

**IN THE TENNESSEE SUPREME COURT
AT JACKSON**

TIMOTHY A. BAXTER,)	
<i>Petitioner,</i>)	
)	
v.)	Case No.
)	
COURT OF CRIMINAL APPEALS,)	Madison County Circuit
<i>Respondent.</i>)	Related Case No. 11-250
)	

PETITION FOR STATUTORY WRIT OF CERTIORARI

This is the Petitioner's first application for the writ.

Petitioner, Timothy A. Baxter, pro se, pursuant to Article 6, Section 10 of the Tennessee Constitution and Tenn. Code Ann. §§ 27-8-101 to -119 and 27-9-101 to -114; and petitions the Tennessee Supreme Court to review the illegal action of the Court of Criminal Appeals.

Petitioner is entitled to statutory writ of certiorari because the TCCA recognized the mandate requiring expert medical record evidence at trial set forth by the Tennessee Supreme Court, but nevertheless, allowed the State to skirt the mandate, and as a result, caused serious procedural error by misallocating the State's burden of proof. There is no other plain, speedy, or adequate remedy.

I. PROCEDURAL BACKGROUND

1. Petitioner filed a pretrial Motion In Limine to Exclude All Medical Records granted by the trial court on the basis the State was “withholding Regional Records,” and if not disclosed in time, defense would not have time to have an expert review such records.” *See* (Vol. I, T.R. 21-31)

2. The State responded “a day before trial”; “State has not yet received copies from Regional Hospital.” *See* (State's Resp. To Exclude Medical Records, *Id.* at No.6.); (Vol. I, T.R. 34-35); *see also* (Vol. V, T.T. p.20 L.15-17)

3. The trial court ruled the “records from RHMC are excluded and inadmissible.”
See (Vol. I, T.R. 75-76)

4. At trial, the prosecution propounded a complex medical theory regarding the RHMC records which had been previously ruled inadmissible, through uncorroborated testimony. *See* (Vol. I, T.R. 75-76.); *i.e.*, “[hospitalized for four or five days, had to return to the hospital], [required a nerve block to manage pain], without expert medical record evidence.”

5. The trial court continually overruled counsel's contemporaneous objections which negated the court's previous ruling and even more egregious permitted a back-door to evidence that had been deemed inadmissible. *compare* (Vol. 4, T.T. p.16.); *see also* (Vol. 4, T.T. p.8 L14-p.25.)

6. Petitioner's Motion for New Trial outlined; (1) the evidence was insufficient to support a conviction for aggravated assault, (2) the objection to the testimony of Upright was erroneously overruled, (3) allowing Upright as lay witness to testify to a legal standard; and, (7) in order to prove beyond a reasonable doubt aggravated assault by utilization of Tenn. Code Ann. § 39-11-106(a)(34)(C) expert testimony is required and none was presented to the Court or the jury. *See* (Vol. 1, T.R. 93-94, *Id.* At No.1, 2, 3, & 7.); *see also* (Vol. 7, T.T. p.3-17.)(argument on failure to have a required expert.)

7. The trial judge issued an order denying the motion for new trial on the basis “Expert testimony is not required to prove T.C.A. 39-11-106 (a)(34)(c).”
See (State's Response to Motion for New Trial, Order Denying Motion For New Trial.); (Vol. 1, T.R.)

Petitioner Was Erroneously Found Guilty By a Jury And Proceeded To Direct Appeal.

On March 25, 2013, the Western District Court of Criminal Appeals, heard the case of *State v. Timothy A. Baxter*, No. W2012-00361-CCA-R3-CD, 2013 WL 1197867. In the State opinion, the TCCA held;

“Appellant challenges the sufficiency of the evidence underlying his conviction for aggravated assault. As charged in this case, the State must have proven beyond a reasonable doubt that appellant intentionally or knowingly caused serious bodily injury to the victim. Tenn. Code Ann. §§ 39-13-101(a)(1),-102(a)(1)(A)(i) (2010).

Although the element of "serious bodily injury" can be established by proof of one of

six separate mechanisms, in this case, the State elected to proceed under the theory of "extreme physical pain." Tenn. Code Ann. §§ 39-11-106(a)(34)(C) (2010).

The Tennessee Supreme Court recently addressed the level of proof necessary to establish the element of "serious bodily injury" on the basis of "extreme physical pain." *State v. Farmer*, 380 S.W.3d 96 (2012).

In *Farmer*, our supreme court held: [I]n the instant case, the evidence does not support a finding that [the victim's] injury involved a degree of pain that would warrant its inclusion among the other enumerated portions of the definition of "serious bodily injury." Although [the victim] testified that he experienced pain after realizing he had been shot, hospital records do not classify his pain as "extreme" but rather as "mild" to "moderate." [The victim] was given a prescription for pain medication before leaving the hospital, but he never testified as to the degree of pain he experienced.

A jury could not reasonably infer from [the victim's] testimony, the hospital records, and the nature of his injury that [his] wound involved extreme pain. Id. at 101-02 (footnote omitted) (citing Tenn. Code Ann. §§ 39-11-106(a)(34) (2010)).

By contrast, the victim in this case classified his pain as "killing pain," "maximum," "more than [he could] handle," and "unbearable."

"This is not a case in which the victim's description of the level of his pain is the only evidence of extreme physical pain." The victim also testified that he required a nerve block while in the hospital to manage his pain, that he was hospitalized for four or five days, that he had to return to the hospital, and that he eventually had to quit his job as a truck driver because the pain was too severe for him to continue working.

No evidence was presented to refute his testimony. **The jury, as the trier of fact, accredited the victim's testimony. The jury obviously believed that the victim suffered an injury to his shoulder and neck.** In this case, viewed in the light most favorable to the State, a jury could have reasonably inferred from the victim's testimony that he was injured and that he suffered extreme physical pain as a result of appellant's attack. Appellant is not entitled to relief on this claim. *State v. Timothy A. Baxter*, No. W2012-00361-CCA-R3-CD, 2013 WL 1197867, *Id.* At *4-6.

As explained by *Farmer*, "Bodily injury" is defined to include "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(a)(2) (2010). "Serious bodily injury" is defined as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; [or] (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty[.]" Tenn. Code Ann. § 39-11-106(a)(34).

Argument Point 1. At trial, serious bodily injury was not established as required under Tenn. Code Ann. § 39-11-106(a)(34)(B)-(E). The State presented no evidence that Upright's alleged injury involved a loss of consciousness, the State presented no expert medical evidence in the record that

Upright suffered extreme physical pain, nothing in the record even supported an inference that Upright's suffered any injury that involved protracted or obvious disfigurement, or protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty.

The trial court and prosecutor claimed “Expert testimony is *not* required to prove T.C.A. 39-11-106 (a)(34)(c).” This omission of an essential element was a misapplication of law that was objectively contrary to the Petitioner's federal rights.

On appeal, the TCCA also failed to address the omission of the essential element of whether any injury was [life-threatening or a substantial risk of death involved]. *Id.* Specifically, there was “no expert medical record testimony of an injury presented,” nor was the *Farmer* mandate requiring expert testimony supported by the required admission of medical records upheld.

The obvious lack of the mandated medical record evidence misallocated the burden of proof.

Contrary to the medical record evidence requirement set forth in *Farmer*, the TCCA held; “This is not a case in which the victim's description of the level of his pain is the only evidence of extreme physical pain.” “No evidence was presented to refute his testimony. The jury, as the trier of fact, accredited the victim's testimony. The jury obviously believed that the victim suffered an injury to his shoulder and neck.” “[A] jury could have reasonably inferred from the victim's testimony that he was injured and that he suffered extreme physical pain as a result of the appellant's attack.” *Id.* At *4-6. Therefore, the TCCA's decision was made without any due process analysis of whether or not the State had met its burden to present all elements of the offense.

The Petitioner contends the TCCA finding “a jury could have reasonably inferred from the victim's testimony *alone*” is objectively contrary to law. *State v. Farmer*, 380 S.W.3d 96 (2012), *Id.* at *105. (*Expert testimony is required* under T.C.A. 39-11-106 (a)(34)(c)). Emphasis added.

As such, the TCCA's decision to reject Petitioners' sufficiency claim was an error.

The TCCA's Review Of The Post-Conviction Appeal.

On November 26, 2014, the TCCA heard the case of *Timothy A. Baxter v. State*, No. W2013-02427-CCA-R3-PC; and assessed the issues raised concerning Ineffective Assistance of Counsel and concluded:

In the matter at hand, the post-conviction court examined Counsel's decision to exclude the victim's medical records, as testified to by Counsel, Mr. Donahoe, and the Petitioner. Counsel testified that he and a team of attorneys had specifically examined the victim's medical records as a whole and made the decision that the records were harmful to the Petitioner's case and, thus, should be excluded from the evidence. He testified that the attorneys considered introducing only beneficial portions of the record but that when it became clear that the entire record would have to be admitted, they decided that the negative aspects of introducing the records outweighed the benefits of introduction of the records. The post-conviction court concluded that the decision was a matter of strategy to limit the jury's exposure to the victim's injuries, because, without the medical records being admitted into evidence, the victim was prevented from testifying about any medical proof of his injuries.

This, the post-conviction court noted, was an accepted practice by criminal defense attorneys and did not constitute ineffective assistance of counsel simply because the strategy had not worked. We conclude that the post-conviction court's decision was supported by the evidence presented at the hearing. The record shows that Counsel made an informed and deliberate decision to exclude the medical records to limit the jury's exposure to the medical diagnosis about the extent of the victim's injuries. Counsel testified that the medical records contained information that was harmful to the Petitioner's case and, therefore, needed to be excluded. Counsel stated that the records would only bolster the victim's testimony, in his opinion, further damaging the Petitioner's case by showing the jury the extent of the victim's injuries. He testified about the *details contained in the medical records concerning the victim's injuries and hospital treatment*. In furtherance of Counsel's stated trial strategy to limit the jury's exposure to the nature of the victim's injuries, Counsel also successfully excluded a video recording of the altercation, leaving the State with only the victim's testimony as evidence of the assault and injuries. *Timothy A. Baxter v. State*, No. W2013-02427-CCA-R3-PC, *Id.* At *12.

Argument Point 2. As demonstrated more fully above, *infra @* No. 1-7, the State admitted to “withholding Upright's RHMC medical records.” This act is unconstitutional. Therefore, it was unreasonable for the trial court and the TCCA to conclude, “*the [v]ictim was prevented from testifying about any medical proof of his injuries.*” (emphasis added) *Id.*

Upright was never **prevented** from testifying, and his uncorroborated testimony was winding and encompassed far more than his RHMC medical records supported. Upright's uncorroborated testimony did not meet the medical record evidence requirement set forth in *Farmer*.

The State withheld Upright's RHMC medical records. After ruling Upright's RHMC medical records inadmissible, the trial court contradicting its own evidentiary ruling when it allowed the State to surreptitiously back-door the admission of the contents of Upright's RHMC medical records without actually producing Upright's RHMC medical records. This not only misallocated the burden of proof, but made a fair trial impossible.

The TCCA Was Confronted With The Contradictions' and The Misallocation of the Burden Of Proof.

On December 16, 2014, the TCCA assessed the issues raised by Baxter in his Petition To Rehear:

The Appellant accuses this Court of “skirt[ing]” the issue of whether the State met its burden of establishing serious bodily injury in accordance with *Farmer*.

The Appellant further argues that this Court's conclusions on direct appeal constituted a “gross misstatement of fact.” The Appellant bases his argument on the following language from this Court's opinion on direct appeal:

By contrast, the victim in this case classified his pain as “killing pain,” “maximum,” “more than [he could] handle,” and “unbearable.” *This is not a case in which the victim's description of the level of his pain is the only evidence of extreme physical pain.* *Timothy A. Baxter*, 2013 WL 1197867, at *4.

The Appellant argues that this language is contrary to our recognition in our opinion in the instant case affirming the denial of post conviction relief that *“the state was left with only the victim's testimony as evidence of the assault and injuries.”*

The Appellant appears to suggest that this Court concluded on direct appeal that the State presented evidence in addition to the victim's testimony to establish serious bodily injury. The Appellant, however, quoted only a limited portion of this Court's analysis of the issue on direct appeal. The remainder of the paragraph, which the Appellant failed to recognize, states as follows:

The victim also testified that he required a nerve block while in the hospital to manage his pain, that he was hospitalized for four or five days, that he had to return to the hospital, and that he eventually had to quit his job as a truck driver because the pain was too severe for him to continue working. No evidence was presented to refute his testimony. **The jury, as the trier of fact, accredited the victim's testimony.**

The jury obviously believed that the victim suffered an injury to his shoulder and neck. In this case, viewed in the light most favorable to the State, *a jury could have reasonably inferred from the victim's testimony that he was injured and that he suffered extreme physical pain as a result of appellant's attack.* Appellant is not entitled to relief on this claim. *Id.*

We question the Appellant's failure to acknowledge this portion of this Court's analysis when it directly follows the portion of the opinion from which the Appellant quoted in his petition to rehear. *This Court clearly stated that our conclusion was based solely upon the victims testimony at trial.* Not only did the victim testify to his level of pain, he also testified that he was hospitalized for several days, was administered a nerve block, and was forced to quit his job.

Clearly, this Court's analysis on direct appeal is not contrary to our statement that “the State was left with only the victim's testimony as evidence of the assault and injuries.” Nor did this Court “skirt” the issue on direct appeal as alleged by the Appellant.

Rather, this Court carefully reviewed the evidence presented at trial, applied the Tennessee Supreme Court's holding in *Farmer* to the facts of the case, and determined that the evidence was sufficient to establish serious bodily injury. The Appellant's motion to rehear is wholly without merit. *Timothy A. Baxter v. State*, No. W2013-02427-CCA-R3-PC, Order Denying Petition To Rehear, Dec.16, 2014.

Argument Point 3. Comparison of the TCCA opinions clearly define a contradiction and inconsistency. In fact, on November 26, 2014, the TCCA concluded; "the State was left with only the victim's testimony as evidence of the assault and injuries." See *Timothy A. Baxter v. State*, No. W2013-02427-CCA-R3-PC. This is 'clearly inconsistent' with the TCCA direct appeal conclusion; "This is *not* a case in which the victim's description of the level of his pain is the only evidence of extreme physical pain." See *State v. Timothy A. Baxter*, No. W2012-00361-CCA-R3-CD, 2013 WL 1197867, at *4.

Obviously, the TCCA's statement that their opinions were not contradictory, is unreasonable and clearly erroneous. The TCCA's conclusion on direct clearly assumes a position and narrative that evidence *in addition* to the victims testimony was presented.

Furthermore, the TCCA deliberately failed to address and omitted whether any injury was [life-threatening or a substantial risk of death involved]. *Id.* The lack of an adequate record identifying any significant injuries with expert medical records at trial, is clearly insufficient under *Jackson, supra*.

However, the TCCA erroneously rejected the sufficiency claim by finding; "The jury, as the trier of fact, accredited the victim's testimony." *Id.* This finding completely disregards *Farmer*.¹

As more fully explained above, the State did not satisfy its burden of proof by introducing expert medical record evidence at trial, this error was compounded by the trial judge and the TCCA's failure to recognize the serious procedural error which caused the misallocation of the burden of proof, thus, Petitioner is entitled to a "redetermination of both the facts and the law from all the evidence" by issuance of a statutory writ of certiorari.

¹ "[J]urors in criminal cases have no greater expertise with regard to medical matters than jurors in civil cases." "Evaluating whether a particular injury involves a "substantial risk of death" is "beyond the ken of the average layperson." citing *Bolanos v. United States*, 938 A.2d at 679 n.8. "Because expert medical testimony would very likely substantially assist the trier of fact in such circumstances, the importance of using expert medical testimony to aid in establishing that a bodily injury involves a substantial risk of death cannot be overstated." *Id.* *105.

MEMORANDUM OF LAW

The TCCA exercising its judicial functions has exceeded the jurisdiction conferred, and is acting illegally. Specifically, the prosecution, the trial court, and the TCCA did not conduct an exhaustive analysis of *whether any injury was life threatening*, and the explanation (“Expert testimony was *not* required to prove T.C.A. 39-11-106 (a)(34)(c)”); misallocated the burden of proof—which amounts to an illegality *that is fundamental*, as distinguished from an irregularity.

The writ Petitioner seeks "may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy." Tenn. Code Ann. § 27-8-101. The writ does not apply to an action governed by the Tennessee Rules of Appellate Procedure. *Id.*

The writ of certiorari derives from Article 6, Section 10 of the Constitution of Tennessee, but the practice with respect to how and when it may be obtained is set forth in statutory provisions enacted by the General Assembly. *Tragle v. Burdette*, 222 Tenn. 531, 438 S.W.2d 736, 737 (1969). . . . The writ may also not take the place of an appeal when an express provision for an appeal is available. *Tragle* at 737; *Sullivan v. Cocke*, 167 Tenn. 253, 68 S.W.2d 933 (1934);

I. PETITIONER IS ENTITLED TO A STATUTORY WRIT OF CERTIORARI BECAUSE THE TCCA RECOGNIZED THE MANDATE REQUIRING EXPERT MEDICAL RECORD EVIDENCE AT TRIAL BUT ALLOWED THE STATE TO SKIRT THE MANDATE SET FORTH BY THE TENNESSEE SUPREME COURT

As a result of the TCCA incorrectly applying its principle *Farmer*, the State has been allowed to skirt the mandate—requiring expert medical record evidence at trial, fostered disrespect for the rules and substantive due process rights, and denied Petitioner, his Right to Equal Protection of the Law.²

Accordingly, Petitioner meets the strict requirements of Tenn. Code Ann. § 27-8-101, because there is no other plain, speedy, or adequate remedy, and Tennessee Court's have intentionally denied Petitioner equal protection and due process rights to fair procedural process and a fair appeal.

Conclusion.

Petitioner asks the Supreme Court to grant the statutory writ of certiorari because Tennessee Court's are acting illegally when the essential elements of *life threatening* and *substantial risk of death* were omitted and were not established beyond a reasonable doubt in this case.

Respectfully Submitted,

TIMOTHY A. BAXTER, pro se
Tenn. Dept. Corr. Reg. Num. 304285
140 Macon Way
Hartsville, Tennessee, 37074

² See STATE OF TENNESSEE v. STEPHEN RENE MORRIS, COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE, 2014 Tenn. Crim. App. LEXIS 1022, No. M2013-01265-CCA-R3-CD, May 14, 2014, Assigned on Briefs November 12, 2014, Filed JOHN EVERETT WILLIAMS, J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and ROGER A. PAGE, JJ., joined. (“recognizing the evidence showed that the victim was injured after Individuals hit or pushed the victim to the ground, holding an *exhaustive analysis of injuries that were not life threatening resulting in only "bodily injury."*”) (emphasis added)

CERTIFICATE OF SERVICE

I hereby certify that on 13 day of December 2018, a copy of the above motion was served upon the Respondent's counsel via its registered agent by depositing same in the U.S. Mail with sufficient postage thereon, addressed to the below address.

Herbert H. Slattery III
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202


TIMOTHY A. BAXTER

STATE OF TENNESSE

COUNTY OF TROUSDALE

VERIFICATION

I, TIMOTHY A. BAXTER, being first duly sworn according to law, make oath that I have read the foregoing petition and that the facts set forth therein are true to the best of my knowledge, information and belief.


TIMOTHY A. BAXTER

NOTARY

My commission expires: _____