testified that, in conversations with Petitioner's attorneys before trial, they talked about having an expert witness on biomechanics for trial. She said that she asked co-counsel during trial if "the expert witness [was] [t]here[,]" to which co-counsel responded, "Science is science[.]" She said that she interpreted co-counsel's response to mean that "the expert witness was not necessary." Petitioner's mother testified that she and her husband paid for Petitioner's defense and that they would have paid for expert witnesses.

On cross-examination, Petitioner's mother agreed that, on September 19, 2009, the victim's day care contacted her and reported that the victim had two black eyes. She said that, in reviewing the discovery provided by the State in Petitioner's case, she saw photographs of the victim with what appeared to be black eyes. She did not recall whether she was there when the victim's two-year-old sister indicated to day care workers that Petitioner had struck the victim in the face. When asked if she was aware that, at least three different people indicated that she was present when the victim's sister made the demonstration, Petitioner's mother responded, "I'm not saying they were not being truthful, I am saying I don't recall."

She testified:

> I recall calling the doctor, the pediatrician, Dr. Sheffield, to see if we could bring [the victim] into her office that day for her to take a look at him. And she said . . . that we could bring him in tomorrow and that is what we did. And, when we went to see her I said, please take a look at him because it's been told that his dad - that he had been abused, take a look at his eyes.
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> . . . .
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> I said I need a note in order for him to go back to school next week. And what she wrote down on that was, he has a rash . . . but it was - the bruise

was unintentional. That is what she believed and she signed it and I sent a copy of that [note] to the day care provider[.]

She said that she also sent the doctor's note to a Department of Children's Services' (DCS) caseworker because DCS investigated the abuse allegations after the day care report. She testified that the result of the DCS investigation was a finding that "Petitioner had not done what he had been accused of[.]"

Petitioner's mother said that, on another occasion, the day care reported bruises on the victim's arms and legs. She agreed that one of Petitioner's attorneys spoke to her about the reports of abuse from the day care; Petitioner's attorney said that the people at the victim's day care did not think Petitioner was taking good care of the children.

Dr. John C. Hunsaker, III, testified that, in February 1983, he was appointed as Associate Chief Medical Examiner in Kentucky but that he was currently "semi-retired," working as a professor at the University of Kentucky and "doing what is called forensic, or medical-legal consultations on the basis of [his] background as a medical examiner and forensic pathologist, since the early 1980's." Dr. Hunsaker stated that he had testified as an expert in forensic pathology "hundreds" of times and that he had conducted "hundreds" of autopsies related to child deaths. He agreed that there was a sub-specialty of pediatric forensic pathology within forensic pathology. He said that, although he did not have a certification in pediatric forensic pathology, he had "certainly . . . done a lot of examinations and investigations involving the death of children[.]" Dr. Hunsaker stated that he stopped performing autopsies in 2015. Following this voir dire, Dr. Hunsaker was accepted as an expert in forensic pathology.

Dr. Hunsaker stated that he consulted on Petitioner's case at the request of post-conviction counsel and that he provided post-conviction counsel with a report on his conclusions. He said that, if he had been asked to consult on the case in 2015, he would have reached the same conclusions as in his report. Dr. Hunsaker testified that he reviewed the victim's autopsy report, photographs from the autopsy, and records from the hospital and that he read the sworn testimony of Dr. Lakin and Dr. Chancellor. Dr. Hunsaker testified that he knew Dr. Chancellor and considered her "highly competent[.]" Dr. Hunsaker also reviewed Petitioner's trial testimony and viewed the video reenactments that Petitioner provided showing how the child was injured by him.

When asked what issues he was asked to review, Dr. Hunsaker stated:

[T]he basic issue was looking at the injuries that were well documented both in language and pictorially, if it was possible to say that they were caused intentionally, as opposed to accidentally, whether I had some opinions

different than [Dr. Lakin and Dr. Chancellor] and was it plausible that the injuries present could have been caused accidentally and some questions about the timing of bruises of skin, that's bruises of skin that were present and documented at autopsy.

Dr. Hunsaker testified that, as a forensic pathologist, he could not infer "intentionality . . . from the presence of any changes on the body." He agreed that Dr. Chancellor accurately portrayed the changes to the victim's body but disagreed with her testimony that the victim's injuries were intentionally inflicted by someone. He stated, to a reasonable degree of medical probability, that he saw no medical evidence from the information that he reviewed that would allow him to determine whether Petitioner purposefully harmed the victim.

Dr. Hunsaker testified that he would not have determined that the victim's manner of death was homicide; he said that, if he had conducted the autopsy, he would have listed the manner of death as "undetermined." This exchange then occurred:

Q. Let's talk about . . . Dr. Chancellor's testimony for a minute. Were there any conclusions that she drew that you disagreed with?

A. Well, we haven't talked about it much but the short of it is the child's care giver, who I guess was [Petitioner], indicated how he had jumped over this barrier at the doorway and landed two feet[4] on the child's abdomen.

Dr. Chancellor did not believe that is how . . . the injuries came about in the abdomen, or on the abdomen.

Now, I disagree with that. And that also applies to Dr. Lakin.

Q. What specifically did you disagree with?

A. That it was unlikely that that mechanism of his getting over the barrier . . . and landing with - he is a large adult, over 200 lbs., and then landing with his feet on the abdominal area of the deceased, of the child.

[4] We note that Petitioner testified at trial he landed on the victim with his right foot, not both feet.

And Dr. Chancellor[5] disagreed with that as a way in which these injuries came about. And therefore, I disagree with that conclusion of hers, or that opinion.

In other words, that is an explanation offered by a person, the only eye-witness to the event, that is plausible.

Q. Do you have a conclusion as to what mechanism of injury was . . . more plausible?

A. I am not in the process of aggrading this or that, the bottom line is there were blunt force injuries, or blunt forces applied to his abdomen, by some mechanism. And I am just stating that the mechanism was offered about jumping over the barrier and the feet impacting the abdomen and it is a plausible explanation. (Footnotes added).

Dr. Hunsaker was then asked to read the conclusion from his report, which stated: "I disagree with the conclusion that it could not have been caused by a 250 lb[] man jumping over the gate and forcefully compressing the toddler's abdomen, indeed that mechanism is more plausible than the one in which [a fist] or some other blunt object forcibly impact[s] the abdomen." The following colloquy then occurred:

Q. How did you reach your conclusion about what was a more plausible mechanism of injury?

. . . .

A. That the forces involved a 200[-]plus pound adult jumping several feet down onto the abdomen of a seventeen[-]month[-]old child, which includes also not only his weight and of course gravity.

Then it's more severe than if someone were to ram something into the abdomen, such as a fist, which in all my experience is commonly been [sic] involved in injuries of this type. And that is because the internal injuries were very, very extensive.

[5] It is not clear what part of Dr. Chancellor's testimony Dr. Hunsaker is referring to here. A review of Dr. Chancellor's trial testimony (and of her autopsy report) shows that she never testified about Petitioner's claim that he stepped over a gate onto the victim's abdomen.

> A part of the muscle attached to the spine was [ripped] away from it, what's called a bulge. There was severe injury to this organ called the mesentery which has blood vessels and are connected tissues that attaches to the bowel. There was damage to the bowel.
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> . . . .
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> A severe degree of mechanical force was applied to that child's abdomen. And I believe the greater amount of force would occur along the lines described by [Petitioner] in this case, as opposed to some other mechanism, even including it being say, a lap belted child in the backseat of a vehicle, concerning as I've had a fair number of investigations over the years.

Dr. Hunsaker testified that the CPR performed on the victim could have potentially made his injuries worse. He stated that CPR, "specifically . . . using hands to press on the chest, . . . bruising can occur, both externally and internally. And, for someone who is not trained in it, frequently the degree of injury is worse." He stated that bruising occurring after death, called "post-mortem contusions," could involve the skin or internal organs.

On cross-examination, Dr. Hunsaker testified that he reviewed some materials concerning statements that Petitioner made outside of his sworn testimony at trial but did not recall if he reviewed all of Petitioner's various statements regarding the events leading to the victim's injuries. He said that he did not recall whether he was provided reports to review from DCS, the victim's day care, or other witness statements regarding prior instances of alleged abuse to the victim. Dr. Hunsaker testified that, even if the victim had been deceased at the time CPR was administered, the CPR could have caused bruising. He clarified, however, that first responders doing CPR would not have caused "such extensive injury in the abdomen" but that "even that type of effort by the first responders could have made some of the bleeding worse, some of the tears worse."

Dr. Hunsaker testified that he agreed with Dr. Chancellor that the cause of the victim's death was multiple blunt force injuries to the abdomen. He further agreed that blunt force trauma to the abdomen may be a sign of child abuse. He acknowledged that statistics indicated that child abuse was the leading cause of trauma-related deaths in children under the age of three. Dr. Hunsaker agreed that an essential step in evaluating injury in children was determining whether the injury matched the history provided by the caregiver. The following exchange then occurred:

> Q. So if you did not review the history in this case of this child and did not review the prior statement of [Petitioner] regarding what he said

initially about the mechanism of injury, would that impact your determination?

A. I'll say I don't recall how much of that background I reviewed, but any information that is relevant and material, coming to the final conclusion is something that one should look at, if that is what you're asking, yes.

. . . .

Q. . . . [A]re you aware that the guidelines suggest that there should be a concern for possible abuse where the details change, or additional scenarios are suggested by the caregiver as additional trauma is identified, or the cause of trauma is questioned?

A. Yes.

Q. And if that occurred in this case, would that be something that you would take into consideration regarding your opinion about what happened?

A. That is something that one should consider[.]

. . . .

Q. And again, would you agree with the conclusion that one should have concerns about abuse where there is a delay in seeking treatment?

A. Yes, that is a factor that one would consider.

Dr. Hunsaker further agreed that forensic pathologists should look to determine whether there are multiple injuries, multiple types of injuries, and multiple locations of injuries to determine if there might be abuse to a child. The colloquy continued, as follows:

Q. So the existence of prior injury, such as head injury or co[n]com[i]tant injury, such as head injury with the injury that causes death, would you agree that that would be something to look for in the physical exam when determining whether this was a death related to abuse?

A. Yes, I believe that is fair.

Q. And again, would you also agree in the physical exam, in determining whether or not this is abuse . . . the guidelines suggested that you should look for bruising in the non-boney predominant areas, in particular the ear, the cheek, the neck and the face?

A. You should look for injuries anywhere you can find them that's right.

. . . .

Q. And did you not indicate in your report that, in fact, [Petitioner] had not offered a satisfactory explanation for the head injuries to the child?

A. On the basis of what I was given to review, that is true, yes.

Q. And they had injuries in this case involving the non-boney prominent areas of the ear, cheek, neck and face; correct?

A. I think some of those, yes.

Dr. Hunsaker testified that Petitioner's explanation of how the victim's abdominal injuries occurred was "a way" but not "the only way" in which the injuries could have been caused. He said that seventeen-month-old children were not "skilled enough in terms of motor development and judgment" to ride a bicycle and that the victim's injuries would not have been caused by a "simple fall that a toddler might take while at play[.]" He said that some of the bruising observed on the victim at autopsy could have happened more than three days before the victim's death, particularly the injury to the victim's scalp. He said that, in addition to the abdominal injuries, it was possible that the victim had both old and new bruises at the time of his death.

Dr. Hunsaker testified that he was familiar with a new program at the University of Louisville that began in 2017, in which physicians were researching biomechanics and injuries to children and studying "issues that are related to childhood deaths and subset child deaths due to abuse." When asked if this was "a fairly new field" of study, Dr. Hunsaker stated, "I don't necessarily disagree with that." Dr. Hunsaker said that he was familiar with studies which showed that fatal blunt abdominal trauma in children ages zero to four years old did "occur when they receive[d] a kick, or a fist punch into the upper abdomen[.]"

Dr. Kevin Toosi testified that he was a biomechanical engineer, a principal scientist at BioEx Consulting, and an adjunct professor at the University of Pittsburgh. Dr. Toosi

explained that biomechanical engineers apply the "law of physics and principles of engineering to living systems in general, but mostly to the human being" and that they investigate and study "forces and motions of human body parts, all the interaction of the external forces and how external forces can create injuries with those body parts." Dr. Toosi stated that he had testified four to five hundred times as an expert in biomechanical engineering.

During the State's voir dire, Dr. Toosi acknowledged a previous case out of New York in which he had been precluded from testifying after the court found that certain statements of his were less than credible, that his methods did not adhere to accepted standards of reliability, that he was "neither competent [n]or sufficiently experienced in his claimed field of expertise to testify[,]" that he made errors in obtaining the data from his calculations, and that he could not show one peer reviewed item of scientific literature to validate the method he used. Dr. Toosi stated that he disagreed with the New York court's conclusions regarding his testimony. When Dr. Toosi was asked about three other cases from New York in which he was precluded from testifying, Dr. Toosi stated that he did not recall and was not familiar with those cases.

Dr. Toosi acknowledged that he did not have a background in pediatric trauma or pediatric pathology. He acknowledged that he had never published any articles or conducted accident reconstructions regarding biomechanics and the physiology of children. When asked if he had reviewed specific articles relating to blunt force trauma in non-accidental deaths in children in forming his opinion in Petitioner's case, Dr. Toosi stated, "No, some of them are referring to the human body in general. They can be generalized to the body of children." Based on Dr. Toosi's answers, the State challenged his ability to testify as an expert, but the trial court concluded that he could testify as an expert in the field of biomechanical engineering.

Dr. Toosi testified that, in forming his opinion and preparing his report for post-conviction counsel, he reviewed the autopsy report, photographs from the autopsy, "crime scene re-enactment media," the trial testimony of Dr. Lakin and Dr. Chancellor, Petitioner's trial testimony, the case report prepared by Dr. Hunsaker, and "State of Tennessee versus Curtis Morris, Jr., dated June 6, 2009." He said that he used the materials in an analysis of the amount of force a person the same height and weight as Petitioner "could apply to a body of an infant" and whether that type of force could have created the fatal injuries that were sustained by the victim. He said that he used biomechanics to "calculate the amount of force being exerted as a result of stepping, or stomping." Based on his calculations, Dr. Toosi concluded that there were "4.6 . . . or 5 kilograms in force being exerted as a result of landing from a height of eighteen inches for a 250[-pound] man." The following exchange then occurred:

Q. For those of us who are unfamiliar with kinematics, how does this compare with the amount of force generated in, for example, car accidents?

A. Well it is actually following the range that were studies of seatbelts and car accidents you can see the range of forces that can be applied to the abdomen of the occupant, as a result of an accident. A relatively moderate severe accident that can be injurious and powerful, the range has been established to be between 4 to 6 kilogram, or 4000 to 6000 Newton force.

The Newton is . . . the unit of force and you are getting from 4 to 6 thousand of that from a car accident that can be injurious to an adult male that has been established in the scientific literature. And the force that's been calculated from this accident was actually falling in the same range that would be harmful for an adult male.

Obviously, an infant being that size and much smaller and weaker from a human adult would be susceptible to be injured at a lower amount of force.

We don't have the exact force in the literature for the kids, or infants, but again, conservatively dealing with the numbers if the number is harmful for an adult male, you can imagine, or assume, scientifically that the numbers can be extrapolated for a child that age and it doesn't take that much of force to actually recreate that type of injury that he sustained during the accident.

Dr. Toosi testified that, based on the calculations in his report, he believed it was possible that the victim's injuries could have been produced accidentally as testified to by Petitioner at trial. He stated that, if he had been retained by trial counsel in advance of Petitioner's trial, he would have prepared the same report.

On cross-examination, Dr. Toosi testified that his report was inconclusive as to whether the victim's fatal injuries were caused accidently or intentionally, stating that "both scenarios would have been happening with the same amount of force." Dr. Toosi said that Petitioner would have created the same amount of force whether he jumped from the height of the gate or stepped from the height of the gate. He explained, "It doesn't matter if you describe that as a jump, or as a soft landing, it is about the height and weight of the person." The following exchange occurred:

Q. So you're saying that your calculations would be the same if he were landing from a jump from eighteen inches high, or normally walking?

A. It is based on that eighteen inches height between the foot, when it is landing on the ground, yes.

. . . .

Q. And I think one of the principles that you cited in your report, or one of the conclusions was that you felt confident in your assertions about your findings in this case and your calculations in this case, because children would be even more susceptible to injury; is that right?

A. With the same amount of force it is generally accepted that the body of the children is more susceptible to get injured for the same amount of force as the adults.

Q. Would you be surprised to find that numerous articles, including one from the American Association of Pediatrics and the lab I mentioned in Louisville and their program with biomechanics found that children's joint, cartilage and ligaments are stronger and relatively more resistant to stress than the bone and cartilage of an adult and accounts for less joint dislocations and ligamentation and tears in children in childhood injury.

A. I am not surprised and I agree with that, but here you are not talking about the cartilage and bone and so-called muscular structure, you are talking about the subliminal injury to the soft tissue and that is different here.

Dr. Toosi said that he made no conclusion on whether the victim's injuries could have been caused by non-accidental trauma. He stated that both accidental and non-accidental trauma were possible based on the amount of force that had been exerted. The following exchange then occurred between the State and Dr. Toosi:

Q. And again, your conclusion was based upon extrapolating adult data to children, correct?

A. As the minimal amount of force, yes.

Q. And when you extrapolated that adult data to children you used the assumption that a child would have a more severe injury than an adult; correct?

A. Were to have abdominal injuries, yes.

Q. And again, you were not familiar at the time that you made those conclusions that there were numerous studies indicating that often times due to the elasticity that has to do with childhood anatomy in the abdominal area that many of the experts believe that often times childhood injuries may not be as severe as adult injuries because of that specific anatomy?

A. I haven't seen anything to have had abdominal injury, what I agreed with the article was the muscular, skeletal many bones, cartilage and ligaments, was not for the abdomen, no. I haven't seen one paper.

Q. And again, Doctor, you are not familiar with any of that research? You are not familiar with any of the articles reaching, or numerous articles reaching the conclusion that childhood abdominal injuries are often time not viewed as severe as sometime adult injuries because of the structure of the child's abdomen?

A. I have not seen that.

Q. Okay. And so you used the assumption, the opposite assumption that those injuries would be more severe; correct?

A. That is correct.

Co-counsel testified that he had assisted lead trial counsel during Petitioner's trial. Co-counsel stated that the defense strategy had been to show that there was insufficient evidence to convict Petitioner.

Co-counsel acknowledged that he did not have a medical or scientific background. When asked the names of any experts that were retained on Petitioner's behalf, co-counsel recalled that he and trial counsel consulted with two experts, but he could not recall their names six years after trial. He stated that the opinions of the experts they consulted did not support Petitioner's defense.

Co-counsel testified that he reviewed the State's entire file prior to trial; he said that he did not know why he had not seen the transcript of the 9-1-1 call that the State had prepared. Co-counsel testified that he believed trial counsel had filed many motions in Petitioner's case because their firm had a "litany of standard motions" that they generally filed in every case.

Co-counsel agreed that the critical issue in the case had been whether Petitioner intentionally or accidentally caused the victim's injuries. Co-counsel was asked about his comment to the jury during opening statement: "You won't hear proof about intent, you didn't hear anything now and you won't hear anything during the trial about how it happened, except for when you hear from [Petitioner.]" Co-counsel acknowledged that, in fact, the jury heard testimony from which they could infer intent.

Co-counsel agreed that he also told the jury during opening statement:

> Before November 14, 2009, before this date [Petitioner] went to the Courts, obtained custody of this child, took that child, because he was worried about that child, he took that child to protect the child from the environment that that child was in and began to care for that child, along with his sister, as best as he knew how and that is what he did.

Co-counsel explained that his comments set up "the concept that [Petitioner] was a good father and it would be contrary to his behavior to intentionally kill his son." He agreed that he provided more detail in opening statement than witnesses testified to at trial regarding Petitioner's obtaining custody of the victim.

When asked about Dr. Lakin's testimony, co-counsel recalled that he objected to her testimony, arguing that she was not qualified to give the opinions offered and that the defense had not "offered the sort of proof which would open the door for rebuttal." Co-counsel testified that he believed Dr. Lakin's testimony was "way outside the scope of what [he] understood her expertise to be." Co-counsel initially said that he did not know that Dr. Lakin was going to testify on rebuttal for the State; he agreed, however, that the State had disclosed Dr. Lakin as a witness several months before trial, stating that "was probably part of the reason that we were trying to find an expert." The following exchange then occurred:

> Q. So[,] I guess when they did disclose [Dr. Lakin] to you, what steps did you take to determine what her testimony was going to be?
>
> A. I am not sure, are you asking me, personally?

Q. Yes.

A. I don't know that I did anything about that.

Q. You're the one who cross examined her, correct?

A. That's true.

Q. But, you didn't take steps in advance to figure out what she was going to testify about?

A. I don't know. From my opinion on her testimony I don't know that she knew what she was going to testify about. I don't know how to determine that, so no.

Q. Did you call her?

A. I did not call her.

Q. Did you ask for a *McDaniel* hearing?

A. No.

Q. Why not?

A. I believe my involvement in the case . . . really was . . . at the time of trial is when I really got involved in the case.

Q. So all the pretrial stuff somebody else in your office did?

A. I think that is correct; yes.

Q. Did anybody in your office call [Dr. Lakin]?

A. I don't know.

Co-counsel did not recall the prosecutor's representation to the trial court that Dr. Lakin's testimony would be about how "the story [Petitioner] gives about taking off and landing on his son [was] not - it [couldn't] be done with physics . . . that would be the questions we would be asking her about." He agreed that the prosecutor told the trial court that she had "posed a series of hypotheticals for [Dr. Lakin], based on [Petitioner's]

testimony . . . as to whether or not that is physically possible with the injuries we see." Co-counsel also agreed that, during his cross-examination of Dr. Lakin, Dr. Lakin testified that her training was not in biomechanics and that she was not a physicist. Co-counsel acknowledged that he did not request a continuance, a *McDaniel* hearing, or a mistrial based on Dr. Lakin's testimony.

Co-counsel agreed that, prior to Dr. Lakin's testimony, he requested ten minutes to prepare for his cross-examination after Dr. Lakin testified about "bruising to the head[.]" Co-counsel denied that Dr. Lakin's testimony required more than ten minutes of preparation before his cross-examination of her.

Co-counsel was asked about a notation on documents from the defense investigator, Inquisitor, Inc., which stated, "Please do not forward to client[.]" Co-counsel responded, "I don't know why that's there, I didn't put that there and I don't know whether we shared it with the client, or not. We don't take direction from Inquisitor, Inc. about the communications we have with our clients." Co-counsel stated that, based on his firm's practice, they forwarded all documents to Petitioner. He said that the reference to "client" on the documents could have been referring to Petitioner's father who was financing the litigation.

Co-counsel agreed that the trial transcript reflected that trial counsel did not cross-examine Chief Beaman, who had indicated in a report that he could not see any outward signs of injury to the victim. He recalled, however, that there were physical signs of trauma that had been detected by Chief Beaman in that, when he responded to the scene, the victim was cold, unresponsive, and was not breathing.

On cross-examination, co-counsel testified that, at the time of Petitioner's trial, he had been practicing law for sixteen years and that his practice had consisted of federal and state criminal defense and "other [c]ivil litigation." He said that he had previously tried many first degree murder cases and cases involving allegations of aggravated child abuse.

The following exchange then took place:

> Q. During that time of handling cases both in the criminal context and in the civil context, had you developed relationships with certain expert witnesses?
>
> A. Yes, and the better answer would be maybe I developed relationships with organizations that helped find experts.

Q. And could you pick up the phone and call one of those organizations and find someone that you could talk to about those issues?

A. Generally, yes.

Q. And often time[s] was it your practice to talk to those individuals, provide them some information and get some idea as to whether their opinion might be helpful to you before you hire them, retain them, have them put down a report that you have to turn over?

A. Yes.

. . . .

Q. And was there a strategic reason that you handled it that way?

A. Yes.

Q. And what was that?

A. Well, [if the] testimony wasn't going to favor my client, or benefit my client then I don't want – I'd like to conflict them out if I can from the other side using them, but I don't want there to be something that I have a duty to disclose.

Q. And in addition, you don't want to waste your client's money on an opinion that is not going to help them, is that fair?

A. It would be mal-practice to spend money on an opinion that is going to be contrary to your client's position.

Q. So is it possible that you have a file where there was no retention of an expert but that you had, in fact, consulted an expert, or more than one, about a particular issue?

A. Yes, I believe I have in this case.

Q. Was that uncommon in your practice?

A. No.

Co-counsel recalled that, during informal discussions with several doctors, he and trial counsel learned that the bruising on the victim's head was a sign of abuse and would be "extremely difficult to get around." He testified, "Assuming that [Petitioner's] testimony was consistent with the video, which it ended up being . . . I think consistent with the reenactment video, yes it would be tough to explain the bruising on the head through medical proof, when it was a one step into the abdomen."

Co-counsel acknowledged that Petitioner made multiple different statements regarding what had happened to the victim and that Petitioner did not tell first responders that he had stepped on the victim. Co-counsel agreed that because Petitioner was charged with first degree felony murder, rather than first degree premeditated murder, the issue of "intent" involved the "intent to commit an act of child abuse and the intent to commit an act of child neglect[.]" He agreed that the defense strategy had been to show that Petitioner "was a loving, caring, devoted father, who made a terrible mistake and not a monster who stomped his child to death" and explained that the defense had "wanted to share with the jury that he was not really equipped to deal with the situation after the situation had happened. Because, we had to explain two things; one was how his son got injured and number two, is the behavior after the injury."

The following colloquy then took place:

> Q. Was that complicated in this case, because you had injuries, not only to the abdomen that might could have been explained from the scenario offered by [Petitioner], but you also had injury to the head.
>
> In particular in this case, to the ear, neck, throat and face, which are, as Dr. Lakin indicated, I think, injuries that could be suspected of abuse.
>
> A. Yes, I think we did okay with [Dr.] Chancellor on that issue, I believe. And I think we recognized that there was a lot of problems with the head injuries. And so there was a strategy, as I remember, about some things that had happened at the day care, to keep that out and who was going to testify and who wasn't going to testify and what doors we would be opening.
>
> Q. Is it fair to say that in this case you were walking a trip wire, because there were, at least, two prior allegations of abuse? One of those things fairly serious in that there were allegations that the child had black eyes and had been hit in the face by [Petitioner]?
>
> A. Yes.

Q. So would it be fair to say in cases like this, involving 404 (b), but because of the unique circumstances of this case, it was a very fine line to walk, to make sure that you were presenting a defense that was viable for [Petitioner] but not opening the door to prior abuse, is that fair?

A. Yes, that is fair.

Q. And is it fair to say that that was particularly difficult, because your defense was a defense of accident and it was very tricky not to open the door to the prior abuse for the State to rebut that assertion of accident; is that fair to say?

A. That's right.

Co-counsel acknowledged that the State had filed a notice prior to trial that Dr. Lakin could be an expert witness called by the State. He agreed that the notice indicated that "Dr. Lakin [was] a medical doctor with expertise in the field of pediatric child abuse, maltreatment and forensics, sexual assault examination" and that she had reviewed the victim's medical records. Co-counsel agreed that Dr. Lakin had not prepared a report and explained that Dr. Lakin would not have been allowed to testify "but for the testimony of [Petitioner]" that the victim's injuries were accidental injuries. He agreed that the State made the decision to call Dr. Lakin only after Petitioner testified. Co-counsel then testified as follows:

Q. You didn't know and the State didn't particularly know whether or not she would, or could be a witness until after that testimony; is that right?

A. Right. And just into this day I don't think she should have been allowed to testify, based on a couple of different reasons, but yeah, I had no idea once they closed their proof and we didn't put any medical proof on, then part of our thought process was that she wouldn't be able to rebut medical proof.

Q. Again, did that go back to clinging to sort of your decision making about whether or not you presented expert proof of your own?

A. Yeah, I know that informally we talked to several doctors and the bruising on the head, particularly, was extremely difficult to get around.

Q. And did they tell you, essentially, that was a tell-tale sign of abuse?

A. That is what we learned. And it was part of a couple of problems in terms of what we put in with the experts, because what we understood the testimony to be of [Petitioner] was that th[is] was nothing other than an accidental -- he had gone into a room to get a toy, or a ball, so that they could go downstairs and play and then when he jumped over the gate that he didn't realize his son had been there and he had some; what I thought, was reasonable explanations for his fear, I think something had happened before that had kind of made [him] nervous, or something.

Q. Concerned that the child might have fallen down the stairs?

A. I think that's what it was, he was worried that the child had fallen down the stairs, so he jumped over to go down and then that was kind of consistent with his story, I think, from the video and on.

Q. But again, *you were not able, with the people that you consulted, to find a way to medically explain, not those injuries that would be caused by an accident like that, but the other injuries that were found on the child, related to the head grouping; is that right*?

A. *That was a challenge, yes*.

Q. It was the (indiscernible) sort of injuries that made it difficult to explain by that one act; is that fair?

A. Assuming that the testimony was consistent with the video, which it ended up being, I think consistent with the reenactment video, yes, it would be tough to explain the bruising on the head through medical proof, when it was a one step into the abdomen. (Emphasis added).

Co-counsel recalled that, during his cross-examination of Dr. Lakin, he was able to elicit testimony from her that "someone jumping on someone could possibly generate enough force to cause severe injury" but that Dr. Lakin "stated that she didn't believe that to be the case here, because usually in those circumstances an adult will try to catch themselves, prior to the full force reaching the victim[.]" Co-counsel agreed that Dr. Lakin eventually testified that she could not entirely rule out the possibility that Petitioner's scenario could have caused the victim's injuries.

Co-counsel said that the issue of biomechanics came up during the preparation of the defense and that they "talked to a couple of experts about biomechanics." He said:

> I wouldn't have done that, but I think that there was a consensus that that needed to happen and I think it did happen.
>
> And so, I had more knowledge about that issue at the time of trial, than before, because of looking at it and I think that is what I was telling the Court, I had some specific issues of questions, because of some research I had done, maybe.

Regarding his failure to object to the prosecutor's use of the word "stomping" during cross-examination of Petitioner, co-counsel testified,

> There's always a balance in objecting about whether or not you're actually calling attention to a point that maybe you want to just to kind of slide on by, hope the jury doesn't grab on to it. So that is probably part of the decision and I think it was going to come in anyway.

Co-counsel testified that he did not represent Petitioner's father on any criminal charges and that, to his knowledge, his firm did not represent Petitioner's father on any matters. He said that there was no conflict that would have prevented the defense from calling Petitioner's father to testify. Co-counsel stated, however, that even if certain witnesses had "potentially positive things to say about Petitioner's character" or about his "care for the children," they would have run the risk of opening the door to the allegations of Petitioner's past abuse.

On redirect examination, co-counsel said that he did not personally talk to the experts but that he was "confident that experts were consulted by [his] firm." He stated, "I have a memory that physicians were consulted[,] and I think that it was a bio-expert as well, a couple of them, is what I think I know." He acknowledged that DCS never determined that Petitioner engaged in prior instances of abuse against the victim. Co-counsel agreed that the defense did not have an expert "on call" to consult during Dr. Lakin's or Dr. Chancellor's testimony.

Petitioner's father testified that, on the day of the offense, he and Petitioner's mother saw Petitioner at the hospital where the victim had been taken. He stated that Petitioner appeared to be "in quite a bit of pain and agony" and that Petitioner was "sobbing[.]" He said that, after Petitioner's arrest, he hired trial counsel to represent Petitioner. He recalled that trial counsel had two other attorneys assisting him at trial.

Petitioner's father testified that he communicated with trial counsel regarding Petitioner's defense. He stated that he asked trial counsel to hire an expert and "suggested one who would be an expert witness as a child abuse specialist[.]" He said that he intended for trial counsel to use part of the attorney's fee to pay for an expert to be used in Petitioner's defense. He recalled that trial counsel told him that counsel would look for an expert. Petitioner's father identified an email that he sent to trial counsel prior to Petitioner's trial and explained that

> the email was to bring back to [trial counsel's] memory how important the medical examiner was in [Petitioner's] defense and . . . why it was important to get an expert witness and . . . that[,] if he had . . . exhausted his search[,] I wanted him to contact an expert witness that I kn[e]w at church . . . .

Petitioner's father stated that trial counsel responded that "'Science is science' . . . or something like that." He said that he learned trial counsel did not hire an expert for Petitioner's defense on the final day of Petitioner's trial when no such witness was called to testify. Petitioner's father reiterated that he would have paid for an expert to testify in Petitioner's defense, noting that he also paid for the investigator hired by trial counsel.

Erica Gatewood testified that she was an attorney who represented Petitioner in a custody matter in juvenile court where Petitioner sought custody of his two children. Ms. Gatewood recalled that Petitioner had concerns about the mother's stability. She recalled that the children's mother had a serious drug addiction and had been suicidal at the time Petitioner sought custody. Ms. Gatewood testified that Petitioner was ultimately awarded primary custody. She did not recall whether she was ever contacted by trial counsel or co-counsel regarding Petitioner's criminal case.

On cross-examination, Ms. Gatewood did not recall whether Petitioner was employed at the time of the custody proceedings. She testified that she was unaware that day care workers had observed the victim with two black eyes and had reported the incident. Ms. Gatewood agreed that it is more common for a court to give custody to a parent, especially when a parent has the support of his parents. She agreed that Petitioner's parents were helping him with his housing and other bills at the time of the court proceedings. Ms. Gatewood recalled that Petitioner did not initiate the custody proceedings; they were initiated by the victim's maternal grandmother, and a copy of the grandmother's petition was served on Petitioner. Ms. Gatewood acknowledged that Petitioner, as the child's father, would have been given notice of a custody petition because as the father, he would have been responsible for support.

Trial counsel testified that he was lead counsel during Petitioner's trial and that he was retained to represent Petitioner by Petitioner's father. He said that, although

Petitioner's father had wanted to be involved, there had been a lot of "negative information" that counsel could not share with Petitioner's father. When asked about what Petitioner's mother and father knew about the case, trial counsel stated:

> [T]here was a disconnect between [Petitioner's] mother and father and [Petitioner]. They [said] what they knew about [Petitioner] and his life and lifestyle was very limited. And for lack of a better word, they were kind of green, they were older parents and what we had come up and come to know about [Petitioner] through our investigation, there were a lot of things in his past, while this was going on that were bad things that we could not share with [his parents].

Trial counsel acknowledged that he had no background in medicine, science, or forensics. He recalled that co-counsel cross-examined the State's experts at trial but that he helped co-counsel prepare for the cross-examination. Trial counsel testified that he consulted two experts—Dr. William Terrell and Dr. Rick Hodges; he acknowledged, however, that his file did not contain any notes regarding his consulting these doctors.

Trial counsel stated that, in addition to Dr. Terrell and Dr. Hodges, he spoke to two other experts by phone—one in Kentucky and one in East Tennessee—after sending them records from the case. He said that his conversations with these experts occurred after the experts reviewed records provided by trial counsel and that their discussions were "off the record, to see what their opinion would be." He stated, "I didn't want to memorialize anything in writing, because I didn't know what their opinion would be." Trial counsel explained that none of the experts he spoke to would have been helpful to Petitioner's defense and, as such, he did not ask the experts to prepare any reports. Trial counsel testified, "[E]verybody that I talked to said these were some of the worst injuries that they had ever seen and that the story that [Petitioner] was telling and the injuries didn't add up." Trial counsel stated that none of the experts he spoke to were biomechanical engineers. He recalled that Dr. Terrell was a pediatrician with over forty years of experience, that Dr. Hodges was an OBGYN, and that the experts in Kentucky and East Tennessee were forensic pathologists. Trial counsel stated that he spoke to Petitioner and Petitioner's father about his conversations with these experts.

Trial counsel stated that he did not recall why no objection was raised during the State's cross-examination of Petitioner when the prosecutor said that Petitioner "stomped" on the victim. However, he stated:

> Sometimes . . . when you object to certain things it puts a bad taste in the jury's mouth.

I think that [Petitioner] stated his position and I think the evidence was what it was.

So a lot of times when you don't have a lot to fight with you don't want to offend the jury and make them not like you, or your client.

Trial counsel testified that, in preparation for trial, he interviewed the victim's mother and grandmother, Petitioner's girlfriend, and several of Petitioner's neighbors. He said that, prior to trial, he and co-counsel reviewed the full discovery file provided by the State and the victim's medical records. After reviewing the court's file, trial counsel acknowledged that there were no defense motions filed in Petitioner's case.

When asked how they prepared to cross-examine Dr. Lakin, trial counsel testified:

I don't recall. I'm sure we reviewed discovery. I'm sure we looked at all of the medical records, I mean we did the preparation work that we would do for this trial, or any other murder trial that we were involved in to deal with the issues that we had to face.

And in this trial the issues were the severity of the injuries to [the victim].

When asked if establishing that Petitioner fought for custody of his children would have assisted in his defense, trial counsel responded:

In [Petitioner's] case[,] there's kind of a fine line between some of the information that we knew. We never wanted to open the door to character. And so, we had to sort of kind of walk a tight rope on, you know, if we started to try to paint him as this guy who was a great father, then there were these reports from the day care, there were reports from ex-girlfriends and current girlfriends and different people about his cocaine use and drug use.

The following exchange then occurred:

Q. Would you have called his custody attorney?

A. Maybe. [Petitioner] could have talked about it. I talked about it, you said I talked about it in closing.

Q. Do you recall whether [Petitioner] . . . talk[ed] about it?

A. I don't. I mean, I think it was established without us having to, again, walk that tight rope on character, I think we were able to get it in, even though we didn't call witnesses to get it in, which I think, in my mind, we showed good lawyering.

When asked about not calling any witnesses other than Petitioner to testify, trial counsel stated:

> [Petitioner] lived at that condo, by himself, with those two kids, did not have a car, didn't have transportation. And it was almost like he lived in a bubble. The only people that we talked to were people that he partied with and did drugs with and would come over from time to time to do drugs.

On cross-examination, trial counsel stated that he had been practicing law for fifteen years at the time of Petitioner's trial. He testified that he had tried more than forty criminal cases with most of those cases involving serious felonies. He stated that he had previously handled first degree murder cases and child abuse cases. Trial counsel explained that he had handled cases that involved significant medical proof and issues of causation. He said that he was retained to represent Petitioner shortly after Petitioner's arrest. He said that he was assisted on Petitioner's case by co-counsel and by another attorney from their firm.

Trial counsel testified that he had previous experience with locating experts in other cases. He agreed that he knew certain experts that he could call on to get an informal opinion; he said that, in handling murder cases, it was his practice to have these experts "help [him] go through the medical evidence, the proof, to talk about what [his] theory of the case would be, did that make sense."

When trial counsel was asked if it would have been helpful to consult with another expert or a "different kind of expert who had an opinion where they could not make a determination about whether it was [an] accident, or whether it was non[-]accidental child abuse injury[,]" trial counsel responded: "I don't think so. I mean, the injuries, as I said before, honestly it was just a tough case and the injuries were horrible." The following colloquy then occurred:

Q. What did the experts that you consulted tell you about the nature of these injuries?

A. Basically, that the story that [Petitioner] was telling versus the injuries didn't -- it just didn't make sense . . . .

Q. Was that based upon the amount of injuries, given that there was not just the internal abdominal injuries but that there was also, do you recall, bruising on his face and neck area?

A. I think both of those.

Trial counsel testified that the defense elicited testimony from a day care worker that, when Petitioner brought his children to day care, they appeared to be fed and dressed appropriately and that Petitioner testified about how he took care of the children. He recalled that the victim's sister demonstrated to day care workers how Petitioner hit the victim in the face and that she also told day care workers that Petitioner had pushed the victim down the stairs. He recalled that Petitioner's mother had been informed about the abuse that the victim's sister had reported and that Petitioner's mother had been in the room when the victim's sister had demonstrated the abuse on a doll. He recalled that some of the witnesses he spoke to about Petitioner "paint[ed] him out to be a pretty bad guy[.]" He said that, from his investigation, he learned that "the people who would have observed [Petitioner's] being a father, that they were, you know, smoking weed and doing cocaine."

Trial counsel recalled that Dr. Lakin testified for the State as a rebuttal witness and that she was certified as a child abuse specialist. He said that the defense objected to her testifying but that the trial court allowed her to testify after Petitioner testified and presented his claim that the victim's injuries were the result of an accident. The following exchange then occurred:

Q. Do you recall . . . that [co-counsel] was able to have [Dr. Lakin] acknowledge, in fact, that she was not a biomechanical engineer?

A. I think, yeah, he did go down that road with her and we were able to get her to agree with that, on cross, about the biomechanical engineer piece, yes.

Q. And do you recall, also, that he was successful in getting her to . . . acknowledge that she could not entirely rule out the possibility that [Petitioner's] scenario could lead to that injury?

A. That's correct.

Trial counsel agreed that Petitioner "did not make a very good witness[.]" He explained that Petitioner "didn't show a lot of emotion" when talking about the victim's death. Trial counsel stated, "I think that jurors pay attention to stuff like that[,] and they pick up on that."

Trial counsel said that one problematic fact about Petitioner's case was that Petitioner had given several different versions of the events leading up to the victim's injuries. Moreover, Petitioner delayed calling 9-1-1 after injuring the victim. Trial counsel recalled that, when paramedics arrived, the victim was discolored, cold to the touch, and unresponsive. The following exchange then occurred:

> Q. And do you recall in this case the State had charged felony murder both ways. They charged felony murder both by aggravated child abuse, but also neglect; do you recall that?
>
> A. That's correct.
>
> Q. So even if the jury somehow didn't find that this was intentional, as far as he had intentionally injured the child, based upon his testimony that he heard a sound that he never heard [the victim] make and that [the victim] had thrown up and that there had been other signs of injury that he ignored for over an hour, was it a difficult case, especially with regard to the neglect charge?
>
> A. That was something that was very difficult in having to overcome, as a [l]awyer, and then from a lay-person's p[er]spective, because we always, whenever we had murder cases we would try to put together, like, a group of people and sort of -- what's the word I am looking for?
>
> Q. Mock jury?
>
> A. Kind of like a mock jury. And you get the people together and you talk about the good facts and the bad facts. We had done that in this case and it was just -- the men and women, overwhelmingly, like, that just left a bad taste in their mouths, the fact that they did not - that [Petitioner] didn't immediately call 9-1-1.
>
> Q. And again, that was something the jury could use to infer a consciousness of guilt with regard to the abuse allegation; is that right?
>
> A. Yeah, that's correct.

Trial counsel explained that he objected to the introduction of the 9-1-1 transcript at trial because he did not know who transcribed the call; he said that he had listened to the 9-1-1 call but that he had not had the opportunity to verify the authenticity of the transcript. He acknowledged that the State provided "open file discovery" in Petitioner's case and

agreed that the State provided the defense with "everything [they] were supposed to have." Trial counsel testified that the defense made oral motions regarding certain issues pretrial, including the issue of the admissibility of Rule 404(b) evidence. Trial counsel agreed that he had no experts to present in Petitioner's defense because he was unable to find an expert that would have been helpful.

On redirect, the following colloquy occurred:

Q. With respect to Dr. Lakin you indicated that you remember the qualifications from either this trial, or past trials; is that correct?

A. Uh-huh.

Q. Do you all look up how many times she had testified for the State?

A. I'm sure we had at the time of trial, I don't remember.

Q. Would it surprise you to learn that it was dozens?

A. No.

Q. As far as I could tell would it surprise you that she testified that there was abuse fairly regularly?

A. No.

Q. Would you have impeached her on that?

A. If we didn't we probably should have.

Appellate counsel testified that he represented Petitioner on his motion for new trial and on appeal. Appellate counsel stated that he had forty years of experience as a criminal defense attorney and testified as an expert in criminal defense practice. Appellate counsel agreed that some criminal defense cases required expert testimony from the defense. He explained that, in cases where the State has an expert to corroborate its theory of the case, counsel should investigate to determine if he or she could find an expert for the defense. He agreed that it was important for defense counsel to have experts to consult with "in order to help . . . cross-examine another expert[.]" Appellate counsel explained that, previously, he had "some experts prepare some of the cross-examination questions to ask"

witnesses. Appellate counsel stated that Petitioner's case would have benefitted from expert testimony for the defense. He testified:

> [T]his case was about the death of a sixteen, or seventeen[-]month[-]old child. The death was attributed to an impact of blunt force trauma to the abdomen. I think everyone agreed on that, at trial.
>
> The question was, what was the source of this trauma and it was the defense's [position] that it was accident, that [Petitioner] had jumped over a gate and landed on the child.
>
> And, the State produced two witnesses, two expert witnesses, who gave testimony that the injuries received by the child were not consistent with, they were so severe that they were not consistent with an accident.
>
> So it would have been good to have an expert to come in and say, wait those injuries are consistent with an accident.

He testified that, if he had represented Petitioner at trial, he would have gotten an expert to testify for the defense. When asked if he had ever had trouble finding an expert to consult with or for trial, appellate counsel responded, "No, you just have to find an expert. In this particular case, I know [Petitioner's father] . . . was able to provide funds for an expert."

Appellate counsel agreed that he had represented trial counsel in a criminal proceeding. When asked whether the timing of his representing trial counsel overlapped with his representing Petitioner on appeal, appellate counsel said that he could not recall. He testified in the following colloquy, as follows:

> THE COURT: . . . If you represented [trial counsel], while you were handling [Petitioner's] appeal, . . . would you have failed to raise plain error objections that [trial counsel] may not have objected to something, or something like that, because he was also your client?
>
> A. I raised plain error objections.
>
> THE COURT: I know, but would there have been some errors that you would not have alleged because you were also [trial counsel's] lawyer in another case?
>
> A. Absolutely not. I don't see that as a conflict[.]

On cross-examination, appellate counsel acknowledged that standards for defense counsel do not "require them to exhaust every expert they can find to talk to . . . if they are repeatedly getting an opinion that is not favorable to their client[.]" The following exchange then took place:

> Q. The standard is that you should seek an opinion, if you can find one, right?
>
> A. Yes.
>
> Q. You should seek an expert, consult an expert and utilize that expert, if you can find an expert who gives you an opinion that is favorable to your case; right?
>
> A. True, there are data bas[e]s for experts, like Tennessee Association for Criminal Defense Lawyers, as well as a National Association and other organizations[.]

Appellate counsel agreed that it was common practice for defense counsel to consult with experts informally because "you don't want a report that is damaging to you[.]" Regarding the reports compiled by Dr. Toosi and Dr. Hunsaker, appellate counsel said, "I think what impressed me with it was they said that you could not say that the injuries were inconsistent with an accident. And that was the State's position at trial."

Post-conviction court's order denying relief

Following the hearing, the post-conviction court denied relief in a lengthy written order. Regarding Petitioner's claim that counsel rendered ineffective assistance by failing to call experts in forensic pathology and biomechanical engineering to testify at trial, the post-conviction court found that Petitioner's attorneys "did not fail to consult with relevant experts," "did their best to impeach the testimony of the State's experts through cross-examination[,]" and "could not find an expert qualified in forensic pediatrics that could bolster and validate Petitioner's testimony that he killed the victim accidentally." The court accredited the testimony of trial counsel and co-counsel. The court found that trial counsel consulted with Dr. Hodges and Dr. Terrell and two other experts, "one was in Kentucky and one was in Tennessee," having phone conversations with them after he sent them the relevant records. The court found that, after consulting with these experts, Petitioner's attorneys strategically determined that they could not use them because each of the experts told trial counsel that "these were some of the most horrendous injuries that they had ever seen to a child" and that Petitioner's story did not account for the victim's injuries. The

court found that counsel was well-prepared for trial and "did the best [they] could with a very difficult fact situation."

The post-conviction court found that co-counsel objected to Dr. Lakin's testimony because he did not think it was proper rebuttal but that the State did not mislead him about her testimony. The court found that co-counsel then "asked for a few minutes to prepare additional voir dire before the jury was brought in[.]" The post-conviction court noted that, while making this request during trial, co-counsel discussed his preparations for her cross-examination thus far, stating:

> I've prepared a list of questions basically we've been working on them about injury biomechanics and what that is. And if it is a specialized field and learning whether or not she's qualified -- has reviewed the materials, is qualified to testify . . . because that's what this testimony is going to have to be. And if she's not qualified there[,] she may be qualified to talk about the head [injury]. I don't know. Because I've prepared to disqualify her or attempt to disqualify her as an expert on this basis alone.

The post-conviction court found that it "was obvious . . . from the fight that [co-counsel] put up in his attempt to exclude [Dr. Lakin's] testimony and his discussion of experts from Duke and Penn in the field of biomechanics during his objections that he was well-prepared for cross-examination if he proved unsuccessful" in his attempt to disqualify her. The court also found that co-counsel "utilized adept, aggressive voir dire of [Dr. Lakin's] expertise, both out of the presence of the jury and in front of the jury" and that he

> did a good job cross-examining her about her training and findings . . . and got her to admit that the injuries could [have been] caused by a foot, and that she had no evidence that the blow he testified to and the [head] injury even occurred at the same time.

The court determined that co-counsel was "prepared for the cross-examination of Dr. Lakin and did as effective [a] job as possible in light of [P]etitioner's admitting during his testimony that he had lied to the police about the events of that evening, and the video of his reenactment of how [P]etitioner had caused the injuries, prior to retaining [trial and co-counsel's] law firm."

Regarding Petitioner's proffered experts, the post-conviction court concluded that Dr. Hunsaker's testimony was credible "as to his limited expertise" but that he had no special qualifications in pediatric injuries. The court found that, although Dr. Hunsaker was qualified to provide testimony as a forensic pathologist, he admitted that he was not familiar with recent pediatric forensic research, and after a close and rigid cross-

examination by the State regarding pediatric studies of injury and indications of abuse, "it appeared to [the post-conviction] court, and also would have to the jury, that [Dr. Hunsaker] was not very knowledgeable about injuries to [seventeen-]month[-]old children." The court concluded that Dr. Hunsaker would not have made a good impression on the jury when compared to Dr. Lakin's expertise.

The post-conviction court found that, although Dr. Toosi was tendered as an expert in the field of biomechanical engineering, he was impeached by the State with several judicial opinions from several states in which courts found "Dr. Tootsi's [sic] methods do not adhere to accepted standards of reliability," "Dr. Tootsi [sic] is neither competent or sufficiently experienced in his claimed field of expertise to testify in this matter," "[Dr. Toosi] made errors in obtaining the data from his calculations," "Dr. Tootsi [sic] was unable to cite a single study that conclusively correlates the delta-V-force with bodily injuries in a motor vehicle accident," and several more. The court noted that Dr. Toosi had never published anything or participated in studies about biomechanics and non-accidental trauma in children.

The court found that Dr. Toosi did not dispute that the victim's injuries could have been caused by Petitioner's stomping on the child or kicking him and propelling him and that Dr. Toosi also admitted there was a lack of data on injuries to children and that he was unfamiliar with studies that showed that children were less likely to be seriously injured in the abdominal area due to the specific anatomy of a small child. Dr. Toosi further acknowledged that he had no background in pediatrics or pediatric trauma and said that he made no conclusion as to whether the victim's injuries could have been caused by non-accidental trauma, as both were possible.

The post-conviction court found that Dr. Toosi's testimony was not credible, stating:

> [O]n cross-examination, when confronted with the fact that in the video re-enactment [P]etitioner didn't jump over the baby gate landing with both feet, but instead just stepped over the gate with his right foot, [Dr. Toosi] stated something that defied logic in this court's opinion. He testified that "It doesn't matter if you describe that as a jump, or as a soft landing, it is about the height and weight of the person. The height of the landing and the weight of the person." He was then asked if his calculations would be the same if he were landing from a jump from eighteen inches high, or normally walking, and his answer was that "It is based on that eighteen inches height between the foot, when it is landing on the ground, yes." Although this court is admittedly not an expert in biomechanics, Dr. Toosi's testimony was not believed by this court, nor would it be believed by the jury at trial, as it defies the ordinary person's understanding of simple inertia. It is just common

> sense and experience that much more force is involved in landing on a [seventeen-]month[-]old child after jumping over a gate than in stepping over onto a child with a "soft landing."

The post-conviction court determined that, if Petitioner had called Dr. Hunsaker and Dr. Toosi during his trial, "they would have had to admit that [the victim's] death could have been caused by [Petitioner's] stomping him to death" and they could not say whether the death was caused accidently, as claimed by Petitioner. The court stated:

> Dr. Lakin would have then impeached [Dr. Hunsaker's and Dr. Toosi's] testimony by her much more qualified and experienced testimony, with her expert background in child injury. If [the defense] had held these two witnesses back to testify in surrebuttal, their lack of qualifications in child injury would have come up short in comparison to an expert board certified in Child Abuse Pediatrics[.]

The court found that Dr. Lakin "was extremely qualified to give her opinion[,]" noting that she had previously testified in front of the post-conviction court and other courts in Shelby County in child abuse cases. The post-conviction court found that Petitioner failed to show deficient performance or prejudice based on counsel's "not being able to find qualified experts in pediatrics to support [P]etitioner's theory of the case" and that Petitioner failed to produce such an expert at the evidentiary hearing.

The court next addressed Petitioner's claim that co-counsel made affirmative misstatements and material overstatements during opening statement to the jury regarding whether the State would introduce "proof about intent" and whether the jury would "hear anything during the trial about how [the injuries] happened except what [they] hear from [Petitioner]." The post-conviction court found that Petitioner failed to show deficient performance based upon co-counsel's statement and failed to show any prejudice to the defense. The post-conviction court found that, at the time the opening statements were made, no proof had been offered, and it was not intended by the State that Dr. Lakin would be called as a witness in the State's case-in-chief. The court continued:

> In fact, she could only be called if the State had already rested its case[-]in[-] chief, and [P]etitioner had testified and had given his version of the injuries as being accidental, from a single misplaced step. After he did testify, Dr. Lakin was then allowed by this court, over the defense's objection and after having a hearing on it, to testify that the injuries to the child were so serious that [P]etitioner's version of the events, in her expert opinion, could not be true. She would not have been allowed to testify as to what was in [P]etitioner's mind when he caused the injuries, as pursuant to Tenn[essee]

> R[ule of] Evid[ence] 602, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." She clearly did not have this personal knowledge, as only [P]etitioner could have had personal knowledge of what he was thinking at the time.

The post-conviction court found that co-counsel's statement that the jury would not hear "anything during the trial about how it happened except what you hear from [Petitioner]" was a true statement of the proof offered at trial as Dr. Lakin did not testify as to how the injuries to the victim happened but only that, in her expert opinion, Petitioner's version was not true. The court noted that the purpose of an opening statement is to set forth each side's "respective contentions, views of the facts and theories of the lawsuit." The court found that co-counsel's statement "accomplished that purpose." The court further determined that no direct testimony was offered at trial as to Petitioner's mental state, or as to how the victim's injuries happened, other than the testimony given by Petitioner when he testified. The court concluded: "His testimony simply was not found to be credible by the jury or by this court deciding the case as [thirteenth] juror."

The post-conviction court also denied relief on Petitioner's claim that counsel rendered ineffective assistance by failing to object to the prosecutor's "mischaracterization" of Petitioner's testimony as "stomping" on the victim. The post-conviction court noted that the State's theory of the case was that Petitioner "stomped" on the victim, causing his death. The court found that Petitioner's actions in his video re-enactment, which was played for the jury, "could accurately be described as 'stomping' on the child." The court determined that the State had a right to cross-examine Petitioner regarding whether he "stomped" on the victim and that the prosecutor did so five times during cross-examination. In reviewing these instances, the post-conviction court noted that Petitioner even admitted to having stomped on the victim in the following exchange:

> Q. And this is after you'd stomped on him with 250 pounds; right?
>
> A. Yes, ma'am.

The post-conviction court found that the prosecutor's cross-examination of Petitioner concerning the State's theory was not a "mischaracterization" of Petitioner's testimony "but a challenge to it." Noting that "[a] witness may be cross-examined on any matter relevant to any issue in the case[,]" the court determined that it would have overruled "without hesitation" an objection by Petitioner's attorneys to the prosecutor's use of the word "stomping" because the prosecutor laid a good foundation for those questions in the State's case-in-chief.

The post-conviction court found no deficient performance by counsel in not objecting, "as there was no valid legal reason to object." The court continued:

> This court also finds no prejudice to the defense in not objecting, as this court would not have sustained the objection in any event, and my overruling it might have been improperly interpreted by the jury as my approving of the word "stomping," as they saw me watching the reenactment video along with them.

The post-conviction court next addressed Petitioner's claim that Petitioner's attorneys rendered ineffective assistance based on their failure to introduce evidence regarding Petitioner's custody proceedings. The court noted that Petitioner did not initiate the custody proceedings; the victim's maternal grandmother did, and a copy of the grandmother's petition was served on Petitioner. The court noted Ms. Gatewood's testimony that Petitioner, as the child's father, would have been given notice of a custody petition because as the father, he would have been responsible for support. Ms. Gatewood also testified that it is more common for a court to give custody to a parent, especially when Petitioner had the support of his parents, who were helping him with his housing and other bills.

The post-conviction court found that, if counsel had introduced further testimony regarding custody and "described his requesting custody or receiving custody" as being "due to his being a wonderful father, it very well might have opened the door to the allegations of prior instances of child abuse[.]" The court concluded that the decision not to put on further details about how and why Petitioner gained custody of the two children was not deficient performance but was a "necessary strategy." Moreover, the court found that Petitioner had not established prejudice, noting that Petitioner was able to testify on direct examination that he won custody of his children; therefore, this fact was placed before the jury without having to call additional witnesses.

The post-conviction court also addressed the claim that Petitioner's attorneys rendered ineffective assistance based on their failure to ensure that the jury was properly instructed on the definition of "knowing" for purposes of the aggravated child abuse charge. The court noted that the definition of "knowing" was provided several other places in the jury instructions and concluded that, if the definition of "knowing" had been specifically defined in the instruction for aggravated child abuse, it would not have created "'a reasonable probability . . . that the result of the proceeding would have been different' pursuant to *Strickland v. Washington*[.]"[6]

[6] Although the post-conviction court's order addressed further claims raised by Petitioner, we have limited our summary of the court's findings to that which is relevant to the issues raised on appeal.

This timely appeal follows.

Analysis

Petitioner contends that the post-conviction court erred in finding that he received effective assistance of counsel, despite the following instances of deficient performance that resulted in prejudice to Petitioner's defense: (1) Counsel failed to call expert witnesses in forensic pathology and biomechanical engineering to rebut the State's experts and to materially bolster Petitioner's testimony that his son's death was accidental; (2) Counsel made "material misstatements regarding the evidence in his opening argument, revealing a fundamental misunderstanding of the legal issues and facts of the case"; (3) Counsel failed to adequately prepare to cross-examine Dr. Lakin and failed to request a *McDaniel* hearing to challenge her unqualified testimony; (4) Counsel failed to file any pretrial motions; (5) Counsel failed to object to the State's repeated use of the word "stomping" to characterize Petitioner's testimony; (6) Counsel failed to request proper jury instructions regarding the *mens rea* required to convict Petitioner of aggravated child abuse; and (7) Counsel failed to present evidence of prior legal proceedings wherein Petitioner sought and won custody of his children, despite stressing this fact during opening statements. Petitioner further contends that he is entitled to post-conviction relief based on cumulative error "given the vast evidence of counsel's ineffectiveness and failure to understand the basic law applicable to the case."

To prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see also Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a

petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, this court "need not address both elements if the petitioner fails to demonstrate either one of them." *Kendrick*, 454 S.W.3d at 457. Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see also Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

1. Failure to call expert witnesses

Petitioner contends that he was denied the effective assistance of counsel based on counsel's failure to call expert witnesses in the fields of forensic pathology and biomechanical engineering to rebut the testimony of the State's expert witnesses and to "scientifically validate" his testimony that the victim's death was caused by accidental trauma. He argues that because the State's case relied entirely upon the testimony of experts to discredit his explanation that he accidentally caused the victim's injuries, a defense expert was required to testify on his behalf. Petitioner contends that the only proof the defense introduced was his own testimony, "despite the availability of Dr. Hunsaker

who would have testified that the injuries were in fact medically consistent with [his] account." Petitioner argues that counsel also failed to effectively impeach Dr. Lakin's testimony regarding biomechanics, which she admitted she was unqualified to give. He asserts that, if called to testify, Dr. Hunsaker would have explained that "professionals with special training in biomechanics add much more information that allows specialists to make proper conclusions about the mechanisms of injury in a child's death" and that Dr. Toosi "would have directly contradict[ed] Dr. Lakin's testimony that [P]etitioner's account of accidentally landing on [the victim] was inconsistent with the injuries listed." Petitioner further notes appellate counsel testified that the defense would have benefited from such expert testimony.

The State responds that the post-conviction court properly found that counsel was not ineffective based upon the failure to call expert witnesses in forensic pathology and biomechanical engineering. The State argues that the record supports the post-conviction court's determination that counsel consulted relevant experts prior to trial and effectively cross-examined the State's experts. Further, the State argues that, when compared with the specific and experience-based testimony of Dr. Lakin, the testimony of Dr. Toosi and/or Dr. Hunsaker would not have changed the outcome of Petitioner's trial.

"Trial counsel has a duty to investigate and prepare a case, and this duty derives from counsel's basic function 'to make the adversarial testing process work in the particular case.'" *Nesbit v. State*, 452 S.W.3d 779, 796 (Tenn. 2014) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986)). Under *Strickland*, counsel's duty is "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions[,]" and "what investigation decisions are reasonable depends critically on such information." *Id*. "Counsel is not required to interview every conceivable witness." *Nesbit*, 452 S.W.3d at 797 (citing *Davis v. State*, 912 S.W.2d 689, 700-01 (Tenn. 1995); *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995)). Additionally, an attorney need not pursue an investigation that would be fruitless. *Strickland*, 466 U.S. at 691.

Furthermore,

> [n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel. Rather, courts must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and [j]udicial scrutiny of counsel's performance must be highly deferential.

Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (alternations in original) (citations omitted) (quoting *Strickland*, 466 U.S. at 688-89) (internal quotation marks omitted).

At a post-conviction hearing, when a petitioner presents a witness whom he claims should have testified at trial, the post-conviction court must determine whether such testimony would have been admissible and whether it was material to the defense. *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008). If the post-conviction court determines that the proffered testimony would not have been admissible at trial or that, even if admissible, it would not have materially aided the petitioner's defense at trial, the post-conviction court is justified in finding that trial counsel was not deficient in failing to call that witness at trial. *Id.* If the proffered testimony is both admissible and material, the post-conviction court must then assess the witness's credibility. *Id.* at 869-70.

In *Harrington v. Richter*, the Supreme Court of the United States stated that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence[.]" 562 U.S. 86, 106 (2011). The Court found "such a case" in *Hinton v. Alabama*, 571 U.S. 263, 273 (2014). In that case, Mr. Hinton's counsel "knew that he needed more funding to present an effective defense," but he "failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants[.]" *Id*. at 274.

The Court stated precisely why counsel's performance was constitutionally deficient in *Hinton*, explaining:

> An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.
>
> . . . .
>
> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." *Strickland*, [466 U.S. at 690]. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate.

Id. at 274-75 (emphasis in original).

In *Kendrick v. State*, 454 S.W.3d 450 (Tenn. 2015), a case involving a petitioner who alleged that his counsel should have called an expert at trial, the Tennessee Supreme Court recognized that "[e]xpert testimony and forensic science evidence, in particular, have become crucial to many criminal cases" and that "[d]ue to the ubiquity and persuasive power of forensic science evidence, it has become necessary for defense counsel to be conversant with forensic science and to be prepared to challenge forensic science testimony—either through effective cross-examination or by marshaling expert testimony for the defense." *Id*. at 475.

Quoting *Harrington*, our supreme court in *Kendrick* noted that

> "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." Rather, "[i]n many instances cross-examination will be sufficient to expose defects in an expert's presentation." Indeed,
>
> > it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy. Here Richter's attorney represented him with vigor and conducted a skillful cross-examination. As noted, defense counsel elicited concessions from the State's experts and was able to draw attention to weaknesses in their conclusions stemming from the fact that their analyses were conducted long after investigators had left the crime scene. For all of these reasons, it would have been reasonable to find that Richter had not shown his attorney was deficient under *Strickland*.

Kendrick, 454 S.W.3d at 472 (quoting *Harrington*, 562 U.S. at 111) (internal citations omitted).

After a discussion of *Hinton*, our supreme court explained:

> *Harrington* and *Hinton* provide a useful lens for assessing allegations of ineffective assistance that relate to the failure to investigate or retain expert testimony. There are cases, such as *Hinton*, in which a defense attorney bears an affirmative duty to consult an expert, and perhaps to call an expert as a rebuttal witness. From *Hinton*, we learn that when the prosecution's theory of the case hinges on expert forensic science testimony, the acquisition of an

> expert witness for the defense may be exactly what professional norms under *Strickland v. Washington* require.
>
> In most cases, however, the decision to select an expert, or which expert to select, constitutes one of the "strategic" defense decisions that *Strickland v. Washington* shields from scrutiny. In many cases, cross-examining the prosecution's expert will be just as effective as, and less risky than, utilizing a rebuttal expert. Each case must stand on its own facts.

Kendrick, 454 S.W.3d at 474-75.

a. Expert in forensic pathology

In denying relief on this claim, the post-conviction court found that Petitioner failed to establish deficient performance and prejudice. The court found that Petitioner's attorneys consulted with relevant experts but "could not find an expert qualified in forensic pediatrics that could bolster and validate Petitioner's testimony that he killed the victim accidentally." The evidence does not preponderate against the post-conviction court's findings.

In order to call an expert witness to testify at Petitioner's trial, counsel had to first locate and consult with an expert that could provide testimony beneficial to the defense. Trial counsel testified that, in researching Petitioner's case, he consulted with several experts "to see what their opinion would be" and to determine whether Petitioner's story of stepping on the victim was a plausible explanation for the victim's severe injuries. Trial counsel testified that he had previous experience with locating experts in other cases and that he knew certain experts he could call on to get an informal opinion. He testified that, in Petitioner's case, he consulted with two doctors, including a trusted pediatrician with forty-years' experience, and two forensic pathologists. He testified, however, that none of the experts he spoke to "would have been helpful for this case." He explained, "[E]verybody that I talked to said these were some of the worst injuries that they had ever seen and that the story that [Petitioner] was telling and the injuries didn't add up." He explained that, in addition to the victim's abdominal injuries, the victim had bruising on his face, neck, and head; he and co-counsel learned in discussions with experts that the bruising on the victim's head was a sign of abuse and would be "extremely difficult to get around." When asked if it would have been helpful to consult with another expert or a "different kind of expert who had an opinion [that] they could not make a determination about whether it was [an] accident, or whether it was non[-]accidental child abuse injury[,]" trial counsel responded: "I don't think so. I mean, the injuries, as I said before, honestly it was just a tough case[,] and the injuries were horrible."

In reconstructing the circumstances of counsel's failure to find and call an expert in forensic pathology and in evaluating the conduct from counsel's perspective at the time, a reasonable attorney could decide to forgo further inquiry into this field where the attorney has consulted multiple experts who have told him the same thing—that the victim's injuries are the worst they have ever seen, that Petitioner's story does not make sense and would not account for all of the victim's injuries, and that the victim's injuries are indicative of abuse. *See Strickland*, 466 U.S. at 689. Thus, we agree with the post-conviction court that counsel was not deficient in failing to call an expert in forensic pathology to testify on Petitioner's behalf at trial.

Additionally, Petitioner has not shown a reasonable probability that, but for this failure, the result would have been different. The post-conviction court found that, if Petitioner had called Dr. Hunsaker at trial, Dr. Hunsaker "would have had to admit that [the victim's] death could have been caused by [Petitioner's] stomping him to death[,]" and he could not say whether the death was caused by an accident as claimed by Petitioner. Both trial counsel and co-counsel testified that the victim's unexplained head injuries and his lack of immediate medical treatment were the biggest hurdles to overcome in presenting their defense and that those injuries informed Dr. Chancellor's conclusion that the manner of death was homicide. Dr. Hunsaker's opinion regarding those two issues was not different from that of Dr. Chancellor. Dr. Hunsaker acknowledged the lack of an adequate explanation by Petitioner for how the victim's head injuries were inflicted and acknowledged that such injuries could indicate abuse; he also acknowledged there was a delay in Petitioner's seeking medical treatment for the victim. Although Dr. Hunsaker stated that victim's external injuries may not have been immediately apparent, his testimony did not address the more obvious signs of severe injury, including Petitioner's description of the injury, the sound the victim made upon injury, the fact that the victim threw up, and the testimony from the first responders that the victim was blue and cold to the touch upon their arrival. Moreover, Dr. Hunsaker agreed it was important to get an accurate history before reaching an opinion as to manner of death, but he acknowledged he did not have a complete history in this case. He acknowledged that, in reaching his opinion that the manner of death was "undetermined," he failed to review all of Petitioner's inconsistent statements. He further stated that he did not review the prior reports of abuse relating to the victim.

The post-conviction court found that, although Dr. Hunsaker's testimony was credible "as to his limited expertise," he had no special qualifications in pediatric injuries and was not familiar with recent pediatric forensic research. The post-conviction court found that, after cross-examination by the State regarding pediatric studies of injury and indications of abuse, "it appeared to [the post-conviction] court, and also would have to the jury, that [Dr. Hunsaker] was not very knowledgeable about injuries to [seventeen-]month[-]old children." We agree with the post-conviction court's conclusion that, when

compared with the specific and experience-based testimony of Dr. Lakin, Dr. Hunsaker's proposed testimony would not have changed the outcome of Petitioner's trial. Petitioner has failed to establish deficient performance and resulting prejudice under *Strickland* based on counsel's failure to locate and call an expert witness in forensic pathology. He is not entitled to relief on this claim.

b. Expert in biomechanical engineering

Trial counsel acknowledged that none of the experts he consulted with prior to trial were biomechanical engineers. Co-counsel testified, however, that he had done some research in the area of biomechanics of injury, that the defense team had discussed those issues, and that they had spoken to a couple of experts about biomechanics as it related to the victim's injuries. The post-conviction court found that, although the defense did not call an expert in biomechanical engineering, co-counsel was prepared and effectively challenged Dr. Lakin's testimony on the issue through effective cross-examination.

The record reflects that co-counsel first attempted to exclude the testimony of Dr. Lakin, challenging her qualifications to testify about the biomechanics of the victim's injuries. During co-counsel's cross-examination of Dr. Lakin, Dr. Lakin acknowledged that her training was not in biomechanics and that she was not a physicist. Co-counsel also got Dr. Lakin to admit that the injuries could have been caused by a foot and that she could not say whether the victim's head injury occurred at the same time as the abdominal injury. Thus, the record does not preponderate against the post-conviction court's findings.

In any event, even assuming that Petitioner's attorneys were deficient in failing to present testimony from a biomechanical engineer, Petitioner has failed to establish prejudice under *Strickland*. Importantly, the post-conviction court found that Petitioner's proffered expert in biomechanical engineering, Dr. Toosi, was not credible. *See Pylant*, 263 S.W.3d at 869-70. The court found that Dr. Toosi was impeached by the State with several judicial opinions from other states in which the courts found that "Dr. Tootsi's [sic] methods do not adhere to accepted standards of reliability," that "Dr. Tootsi [sic] is neither competent or sufficiently experienced in his claimed field of expertise to testify in this matter," that "[Dr. Toosi] made errors in obtaining the data from his calculations," and that "Dr. Tootsi [sic] was unable to cite a single study that conclusively correlates the delta-V-force with bodily injuries in a motor vehicle accident[.]" The post-conviction court also noted that Dr. Toosi had never published anything or participated in studies about biomechanics and non-accidental trauma in children. The evidence does not preponderate against these findings by the post-conviction court, and we will not disturb them. *See id.*

At the evidentiary hearing, Dr. Toosi did not dispute that the victim's injuries could have been caused by Petitioner's stomping on the child or kicking him and propelling him,

and he could not say whether the death was caused by an accident as claimed by Petitioner. Dr. Toosi also admitted that there was a lack of data on injuries to children and that he was unfamiliar with studies that showed that children were less likely to be seriously injured in the abdominal area due to the specific anatomy of a small child. Moreover, his analysis did not account for the other bruising and injuries to the victim, and his testimony did not address Petitioner's delay in seeking treatment after the victim was injured. We further note that Dr. Toosi's opinions did not involve a full review of the medical history of the victim or take into account all of the facts in the case. We agree with the post-conviction court that Dr. Lakin's opinion was far more nuanced and was based upon her unique experience dealing with pediatric injury, especially in the context of distinguishing between accidental and non-accidental injury, and that Dr. Toosi's lack of qualifications in child injury "would have come up short in comparison to an expert board certified in Child Abuse Pediatrics[.]"

Accordingly, Petitioner has failed to show a reasonable probability that any deficiency in failing to call Dr. Toosi to testify affected the outcome of Petitioner's trial, and he is not entitled to relief on this claim.

2. Counsel's affirmative misstatements during opening statements

Petitioner asserts that the post-conviction court erred in finding that co-counsel's "gross misstatements" during the defense's opening statement did not amount to ineffectiveness. He contends that co-counsel's statements—that the jury would hear no evidence of intent or "how it happened," apart from Petitioner's testimony—ignored the State's opening statement and showed "not only a failure to familiarize himself with the evidence, but also revealed his utter lack of awareness of [P]etitioner's charges and the proof required to convict." Petitioner asserts that co-counsel's misstatements also demonstrated co-counsel's lack of familiarity with the anticipated testimony of Dr. Lakin, which the State had previously advised the defense it would offer to dispute Petitioner's claim that he had inflicted the injuries accidentally. He argues that counsel's decision to tell the jury it would hear no evidence of intent or how the injuries happened, apart from Petitioner's testimony, was not informed by or based upon adequate preparation and, therefore, should not be given any deference.

The State responds that the post-conviction court properly determined that counsel's performance was not deficient based upon his making any alleged misstatements during opening statement. The State contends that co-counsel did not misstate any evidence and that he properly challenged the State's interpretation of the evidence to be presented. The State argues that, although it presented evidence at trial from which the jury could infer that Petitioner intended to hit, punch, kick or otherwise strike the victim, Petitioner challenged such inferences and insisted that he was a loving father who did not

intentionally harm the victim. The State contends that, despite its position that Petitioner intentionally inflicted the victim's injuries, Petitioner's attorneys argued throughout the trial that the evidence did not show any intent to harm the victim and that for co-counsel "[t]o make such an argument during the opening statement [was] zealous representation—not a 'gross misstatement' of what the evidence would show."

The purpose of an opening statement is to set forth each side's "respective contentions, views of the facts and theories of the lawsuit." Tenn. Code Ann. § 20-9-301 (2015). Tennessee courts have long held that misstatements and broken promises to the jury can amount to ineffective assistance of counsel. *See Taylor*, 968 S.W.2d at 911-12. Regarding opening statements by defense counsel, this court said in *State v. Zimmerman*, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991), that "[e]ither overstatement or misstatement during this presentation, despite curative efforts, may have adverse effects[.]" The court explained that counsel "should only inform the jury of the evidence that he is sure he can prove" and that counsel's "failure to keep [a] promise [to the jury] impairs his personal credibility." *Id.* (quoting McCloskey, *Criminal Law Desk Book*, § 1506(3)(O) (Matthew Bender, 1990)).

In denying relief on this claim, the post-conviction court found that Petitioner failed to show deficient performance or prejudice. The court noted that co-counsel's opening statement accomplished the purpose of an opening statement; it set forth the defense's contentions, views of the facts, and theory of defense. The court determined that no direct testimony was offered at trial as to Petitioner's mental state when the injuries happened, other than the testimony given by Petitioner. Dr. Lakin did not testify as to how the injuries to the victim happened but only that, in her expert opinion, Petitioner's version was not true. The court found that co-counsel's statement that the jury would not hear anything during the trial about "how it happened except what you hear from [Petitioner]" was a true statement of the proof offered at trial. The court concluded, however, that Petitioner's "testimony simply was not found to be credible by the jury or by this court[.]"

The record does not preponderate against the post-conviction court's factual findings, and we agree with the court's analysis. In support of his contention that co-counsel's statements amount to ineffective assistance of counsel, Petitioner cites to *Taylor*, a case in which the defendant was convicted of rape of a child. 968 S.W.2d at 911-12. In *Taylor*, defense counsel asserted during his opening statement that the medical proof "would not show anything." *Id.* at 904. This court noted on appeal, however, that the nurse practitioner who examined the victim testified during cross-examination "that the victim had a hymenal injury that would be consistent with penetration by a penis or finger." *Id.* at 912. The court found that this error by defense counsel, along with an additional error made by counsel, deprived the defendant of a meaningful defense and remanded the case for a new trial. *Id.* The facts and circumstances of *Taylor* are dissimilar to the facts of the

instant case. Here, co-counsel did not misstate the evidence during opening statement; he challenged the State's interpretation of the evidence to be presented.

Petitioner has failed to show deficient performance and a reasonable probability that, but for co-counsel's alleged error, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Petitioner is not entitled to relief based on this claim.

3. Failure to adequately prepare for Dr. Lakin's testimony

Petitioner contends that he was denied the effective assistance of counsel based on co-counsel's failure to adequately prepare for Dr. Lakin's testimony. He contends that co-counsel: was unaware the State intended to call Dr. Lakin as an expert witness to rebut the plausibility of his account of what caused the victim's injuries; requested a mere ten minutes to prepare to cross-examine Dr. Lakin; and failed to request a *McDaniel* hearing to challenge the admissibility of her testimony. Petitioner asserts that co-counsel's errors and omissions were not matters of strategy but that they were "inexcusable failures stemming from a blatant lack of preparation on the part of counsel." Petitioner argues that "[w]ithout any preparation whatsoever to cross-examine Dr. Lakin beyond the ten minutes that [co-]counsel requested to prepare, it cannot seriously be said that [co-]counsel conducted an appropriate investigation or that his trial strategy was informed or based upon adequate preparation."

The State responds that the post-conviction court properly found that co-counsel was prepared for the cross-examination of Dr. Lakin and that he did as effective a job as possible in light of Petitioner's repeated lies following the death of his son and Petitioner's video reenactment of how he caused the injuries. Regarding co-counsel's failure to request a *McDaniel* hearing, the State contends that Petitioner cannot show that he was prejudiced by co-counsel's failure to request a hearing.

a. Lack of preparation for Dr. Lakin's testimony

Regarding Petitioner's claim that co-counsel was unprepared for Dr. Lakin's testimony, the post-conviction court determined that co-counsel's performance was not deficient. The court found that co-counsel was "well-prepared" and that he "did the best he could with a very difficult fact situation." As noted by the post-conviction court, the State made its final decision to call Dr. Lakin only after Petitioner testified. When the trial court determined Dr. Lakin would be allowed to testify about the victim's head and neck injuries as well as the abdominal injuries, co-counsel asked for a few minutes to prepare additional voir dire. The post-conviction court found that "[i]t was obvious . . . from the fight that [co-counsel] put up in his attempt to exclude her testimony and his discussion of

experts from Duke and Penn in the field of biomechanics during his objections that he was well-prepared for cross-examination if he proved unsuccessful." The court determined that co-counsel "utilized adept, aggressive voir dire of [Dr. Lakin's] expertise, both out of the presence of the jury and in front of the jury."

The record supports the post-conviction court's findings. During cross-examination, Dr. Lakin conceded that she was not a physicist and that her expertise was not in forensic pathology or injury biomechanics. Co-counsel got Dr. Lakin to admit that she had no evidence to show that the blow to the victim's abdomen that Petitioner testified to and the injury to the victim's head occurred at the same time and to admit that a foot could have caused the victim's abdominal injuries. We agree with the post-conviction court's conclusion that Petitioner failed to show deficient performance on the part of co-counsel.

b. McDaniel hearing

Tennessee Rules of Evidence 702 and 703 address the admissibility of opinion testimony of expert witnesses. A court may admit expert testimony only if the proponent demonstrates that: (1) the expert is qualified; (2) the evidence is relevant to the suit; and (3) the evidence is reliable. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 264 (Tenn. 1997). Questions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. *Id*. A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or abused. *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002).

Here, Petitioner has not established prejudice under *Strickland*. He has not shown that the expert testimony offered by Dr. Lakin was untrustworthy or unreliable and that it would have been excluded after a *McDaniel* hearing. The post-conviction court found that Dr. Lakin "was trained and extremely qualified" and that "her testimony was well founded on science." The court concluded that "[t]here would have been no need to request a *McDaniel* hearing, as it would not have benefitted [P]etitioner." Moreover, we note that co-counsel vigorously cross-examined Dr. Lakin about her training and findings, brought to light the limitations of her expertise, and got her to make admissions beneficial to the defense. Under these circumstances, Petitioner is not entitled to relief.

4. Failure to file any pretrial motions

Petitioner contends that he received ineffective assistance of counsel based on counsel's failure to file any pretrial motions in Petitioner's case. He asserts that counsel should have filed a motion to preclude the prosecution from using inflammatory language to describe the manner of the victim's death, as well as a motion for a *McDaniel* hearing

to preclude Dr. Lakin from testifying about matters of physics. He argues that the failure of Petitioner's attorneys to file any motions for the defense was clearly deficient performance and that the defense was prejudiced as a result.

The State responds that Petitioner waived this issue by failing to include it in his petition for post-conviction relief.

The State correctly observes that Petitioner did not include this issue in the post-conviction petition or in an amended petition. Generally, issues not raised in the post-conviction petition are subject to waiver. *See, e.g., Matthew B. Foley v. State*, No. M2018-01963-CCA-R3-CD, 2020 WL 957660, at *7 (Tenn. Crim. App. Feb. 27, 2020) (citing *Lonnie Lee Angel, Jr. v. State*, No. E2018-01551-CCA-R3-PC, 2019 WL 6954186, at *7 (Tenn. Crim. App. Dec. 18, 2019)). However, this court may extend appellate review to issues presented for the first time at the post-conviction hearing "if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection." *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) (citations omitted).

Although some testimony about the lack of pretrial motions was elicited from Petitioner's attorneys at the evidentiary hearing, the post-conviction court's written order confined its analysis to the issues raised in the post-conviction petition and did not address this issue. Accordingly, we are constrained to conclude that this issue is beyond the permissible scope of our review and that it is waived. *See id.*

In any event, as discussed in other sections of this opinion, Petitioner has not shown, if counsel had filed a motion requesting a *McDaniel* hearing regarding Dr. Lakin or filed a motion to prevent the State's use of the word "stomping" to describe Petitioner's testimony, that such motions would have been granted by the trial court. *See Keven Scott v. State*, No. W2010-02515-CCA-R3-PC, 2011 WL 5903933, at *9 (Tenn. Crim. App. Nov. 22, 2011) (stating that to meet the petitioner's burden of showing prejudice, the petitioner "must establish that there is a reasonable probability that, had trial counsel filed a motion to suppress, the motion would have been granted"), *perm. app. denied* (Tenn. Apr. 12, 2012). Petitioner is not entitled to relief.

5. Failure to object to the prosecutor's "mischaracterization" of Petitioner's testimony

Petitioner asserts that counsel rendered ineffective assistance of counsel based upon his failure to object when the prosecutor repeatedly "mischaracterized [P]etitioner's description of accidentally falling on [the victim] as 'stomping' on him." Petitioner notes that the prosecutor asked him questions such as, "And this is after you'd stomped on him with 250 pounds, right?"; "[Y]ou're sitting there saying that you were frightened of the police when you were sitting in that room and you're the one who stomped the life out of

your 16-month-old?"; and "[Y]ou did nothing after you stomped on your son, did you?" He argues that no strategy was involved in counsel's failure to object to these questions, and thus, the post-conviction court should not have granted deference to counsel's decision not to object.

The State responds that the post-conviction court properly concluded the claim was without merit. The State argues that the evidence at trial supported the prosecutor's characterization of Petitioner's testimony as "stomping" and that challenges to his version of events during cross-examination were not improper.

In its order denying relief, the post-conviction court found there was no deficient performance by counsel in not objecting "as there was no valid legal reason to object." The post-conviction court determined that it would have overruled "without hesitation" an objection by counsel to the prosecutor's use of the wording "stomping" because the prosecutor laid a good foundation for those questions.

As recognized by the post-conviction court in its order, "A witness may be cross-examined on any matter relevant to any issue in the case." Tenn. R. Evid. 611(b). The State's theory in this case was that Petitioner stomped on the victim, causing the injuries to the victim's abdomen. The jury was shown the video reenactment of Petitioner's actions, which the post-conviction court found "could accurately be described as 'stomping' on the child." Moreover, on cross-examination, Petitioner was asked to reenact how hard his foot hit the victim's stomach, which he did in front of the jury. Petitioner also agreed with the prosecutor that he "stomped" on the victim.

When asked about his failure to object to the prosecutor's use of the word "stomping" during cross-examination of Petitioner, co-counsel testified, "There's always a balance in objecting about whether or not you're actually calling attention to a point that maybe you want to just to kind of slide on by, hope the jury doesn't grab on to it. So that is probably part of the decision and I think it was going to come in anyway." Petitioner has not shown deficient performance by counsel or a reasonable probability that, but for counsel's failure to object to the prosecutor's use of the word "stomping" during cross-examination of Petitioner, the result of the proceeding would have been different. *Goad*, 938 S.W.2d at 370. He is not entitled to relief.

6. Failure to request accurate jury instructions

Petitioner next asserts that counsel rendered ineffective assistance based on counsel's failure to request complete and accurate jury instructions, resulting in an erroneous instruction of aggravated child abuse that failed to define "knowing." He argues that counsel's deficient performance in this regard prejudiced his defense, as demonstrated

by his conviction for aggravated child abuse "despite the lack of proof of the requisite *mens rea*."

Although the State asserts that Petitioner waived consideration of this claim by failing to include it in his petition for post-conviction relief, we note that the State addressed the claim in its post-hearing brief and the post-conviction court addressed it in its order denying relief. Accordingly, we will review the claim. *Holland*, 610 S.W.3d at 458.

In addressing this claim, the post-conviction court concluded that, if the definition of "knowing" had been specifically defined in the instruction for aggravated child abuse, it would not have created "'a reasonable probability . . . that the result of the proceeding would have been different' pursuant to *Strickland v. Washington*[.]" We agree with the post-conviction court's conclusion.

During direct appeal proceedings, Petitioner raised the lack of the definition of "knowing" in the instruction for aggravated child abuse. This court reviewed the issue for plain error and found that Petitioner was not entitled to relief on that ground, stating as follows:

> [W]hen read as a whole, the jury instruction properly defined knowingly several times, which was sufficient to ensure the jury was not mislead as to the required mens rea. The trial court provided almost identical definitions of "knowing" in relation to the other three charged offenses. [Petitioner] has not established beyond a reasonable doubt that reading these instructions, as provided by the trial court, would have given a juror a definition of "knowing" which differed from the definitions relating to aggravated child abuse. *See State v. March*, 494 S.W.3d at 82; [*State v.*] *Rimmer*, 250 S.W.3d [12,] 31 [(Tenn. 2008)]; *C.f. Ducker*, 27 S.W.3d at 897.

Curtis Morris, 2018 WL 2277404, at *17. Because the jury instruction, when read as a whole, properly defined "knowing" several times and did not mislead the jury as to the required *mens rea* for the charge of aggravated child abuse, Petitioner has not established that he was prejudiced by counsel's failure to ensure that the instruction for aggravated child abuse provided the definition of "knowing." *See Strickland*, 466 U.S. at 694. Petitioner is not entitled to relief.

7. Failure to present evidence of custody proceedings

Petitioner alleges that counsel rendered ineffective assistance by failing to present evidence, through the testimony of his mother and Ms. Gatewood, of the custody proceedings in which Petitioner sought and obtained custody of his children. Petitioner

notes that co-counsel highlighted in opening statements that Petitioner obtained custody of the victim and his sister to protect them and care for them and that co-counsel testified he made the statement to show that Petitioner was a good father who would not have intentionally injured his son. He argues, however, that counsel failed to investigate the custody proceedings or to present any evidence of those proceedings "to emphasize the lengths that Petitioner went to in order to take care of his children" and that, "[w]ithout this evidence, the jury had little before it upon which to conclude that [P]etitioner loved [the victim] and would not have intended to hurt or neglect his child."

The State responds that the post-conviction court properly denied relief on this claim. The State contends that Petitioner's attorneys were adequately prepared for trial and made a strategic decision not to call witnesses who would open Petitioner to challenges on his fitness as a parent and on his overall character.

In addressing this claim, the post-conviction court reviewed the testimony of Petitioner's mother, Ms. Gatewood, co-counsel, and trial counsel regarding this issue and discussed in its order the dangers in calling witnesses who would testify about Petitioner's efforts to get custody of his children. The court noted that Petitioner "testified at trial that he won custody of his children, which was not contested by the State, [and] that fact was placed before the jury without having to call character witnesses." The post-conviction court then concluded that Petitioner failed to establish deficient performance or prejudice.

The record does not preponderate against the post-conviction court's factual findings. Moreover, we agree that Petitioner is not entitled to relief on this claim. At the post-conviction hearing, Petitioner's mother testified that Petitioner loved his children and that she had no concern for the children's safety around Petitioner. She also testified that Petitioner sought custody of his children and won. However, co-counsel testified that, if the defense had called Petitioner's mother, she likely would have been asked about Petitioner's cocaine use and the past allegations against Petitioner for abuse of the victim. Ms. Gatewood testified that Petitioner won custody of his children, but on cross-examination, she recalled the children's mother was "unstable . . . or kind of having some drug and psychological issues." Ms. Gatewood did not recall whether Petitioner had been employed at the time of the custody proceedings, and she was unaware that day care workers had observed the victim with two black eyes and had reported the incident.

When trial counsel was asked about the failure to present more evidence about Petitioner's custody battle, he explained that there was "kind of a fine line between some of the information that we knew." He said that, if the defense tried to "paint [Petitioner] as this guy who was a great father, then there were these reports from the day care, there were reports from ex-girlfriends and current girlfriends and different people about his cocaine use and drug use." Trial counsel testified that the defense was able to establish

that Petitioner had successfully fought for custody of his children without presenting evidence subject to cross-examination.

In this case, counsel made a strategic decision not to call witnesses who would potentially open the door to challenges to Petitioner's fitness as a parent and to his overall character. Petitioner has not shown inadequate preparation by counsel in investigating these issues, and this court will not second-guess counsel's tactical or strategic decisions. *Granderson*, 197 S.W.3d at 790. Petitioner is not entitled to relief.

8. Cumulative error

Finally, Petitioner argues that cumulative error warrants reversal. The cumulative error doctrine recognizes that there may be many errors committed in trial proceedings, each of which constitutes mere harmless error in isolation, but "have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To warrant review under the cumulative error doctrine, there must have been more than one actual error during the trial proceedings. *Id*. at 77.

In this case, because we have not found multiple errors, cumulative error review is unwarranted.

Conclusion

Based on the foregoing, the judgment of the post-conviction court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE