

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

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JUN 14 2013

S.C. Supreme Court

DEREK S. CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213168

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON)

THE STATE)
) TRANSCRIPT OF RECORD
-vs-) 2001-GS-04-1204
) 2001-GS-04-763
DEREK SHANE CARTER,)
) JUNE 11, 2001
Defendant.) ANDERSON, SOUTH CAROLINA

B E F O R E:

HONORABLE JOHN W. KITTREDGE, JUDGE; and a jury.

A P P E A R A N C E S:

DRUANNE D. WHITE, SOLICITOR
Attorney for the State.

ROBERT E. TREACY, JR., ESQUIRE
Attorney for the Defendant.

Michael R. Watts
Circuit Court Reporter

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1 (Proceedings June 11, 2003)

2 THE COURT: The jury has been excused. And
3 solicitor, if you would be kind enough initially
4 just to call the case and tell me what charge or
5 charges are against this individual, and then we
6 will proceed to the motions that need to be
7 addressed.

8 MS. WHITE: Yes, sir.

9 Judge, this is 2001-GS-04-1204, the State
10 versus Derek Shane Carter, indictment for homicide
11 by child abuse.

12 And 2001-GS-04-763, State versus Derek Shane
13 Carter, indictment for great bodily injury upon a
14 child.

15 THE COURT: And in meeting briefly with the
16 attorneys, Mr. Treacy, you indicated that the motion --
17 there was a motion to sever that needed to be
18 resolved?

19 MR. TREACY: Yes, sir. Before the case is
20 called in front of the jury, I think it would be
21 appropriate to just -- for to you make a legal
22 decision of whether or not it's appropriate to call
23 both of those charges in the same trial. My motion
24 to sever addresses that issue.

25 THE COURT: If you are ready to present

1 argument, I'm ready to hear from you.

2 MR. TREACY: Yes, sir. And I'm presuming that
3 you read the motion, so I won't -- I won't just
4 rehash that.

5 Your Honor, they are charging my client with
6 inflicting great bodily injury upon a child, which
7 is, as I read it, is essentially assault and battery
8 of a high and aggravated nature upon a child, the
9 specific definition for what is serious bodily
10 injury.

11 The other charge they are charging him with is
12 homicide by child abuse.

13 I believe the testimony --

14 THE COURT: Is it one victim or two victims?

15 MR. TREACY: One victim.

16 And my concern is that the only -- and my
17 analysis of discovery, the only serious bodily
18 injury, as defined by that statute, is going to be
19 the head trauma that caused -- that ultimately
20 caused her death. My concern is that they are going --
21 one, is they are going to present -- essentially
22 this is analogous to in a stabbing case charging the
23 person with assault and battery with intent to kill.
24 And then when the person dies, charging them with
25 murder, and presenting both of those charges at the

1 same trial.

2 In the alternative, if I have overlooked
3 something and they are charging that there is a
4 previous incident of great bodily injury upon a
5 child, and also a separate later incident of child
6 abuse that caused her death, I would argue that
7 those charges have to be tried separately, based on
8 the precedent I presented to you, because the
9 evidence of great bodily injury on a child would
10 prejudice the case for homicide by child abuse.
11 There would be evidence that would be admissible in
12 that case that should not be admissible in the
13 homicide by child abuse, because you are getting --
14 in this case, Your Honor, what you are going to hear
15 is there is a broad range of acts. Some can be just
16 determined as inappropriate, some as child abuse,
17 and then there is also going to be the allegation
18 that some of that abuse rose to a level that it --
19 and obviously I assume that the pathologist is going
20 to say caused the head injury that ultimately was
21 her demise.

22 My concern is that you are going to have some
23 inappropriate acts and clearly some child abuse that
24 is in no way associated or related to what caused
25 her death- the head injury. We are talking about

1 injuries to her toes, things of that nature that are
2 going to be admitted in the homicide by child abuse
3 case. It's sort of overlaps with later on this
4 afternoon what you are going to hear is my argument
5 to suppress evidence of this other abuse and
6 activity as prior bad acts that's inappropriate in
7 the homicide by child abuse case.

8 This specific motion is -- really the sort of
9 question presented to the State, I think, are they --
10 are they intending to present this case as two acts -
11 one of great bodily injury upon a child that didn't
12 cause her death and also another act that caused her
13 death - and then whether or not you think it is
14 appropriate, if that's the case, for them to be
15 tried together.

16 THE COURT: All right, sir. Let me get initial
17 response from the solicitor.

18 MR. TREACY: Yes, sir.

19 THE COURT: I'll come back to you and we'll
20 take it from there.

21 Yes, ma'am.

22 MS. WHITE: Your Honor, you are walking into
23 this case cold and I would suggest we change things
24 midstream here, that we do our Jackson v. Denno
25 hearing first. That's our statements from the

1 defendant.

2 Oh, he's here. Okay. That scared me. I
3 looked over there and I thought the defendant wasn't
4 here. I'm sorry.

5 That would involve pretty much the stories from
6 the very beginning, all the way through, and I think
7 you will have a much better idea of what you are
8 looking at in this joinder. I don't know that you
9 can do it without considering the statements.

10 I'll be happy to argue you it, but I don't
11 think that you are going to have any idea what we
12 are talking about until you see what we are talking
13 about.

14 THE COURT: Do you object to doing the Jackson
15 v. Denno at this time?

16 MR. TREACY: No, sir, I think that probably
17 would be more efficient.

18 THE COURT: That's fine. If you are ready to
19 proceed with the Jackson v. Denno, solicitor, I'll
20 be glad to hear from you now.

21 MS. WHITE: Yes, sir.

22 MR. TREACY: Your Honor, I have presented the
23 motion on that as well.

24 THE COURT: The State would call John
25 Carpenter.

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

9

1 INVESTIGATOR JOHN CARPENTER, having been first
2 duly sworn, testified as follows:

3 THE CLERK: State your full name and spell your
4 last name for the record, please.

5 THE WITNESS: Investigator John Carpenter,
6 C-a-r-p-e-n-t-e-r.

7 DIRECT EXAMINATION BY MS. WHITE:

8 Q And what is your occupation?

9 A I'm an investigator in the criminal
10 investigations division at the Anderson County
11 Sheriff's Office.

12 Q And were you -- did you -- was this case
13 assigned to you?

14 A Yes, it was.

15 Q And on October 20th of this year did you go to
16 the defendant's residence and interview him and his
17 wife?

18 A Yes, I did.

19 Q Now, when you went to the defendant's home,
20 were you in plainclothes or were you in a uniform?

21 A Plainclothes.

22 Q And when you got there, did you have any
23 discussion to them about their position in regard to
24 custody?

25 A When I got to the residence, the defendant was

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

10

1 there with his wife. I explained to him if they had
2 a few minutes, we would like to talk to them about --

3 Q My question was, did you ask them anything
4 about custody or discuss anything with them about
5 custody?

6 A No, I just asked them if they would talk to us.

7 Q So did you ever arrest them?

8 A No.

9 Q Did you ever handcuff them?

10 A No.

11 Q Did you ever stop their free movement at all?

12 A No.

13 Q And when you got there, did you go in
14 plainclothes with a DSS investigator?

15 A I was accompanied by two DSS employees.

16 Q And when you finished talking to the defendant,
17 did you leave?

18 A Yes, I did.

19 Q And were the defendants free to go at any time?

20 A Yes, sir.

21 Q Was this in their own home?

22 A Yes, it was.

23 Q All right. Now, will you please tell the
24 judge, first of all, did you discuss Minor Child
25 date of birth with the defendant?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

11

1 A That was one of the first questions that I
2 asked them after I got their information.

3 Q What did he say as to the date of birth?

4 A [REDACTED].

5 Q And did he say who the mother of -- the child's
6 name was Minor Child is that correct?

7 A Minor Child

8 Q And did the defendant say who Minor Child
9 natural mother was?

10 A The biological mother is Angela Kay Carmen
11 Carter, a white female, [REDACTED]

12 Q And I believe you said the child Minor Child was
13 born on [REDACTED]?

14 A That is correct.

15 Q Did he say whether or not Angie, her natural
16 mother, was still alive?

17 A He advised me that Angela, the biological
18 mother, had died on March 6th of 1999.

19 Q And did he say -- did he say how she had died?

20 A He advised me that Angela was diagnosed with
21 lupus while she was pregnant with Minor Child and
22 told me something about the symptoms and told me
23 that was her -- that was how she died.

24 Q And did he describe Minor Child

25 A In brief he said that she was normal the first

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

12

1 two years of her life, had regular visits to the
2 doctor. That initially he thought that there was
3 some Down's Syndrome and then he decided that there
4 was not. He then told me that he thought that she
5 might have lupus, because Angela, his wife, had had
6 lupus. And then he said that he -- after that he
7 didn't think anything more was wrong.

8 He commented that he felt like Minor Child was
9 clumsy when she started walking, and that he had
10 attributed that initially because she had big feet.

11 Q So he said she was clumsy and she had big feet,
12 is that correct?

13 A That's correct.

14 Q Now, did you talk to him about any injuries on
15 Minor Child

16 A When we started talking about the feet, she had
17 several injuries to -- like there was injuries to
18 the top of each of her toes. And he explained that
19 as a deck board having come off the rear deck of the
20 residence and fell across all of her toes.

21 Q On both feet?

22 A That's the way he described it at that time.

23 Q And when was this, according to the defendant?

24 A Sometime after school. The school year had
25 started, and I assuming --

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

13

1 Q Did you talk to him about a prior
2 hospitalization from April of 2000, regarding
3 Minor Child

4 A He told me that there was an incident where
5 Minor Child had been treated for a head injury that
6 was the result of an incident involving a
7 step-sibling and the bunk beds that had occurred
8 around April or May of 2000.

9 Q What did he say happened after that head
10 injury?

11 A That they went to see an eye doctor, did one
12 followup with the eye doctor, but then went on to
13 explain that that eye doctor did not accept his
14 insurance that he described as PHP, and that he went
15 to Dr. Stella Legarda in Spartanburg and -- because
16 she accepted the insurance he had. He went on to
17 describe how her eyes were crossed and there was
18 some swelling as a result of that incident.

19 Q Now, what, if anything, according to the
20 defendant, did Dr. Stella Legarda recommend?

21 A He advised me that she did a spinal tap and
22 then referred them to another doctor that was down
23 the street for a blood test. And his explanation
24 was that was because of the excess fluid and
25 pressure in the cranial cavity in the head.

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

14

1 Q And what, if anything, did she recommend, she
2 being the doctor?

3 A Dr. Stella Legarda, according to him, diagnosed
4 speckled lupus, which he said was the highest kind,
5 and then further advised that the doctor suggested
6 medications that were similar to what Angela had
7 taken and a special diet.

8 Then when I asked him about the diet, he said
9 that Minor Child was lactose intolerant and they
10 needed to cut down on milk. And then they found
11 some internet diet that told them to cut out sugar
12 and milk.

13 Q Now, did he say whether or not they took
14 Minor Child to another doctor after this?

15 A He told me that Dr. Maddox here in Anderson was
16 the regular visits for all the kids, is the way he
17 described it, but the last visit for Minor Child was
18 on 10-11 of 2000, and then they had scheduled two
19 more on 10-23 and 10-24.

20 Q When did the child actually die? What month?
21 Don't worry about the exact day. What month?

22 A October of 2000.

23 Q Did he discuss with you -- during this
24 discussion on October 20th, did the defendant
25 discuss how well Minor Child would eat?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

15

1 A His example was that she could eat more than
2 the defendant, a whole plate of spaghetti,
3 Minor Child He said she ate more than he did.

4 Q And how did she say that -- how did he say that
5 she acted?

6 A He described that she would have temper
7 tantrums, rolling and kicking on the floor, and just
8 kind of -- that was the way he described her.

9 Q About potty training?

10 A Said that Minor Child was a little behind on the
11 potty training, and that she could say the whole
12 alphabet, knew her colors and numbers.

13 Q Did he say what happened on October 14th of the
14 year 2000, the day that Minor Child was brought into
15 Greenville Memorial Hospital with the injury that
16 she subsequently died of?

17 A On the 20th, he described to me that he went to
18 work at seven a.m. and that -- told me that Michelle
19 called about mechanical problems with the van.

20 Derek, the defendant, told his new wife
21 Michelle to call his work and say that something was
22 wrong with the children.

23 Then Michelle picked up Derek at work so Derek
24 could take the van to his friend's house. His
25 friend's name is James Burgess, somewhere in the

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

16

1 Belton area, so they could get the van fixed.

2 Then he went on to describe that Minor Child
3 complained of headache. And Derek told her to lay
4 down in the van. Not in the front seat, but the
5 first seat behind the front seat. Minor Child kept
6 grunting and then did not respond when Derek was
7 shaking her. Then he said he decided to take her to
8 the hospital. He advised that Greenville emergency
9 room was closer. He said that Minor Child was looking
10 up, but not at Derek. She was kind of looking
11 through him, is the way he described it. Derek ran
12 into the emergency room with her. And he advised
13 that only he, being the defendant, and Minor Child the
14 deceased were in the van at the time of this going
15 on.

16 Earlier in the day he described to me that
17 Minor Child told Michelle that she had a headache.
18 Michelle gave her some Tylenol and Minor Child went
19 outside to play.

20 Q Stop there a minute. Michelle is the
21 defendant's wife; in other words, Minor Child
22 stepmother, is that correct?

23 A That's correct.

24 Q She's also got pending charges, which would be
25 tried later?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

17

1 A To the best of my knowledge, that's correct,
2 yes.

3 Q Go ahead.

4 A He then went on to describe that Minor Child
5 always wanted medicine because the other kids got it
6 and that Dr. Maddox told them to use colored sugar
7 water. Minor Child would be happy and go outside and
8 play.

9 Then we moved on to about the end of May, while
10 having followup visits to the eye doctor's office,
11 Minor Child he described, got stiff as a board and
12 groaned like she was throwing a temper tantrum.

13 Q Did he discuss where he worked?

14 A He advised me that he was working as a lead
15 utility technician at Plastics Omnium, that he
16 worked fifty to seventy hours a week, and that he
17 was in charge of the computer and water flow to a
18 paint machine.

19 Q All right. Now, at any time was he under
20 custody or was his movement halted by you in any
21 manner?

22 A No.

23 Q And was he free to go at all times?

24 A Yes, he was.

25 Q Was the defendant in any kind of custody?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

18

1 A None at all.

2 Q After you began talking to him on October 20th,
3 did you leave that house with no arrest or any other
4 kind of restraint put on the defendant?

5 A That's correct.

6 Q Did you talk to the defendant again on 10-25 of
7 the year 2000?

8 A Yes, I did.

9 Q And where was that?

10 A During this meeting on the 20th, I asked him,
11 you know, if they would be willing to come in and
12 talk to us and fill out some questionnaires so that
13 we could better understand what happened about
14 Minor Child death. They agreed to do that, and
15 that's when we set up a time for them either -- I
16 don't know if we done it on the spot or we did it by
17 phone later, but we set up for him to come to the
18 office on 10-25 of 2000.

19 Q And did they drive themselves or did someone
20 else drive them?

21 A They came on their own to the sheriff's office.

22 Q And during -- when they arrived, what, if
23 anything, were they told about whether or not they
24 were in custody?

25 A We -- when the defendant came to the sheriff's

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

19

1 office, came upstairs to the investigation division,
2 took them separately, the defendant and then his new
3 wife, to separate rooms where they could fill out
4 the questionnaires. When I sat down, I explained to
5 them that, you know, he didn't have to do this, that
6 if he would just fill it out, we would appreciate
7 it. It would help us ask better questions and learn
8 better what happened. And I told him if had any
9 questions or needed anything, my office was around
10 the corner. I left him with the questionnaire and
11 told him, you know, if he needed to make any phone
12 calls, or leave, or whatever, just left me know. I
13 left him with the questionnaire back there in the
14 room by himself to fill out at his leisure.

15 Q And did the defendant fill out the
16 questionnaire?

17 A Yes, he did.

18 Q Was anyone in the room while the defendant
19 filled out the questionnaire?

20 A No, ma'am. I mean, just long enough for me to
21 give it to him and I left out and went back to my
22 office to do some paperwork.

23 Q Was he in any custody at that time?

24 A No.

25 Q And was he, in fact, left alone?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

20

1 A That's correct, yes.

2 (Questionnaire marked as State's Exhibit No. 1
3 for identification)

4 BY MS. WHITE:

5 Q I'm handing you State's Exhibit 1 for
6 identification. Other than I think two questions
7 being taken off page nine, because they dealt with
8 the polygraph exam, other than that, is that the
9 questionnaire that he filled out on his own with no
10 law enforcement in the room and handed in to you?

11 A Yes.

12 Q And is that a fair and accurate copy of what he
13 gave you, again, other than the part that's been
14 redacted off the last page?

15 A Yes.

16 Q And will you please publish the questionnaire
17 as to what he said? Just start at the top.

18 A Do you want me to read the instructions, or
19 just start with the first question?

20 Q No, just go ahead and start with his answers.

21 MS. WHITE: Judge, if it would -- if you would
22 prefer to read this yourself. I don't know how you
23 want to do this.

24 THE COURT: Do you have any objection to me
25 simply reading it?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

21

1 MR. TREACY: No, sir, that would be fine.

2 THE COURT: Let me read it, please.

3 (off the record)

4 (back on the record)

5 THE COURT: I have read this State's Exhibit 1
6 for identification.

7 (Advisement of Rights Form marked as State's
8 Exhibit No. 2 for identification)

9 BY MS. WHITE:

10 Q Now, after the defendant gave you the statement
11 that the judge -- the questionnaire that the judge
12 just read, did he come out and hand that in to you?

13 A Well, he told me he was done and I went and got
14 it from him.

15 Q And I'm handing you State's Exhibit 2. After
16 you looked through the questionnaire, what, if
17 anything, did you do with the defendant?

18 A He continued to sit in the room where he filled
19 it out for a few moments while I reviewed the
20 questionnaire and tried to read over his answers,
21 along with Investigator Sutton who read over his
22 answers.

23 Q And what did you do to the defendant after
24 that? What, if anything, did you read him?

25 A Brought him from the room where he filled it

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

22

1 out into Investigator Sutton's office and we sat
2 there and she came into her office.

3 Q My question is, what, if anything, did you read
4 him?

5 A The advise of rights form.

6 Q All right. Now, I'm handing you State's
7 Exhibit No. 2 for identification. Has that been
8 changed or altered in any manner?

9 A No.

10 Q And will you please read for the judge or
11 demonstrate for the judge exactly the way that that
12 was read to the defendant before you began
13 questioning him?

14 A Explained to the defendant this is advise of
15 rights form. I wrote on there that we were at the
16 Anderson County sheriff's office, the date and the
17 time. And I said "I want you to read along with me
18 as I read out loud." And I put it between us where
19 he could see it as I read out loud, and I started at
20 the top.

21 "Before we ask you any questions, you must
22 understand your rights.

23 "You have the right to remain silent.

24 "Anything you say can be used against you in
25 court.

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

23

1 "You have the right to talk to a lawyer for
2 advice before we ask you any questions and have him
3 with you during questioning.

4 "If you cannot afford a lawyer, one will be
5 appointed for you before any questioning, if you
6 wish.

7 "If you decide to answer questions now without
8 a lawyer present, you will still have the right to
9 stop answering at any time.

10 "You also have the right to stop answering at
11 any time until you talk to a lawyer."

12 I asked him if he understood each of those and
13 asked him if he did, if he didn't have any
14 questions, to sign his name in where it says sign.
15 He signed his name and I witnessed it and
16 Investigator Sutton witnessed it and put the date
17 and the time.

18 Then I said, okay, "now, the lower part of this
19 is the waiver of rights. And if you will read along
20 with me," and I read "this statement of my rights
21 and I understand what my rights are. I'm willing to
22 make a statement and answer questions. I do not
23 want a lawyer at this time. I understand and know
24 what I'm doing. No promises or threats have been
25 made to me and no pressure or coercion of any kind

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

24

1 has been used against me." I asked him if he
2 understood that. He said yes. I said "do you know
3 what coercion means?" And he said "well, kind of."
4 I said "well, coercion can be negative or it could
5 be positive." I said "positive coercion would be if
6 I can get you to talk to me today, I'm going to take
7 you to Burger King and buy you a Happy Meal to try
8 to make you feel like you have to talk to me, or if
9 I were over you and shine a bright light onto you
10 and had a rubber hose and was telling you you had to
11 talk to me, would be negative coercion." And he
12 shook his head that he understood that and he signed
13 the waiver section. I witnessed it with my name.
14 Investigator Sutton witnessed it, and we put the
15 date and the time.

16 Q Now, did he appear to be under the influence of
17 any drugs, or alcohol, or anything else which would
18 alter his ability to understand what was happening?

19 A He didn't appear to me to be and I couldn't
20 tell if he was.

21 Q Did he at any time while you were talking to
22 him on any of these days ask for an attorney?

23 A No.

24 Q Did he at any time invoke his right to remain
25 silent?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

25

1 A No.

2 Q At any time did you or anybody else use any
3 threats, coercion, or make any promises to the
4 defendant in order to get him to talk to you?

5 A No.

6 Q In your opinion did he freely and voluntarily
7 agree to talk to you?

8 A Yes, he did.

9 Q And after he signed -- you said that this has
10 not been changed or altered in any manner since it
11 was signed, is that correct?

12 A That's correct.

13 Q After the defendant waived his Miranda Rights,
14 to whom did he speak?

15 A After we finished that, he went into
16 Investigator Sutton's office area and talked to her
17 for awhile.

18 Q And she is the polygraph examiner, is that
19 correct?

20 A That's correct.

21 Q And you know not to mention that at all when
22 the jury comes out?

23 A That's correct.

24 Q Now, when he finished talking to Detective
25 Sutton, did he come back and talk to you?

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

26

1 A Yes, he did.

2 Q And we are still on the 25th of October, is
3 that correct?

4 A That's correct.

5 Q All right. Now, after he talked to Detective
6 Sutton and came back and talked to you, what, if
7 anything, did he say again about Angie, the child's
8 natural mother?

9 A We started the interview with just he and I in
10 the same room where he filled out the questionnaire.
11 He told me Angie died March 6th of 1999, and then
12 went on to explain that --

13 Q Just go ahead and -- the jury isn't here, so
14 for time's sake, go ahead and tell the judge what
15 the defendant told you.

16 A Okay. Minor Child didn't get abused while living
17 with Angie and Derek. Minor Child was spoiled from
18 day one, he said. Derek and Angie were not married
19 at the time of the pregnancy. When Derek and
20 Michelle first met, he said he redecorated the whole
21 house. Derek moved in with Michelle after only a
22 few weeks, and then Michelle talked Derek into
23 marriage. He said they got married on June the 6th.
24 of 1999.

25 Then he told me about when they were at the

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

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1 Scarboro Road residence Minor Child did not potty
2 train at what he felt was an appropriate age. He
3 said Michelle got frustrated because it was so easy
4 with her two sons. Michelle would yell at
5 Minor Child and Derek got offended and they had
6 argued. It seemed like they had -- that they always
7 argued. With Minor Child -- excuse me, they would
8 always argue about Minor Child Michelle woke Derek
9 up by yelling because Minor Child got up and got in a
10 can of Crisco and got it all over her and
11 everything.

12 He said it seemed like it was just little
13 things that would set Michelle off. They had
14 arguments about Minor Child

15 Then he went on to tell me that they moved to
16 the [REDACTED] address just after Halloween of
17 1999. He said Michelle would raise hell about his
18 past. Told his family that the only reason Derek
19 married Angie was because she was pregnant. He said
20 at the Scarboro Road address -- and when he started
21 talking about the family, he said the Scarboro Road
22 address, Tim, who was Angie's, or Angela's
23 biological father, would call and hang up repeatedly
24 when Michelle would answer the phone. He said that
25 Minor Child would pee or poop on herself after talking

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1 to Tim Harmon on the phone. He said Michelle did
2 not want Minor Child to visit Christmas with Tim
3 Harmon.

4 At Derek's father's house Harmon came to pick
5 up Minor Child While getting in the truck, Minor Child
6 was screaming and kicking. Derek's dad was offended
7 because Derek let Minor Child go.

8 After this, every phone call from Tim Harmon
9 would cause Minor Child to pee or poop on herself and
10 act weird for several days, is the way he described
11 it.

12 Michelle had just given birth to Jared and he
13 said that she got real testy towards Minor Child and
14 became -- because of the Minor Child soiling herself.
15 When Derek would call home from work, Michelle would
16 complain about the soiling and Minor Child making
17 messes.

18 He went on to describe at [REDACTED] the
19 first time he saw Michelle slap Minor Child was after
20 she pooped on the floor. He said she slapped her
21 across the face.

22 Michelle would make Minor Child bend over and
23 touch her toes and whip her with a belt. Then she
24 would pop her on the head and the bottom of her
25 feet. Popping her on the bottom of the feet was

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1 recommended by Dr. Maddox, according to Michelle.

2 Derek went on to say that Michelle would get
3 mad because Minor Child was eating too slow. They
4 would make Minor Child stand in the kitchen and hold
5 her food. When Minor Child took a bite, she had to
6 the count of five to be done and swallowed and ready
7 for the next bite. If not, she would pop her head,
8 foot, or butt. Michelle would grab Minor Child hair
9 and pull her head back and tell her "you will eat
10 this food."

11 He went on to describe how Michelle -- when he
12 saw Michelle would grab Minor Child by her shoulders
13 and throw and push her to the floor when she did not
14 eat fast enough, or if when she would pee or poop on
15 the floor.

16 One time Michelle grabbed her by the throat and
17 picked her up and choked her and shook her.

18 Derek went on to describe when Minor Child was
19 outside, Michelle would make her run back and forth
20 across the yard because she messed her diaper and
21 would leave the soiled diaper on Minor Child while she
22 was out there having to walk back and forth.

23 Derek described that how he watched her, was
24 there when Michelle would not let Minor Child into the
25 bathtub after she had pissed or pooped on herself.

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1 Minor Child had to stay outside on the ground or on
2 the steps until they sprayed her off with the garden
3 hose.

4 Then Michelle would make her run laps around
5 the kitchen and hall when she was inside the
6 residence. If Minor Child walked or stopped running,
7 Michelle would make her touch her toes while being
8 spanked with a belt.

9 Minor Child would run off from Michelle sometimes
10 when they were in the store shopping. And he told
11 me that Dr. Maddox recommended a child harness. He
12 described that it was a blue with a velcro belt that
13 would be closed in the back. Michelle had it on
14 Minor Child a lot in the house.

15 Michelle said that Dr. Maddox said to switch
16 the door locks so that they would open from the
17 outside, talking about the small bathroom by the
18 parents room, is those door locks that he was
19 talking about.

20 He went on to describe that he went to Wal-Mart
21 and bought, he described, door latches that looked
22 like hinges, that when you mount it on the door and
23 then you -- it folds over and it would act as a
24 brace or a block to stop the door from opening. He
25 said they looked like hinges. He would put the

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1 hinge and locks on both doors of the half bath next
2 to the master bedroom and they would put Minor Child
3 in the bathroom and lock the doors from the parent's
4 room and the baby's room.

5 He said they left Minor Child in the bathroom at
6 night and that they used a child gate to block
7 access to the sink and medicine cabinet in that
8 small bathroom so that she couldn't, I guess, make a
9 mess in the sink or get in the medicine cabinet.

10 He told me that he bought these things at
11 Wal-Mart about one and a half to two months ago
12 prior to our interview, which was 10-25-2000.

13 He said that Minor Child continued to sleep there
14 in the half bath with these locks on the doors until
15 the day she went to the hospital.

16 Once Minor Child pulled the bottom -- I'm sorry,
17 pushed the bottom of the door that was locked. She
18 pushed her way underneath it and got into the baby's
19 room. The baby's name is Jared.

20 Q So is that why they added the bottom one, the
21 bottom lock?

22 A He went on to describe they did one set of the
23 hinge locks up above the doorknob that they reversed
24 out. When that didn't hold her and she pushed under
25 it, he described that they went and bought

1 additional of those hinge locks and put them lower
2 on the door to prevent her from being able to push
3 the door open.

4 Q So you couldn't push the door and get out?

5 A Correct. She kind of pushed it and wedged --
6 you know, trailer doors have the gap at the bottom
7 and kind of pushed it out and she squeezed through
8 and got in the baby's room and made a mess.

9 Q Go ahead.

10 A Then he went on to describe that Michelle made
11 Minor Child run and popped her when she stopped.

12 Michelle told Derek that he would have to get
13 better locks and a chain for the harness. And I
14 already described how he bought two more hinge locks
15 and put them on the bath door.

16 And he described a threaded eyelet, which is
17 like a screw on one end and a circle on the other,
18 and they screwed that into the floor of the parents
19 bedroom. And then there was a chain that they
20 connected to the back of that blue harness, ran it
21 under the gap at the bottom of the door out and down
22 the wall of the parents bedroom far enough. It was
23 like a couple -- I don't remember how many inches,
24 but it was far enough to where they couldn't reach
25 it and then there was this screw eyebolt into the

INVESTIGATOR JOHN CARPENTER - DIRECT BY MS. WHITE

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1 floor and connected the chain to that.

2 Q So she was locked in the bathroom and had a
3 chain attached to her that was done into the parents
4 bedroom, is that what you are saying?

5 A To where she couldn't get to it and get loose,
6 yes.

7 Q Go ahead.

8 A When they closed and locked the door, Minor Child
9 could not get to the anchor and get loose and go
10 shit in the baby's room, is the way he described it.

11 He told me that he knew Michelle used to take
12 the harness and would screw it to a stump.

13 Q Outside?

14 A . Right, to keep Minor Child from -- he said from
15 getting into the house and into the road. So the
16 same harness and chain -- same harness and leash
17 assembly. The eye screw was screwed into a tree,
18 like a stump, and then that kept her in one place in
19 the yard where she couldn't get away to get back in
20 the house with the soiled diaper that they left on.

21 Q Go ahead.

22 A He said that the harness came with the leash
23 and they would sometimes loop it around the doorknob
24 to keep her in one place in the house.

25 And he said that sometimes he would use the

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1 leash and harness tied to the door. He said he did
2 it when Michelle told him to do it.

3 He said that the last few weeks that they did
4 leave the door between their bedroom and the half
5 bath open so that they could watch her, and kind of
6 added that as an afterthought.

7 He told me about times that he would see and
8 hear Michelle call Minor Child a bitch to the child's
9 face.

10 On Saturday, on the way home from work, he
11 advised Michelle told me that if we did not lie
12 about what happened Saturday morning prior to the
13 child being taken to the hospital, that they would
14 get us for child abuse. He said that this was
15 before he took Minor Child to Greenville Hospital.

16 He went on to describe that Michelle came up
17 with the story about getting the car fixed so we
18 would have an excuse for going to Greenville.

19 Q If I could just stop for a minute. They lived
20 where in Anderson?

21 A If you go out 28 bypass.

22 Q How far from Anderson Hospital?

23 A My guess is between three and five miles.

24 Q And correct me if I'm wrong, but they live
25 here, Anderson Hospital is here and Greenville

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1 Hospital is here?

2 A Correct.

3 Q You would have to go by Anderson Hospital, in
4 other words, or somewhere near there?

5 A Yes.

6 Q And so they are saying that they made up this
7 story about the van to explain why they went to
8 Greenville Hospital instead of Anderson Hospital?

9 A Correct.

10 Q All right. Go ahead.

11 A And then he went on and explained that there
12 were times that Michelle choked -- slapped, choked
13 and would stuff toilet paper up Minor Child nose,
14 because one time some -- Minor Child snot got on
15 Michelle. Michelle got real pissed off and would
16 roll up toilet paper and stuff it up in her nose, to
17 the point where it was -- the toilet paper was
18 hanging out.

19 Then we went back to talking more about
20 Saturday.

21 Q Now, Saturday is the day that she was taken to
22 Greenville Hospital, is that correct?

23 A She was transported to Greenville Hospital by
24 the defendant.

25 Q Okay.

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1 A Michelle told Derek that she couldn't deal with
2 Minor Child He said that Michelle pulled up at work,
3 Derek got into the van. Michelle told Derek that
4 she thought Minor Child was having a seizure. They
5 decided that Derek's would go to the hospital with
6 Minor Child And he said that there had been a bad
7 history with Anderson Area Medical Center, and
8 that's when they decided to go to Greenville. Some
9 of the nurses there said some stuff about previous
10 injuries with the head injury and stuff.

11 Q Now, they had -- what they are talking about in
12 April of that year, this is October we are talking
13 about now. In April of that year she had been in
14 Anderson Hospital for a head injury as well, is that
15 correct?

16 A That's correct.

17 Q And, in fact, after that head injury, the
18 doctors there had called DSS, is that right?

19 A That's my understanding that's how the DSS got
20 the call.

21 Q All right. Go ahead.

22 A Because of that bad history is why they chose
23 to go to Greenville.

24 Q Okay.

25 A He said that he asked Michelle what happened

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1 and all she would say was that Minor Child had a
2 seizure.

3 He was kind of frustrated at that point. I
4 kept asking him if she explained any more, whatever,
5 and he was -- he related to me a story that occurred
6 at the funeral home the Friday following Minor Child
7 death. He said that after law enforcement and
8 Department of Social Services came to the house,
9 Michelle said something on the way home from the
10 funeral home to the effect of damn, they gave us
11 \$300.00. And I asked what that was about. She said
12 that -- or he said that she was talking about an
13 envelope that was given to him by some of the
14 co-workers that had come to the funeral home. She
15 was commenting about the money and then on -- he
16 told me that on Tuesday after I had come to the
17 house and talked to them, we discussed earlier there
18 at the house --

19 Q On the 20th is what we heard earlier?

20 A Correct. That Michelle was cussing and wanted
21 to talk to him without the kids in the room. So
22 they sent the kids -- the step-siblings, the six and
23 twelve year old, I think, out of the room. Michelle
24 said, and this was the way he quoted her, "I fuckin'
25 told you that they were going to get me for fuckin'

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1 child abuse." Then Derek and Michelle talked for
2 several hours. Then this morning prior to this
3 interview they talked for several hours and said
4 they were making sure that they had each other's
5 back and that that their stories were straight.
6 That was prior to this interview.

7 Then he went on and I asked him about things
8 that he had done to Minor Child And he said I poured
9 alcohol on her vagina when she was rubbed raw.

10 Q All right. Now, when she came into the
11 hospital, she had several vaginal injuries, is that
12 correct?

13 A Yes, there was bruising and two different areas
14 of the vaginal area.

15 Q And he said he poured alcohol on her vaginal
16 area?

17 A That's correct.

18 Q And what else?

19 A He said that I know that I stomped on her toes
20 with my foot after she disobeyed or made a mess.

21 Q And she had injuries on top of all of her toes
22 and on her feet, is that correct?

23 A Yes. And he went on to describe that I know
24 that I used the edge of the ruler to hit her toes a
25 couple of times. What he's talking about when they

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1 were making her walk laps, or whatever, and she
2 slowed down or didn't walk fast enough or stopped,
3 at first they hit the bottoms of her feet, and we'll
4 get into that, and then he said that later on they
5 would stand there and instead of using the ruler,
6 the flat of the ruler, that the toes would be
7 straight and they would take the edge of the ruler
8 and the edge of the ruler would come down on top of
9 each toe to punish her for not walking or running
10 fast enough.

11 He said I tied her to the door a couple of
12 times with the harness and leash.

13 He said I made her run back and forth in the
14 yard and on the track. They had a little track in
15 their yard that they called a track.

16 He said I know there were a lot of times that I
17 lost my cool and I used both hands to pick Minor Child
18 up under her chin and put her up against the wall.

19 He said I did hose Minor Child off because
20 Michelle would not let her into the house after she
21 pooped or pissed on herself. This happened whenever
22 Minor Child did this. Michelle would not let her get
23 into the bathtub until she was hosed off.

24 Then he went on to tell me that one day when he
25 came home, he noticed that Minor Child 's, what he

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1 called monkey, and then I clarified that to be her
2 vagina, was very swollen. He described it as huge.
3 He said Michelle took a belt and was using it to
4 slap Minor Child vagina. He said I did it a few
5 times, but after I saw how swollen it was, I refused
6 to do it any more.

7 He went on to describe the burn mark on her
8 chest did not happen on a portable heater. Earlier
9 they told us that there was a portable heater. He
10 said we have never had a portable heater. He said
11 those burns happened when he wasn't at home. He
12 noticed the burn at the hospital and asked Michelle
13 about it. About a week before Minor Child went into
14 the hospital Michelle started making Minor Child stand
15 in the mop bucket. He described it as being a red
16 plastic mop bucket with a detachable ringer
17 assembly.

18 Michelle would make her stand in the water and
19 then put ice cubes in the water. And he went on to
20 say that Michelle always made her take cold baths.

21 Michelle said that the scars on Minor Child
22 chest were from when she put ice on her chest and
23 pulled it off, that it took some of the skin off.

24 He said that one point in time Minor Child got
25 ahold of some bug spray and sprayed it. Some of it

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1 got into her mouth, or whatever. Michelle got mad
2 and told Derek that he and Minor Child would have to
3 leave.

4 Q All right. And is that all he told you before
5 he gave a written statement?

6 A That's my notes from when we talked about it
7 before we started writing the written statement,
8 yes, ma'am.

9 (Voluntary Statement marked as State's Exhibit
10 No. 3 for identification)

11 BY MS. WHITE:

12 Q I'm handing you State's Exhibit 3 for
13 identification. Do you recognize that?

14 A It's a handwritten statement that the defendant
15 and I did on the second floor in the office.

16 Q And was this immediately after he gave the
17 verbal statement that you just read, or that you
18 just told the judge about?

19 A Yeah, this was all during the same interview.
20 This is where we went next.

21 Q Has that been changed or altered in any manner
22 since it was signed by the defendant?

23 A No, ma'am.

24 Q And how was this statement taken?

25 A Since we talked through this and I made notes,

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1 I drew from my notes and he and I continued to
2 discuss the things, and I would write down sections
3 and go through and then confirm with him what I was
4 writing. And then there was times when there was
5 little corrections or things he wanted to change,
6 that when it was all over with, I had him --

7 Q Let me get this straight. So he's telling me
8 about it and you are writing as he talks?

9 A Yeah.

10 Q In other words, you are going through it.

11 At the conclusion of the statement, was he
12 given an opportunity to read the statement before he
13 signed it?

14 A After we finished going through line by line
15 together and we got done with that much, because it
16 had gotten past the first shift, there was no
17 investigators upstairs, myself, along with the
18 defendant, went downstairs to where the desk officer
19 was and went into the break room behind where the
20 desk office -- there is like a small console at the
21 sheriff's office --

22 Q Was he given an opportunity to read it before
23 he signed it?

24 A We read it in its entirety. I read it out
25 loud, and he read along with me, and made any

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1 corrections that he wanted to.

2 Q And was he given a copy of the statement before
3 he -- or after he signed it?

4 A Yeah, I think, if you will note at the bottom
5 of the first page, he initialed that he received a
6 copy of the statement. He got the back of the
7 carbon copies.

8 MS. WHITE: No further questions on the Jackson
9 v. Denno portion, Your Honor, of this witness.

10 THE COURT: Your witness, sir?

11 MR. TREACY: If it please the court, Your
12 Honor.

13 MR. TREACY: I have no objection. I just
14 simply need to peruse through it.

15 THE COURT: Very good, sir.

16 MR. TREACY: Would you like me to do my cross?

17 THE COURT: If you would, sir, I appreciate it.
18 Thank you.

19 (off the record)

20 (back on the record)

21 THE COURT: All right, sir.

22 CROSS EXAMINATION BY MR. TREACY:

23 Q Investigator Carpenter, do you mind telling the
24 judge, on October 20th, when you did your initial
25 interview at the Carter's residence, what

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1 information had you gathered about Minor Child

s death before you made that appearance?

3 MS. WHITE: Your Honor, I know we are outside
4 the presence of the jury, but the case law is very
5 clear that the subjective evaluation of what the
6 officer thinks or what he knows or whether they, in
7 fact, think they are under custody is completely
8 irrelevant. The U.S. Supreme Court and the South
9 Carolina Supreme Court made that clear. And I would
10 object that that's a waste of time to go into what
11 they thought or what the officers were thinking.

12 THE COURT: That's a correct standing by
13 itself. It may be germane when considered in
14 conjunction with other factors. I'm going to permit
15 brief inquiry into this area.

16 MR. TREACY: Okay.

17 BY MR. TREACY:

18 Q Just generally then, don't go into details, but
19 what generally had you done in the course of your
20 investigation? Had you had talked to witnesses?

21 A I briefly spoke with Dr. Michael Avant in the
22 pediatric ICU unit and just got a -- at that point
23 on the 16th the child was still alive. He gave me
24 just a brief background on what he had -- he said
25 that the child was the same as yesterday, was close

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1 to death; that he had done a full body x-ray; and
2 that the mother died of lupus; that the ten toes
3 that were injured were not broken. He said that he
4 had some labs pending on the status of whether or
5 not the child did have lupus, because that's I think
6 what the family was asserting to the medical
7 community. I mean, just basic background
8 information from the medical staff on the child's
9 injuries.

10 And then that the -- on Saturday the child was
11 visiting -- the doctor related to me the child was
12 visiting friends, become unresponsive, and the
13 father brought to the E.R., was admitted. He told
14 me that they had conveyed the story about the big
15 board falling on both of her feets, the burn from
16 the space heater, and that there was a yellow jacket
17 sting to the ear, was what the family's history was
18 to the medical community.

19 He went on to describe that the defendant was
20 extremely quiet, and that the stepmother appeared to
21 be understanding in reference to them making the
22 mandated report to the Department of Social
23 Services.

24 Q Let me just -- let me just try to hurry this
25 up. He explained that he was doing, it was a

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1 mandated report, and he was filing it because of the
2 suspicious injuries, is that correct, to the toes?

3 A Yeah, he explained that to the mother and told
4 me that she accepted that -- the stepmother, that
5 she had accepted it.

6 Q And he, in fact, explained to law enforcement
7 his report there were possible medical explanations
8 for her death, but because of the suspicious
9 markings, he felt like he had to file the report and
10 have you investigate. Is that essentially it?

11 A Kind of, but --

12 Q We are not --

13 A -- my knowledge of lupus was rather limited and
14 I had to ask him about it, because I had never
15 really dealt with any investigation involving
16 allegations of lupus. And he briefly described to
17 me that lupus is a disease that the body can decide
18 any function or organ in the body is bad, or like a
19 disease, and the body will attack that. So he gave
20 me that brief overview. And he said if this child
21 does have lupus, then lupus could explain a whole
22 bunch of stuff being wrong, he said. But if this
23 child doesn't have lupus, then I have to make this
24 report, because there is so many different injuries,
25 some of which are not the body attacking itself,

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1 like the toes and other things that were of concern
2 to him. That's why he ordered the full body x-ray
3 because some of the injuries were just diagnostic
4 child abuse type injuries, and some of the other
5 injuries could be explained by lupus, if your body
6 decided that that organ was wrong or that function
7 was wrong and then attacked it. But he felt
8 strongly about some of the others and that he had to
9 make a report that lupus, if diagnosed with that,
10 could explain some. But if there was no lupus, then
11 he had real grave concerns, is the way he described
12 or explained it to me.

13 Q So on October 20th, when you reported to the
14 house, that's the information essentially that you
15 had? You didn't feel like you had enough
16 information to place them under arrest at that
17 point, right?

18 A No, I just started my investigation when I went
19 to the house.

20 Q Now, you stated that your direct testimony that --
21 I just want to make sure that you stated this
22 correctly, that in this October 20th interview when
23 he mentioned Dr. Maddox, being seen after Dr.
24 Legarda, that he had scheduled an October 11th --
25 scheduled some future appointments with Dr. Maddox,

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1 is that what you said?

2 A No, on the 20th when I interviewed the
3 defendant, he explained the last visit to Dr.
4 Legarda was on 10-11 of 2000.

5 Q I think you said Dr. Maddox in your direct.

6 A And then that they scheduled additional. After
7 that he described to me, when I asked him about any
8 other medical treatment, he said that Dr. Barry
9 Maddox, here in Anderson, was their regular visits
10 for all the kids. So that was totally separate from
11 Dr. Legarda's schedule.

12 Q So the future appointments were set with Dr.
13 Legarda, not Dr. Maddox, correct?

14 A By Dr. Legarda, for -- they scheduled an EEG,
15 or something to that effect.

16 Q Now, let's go ahead to the October 25th --

17 MR. TREACY: Your Honor, for purposes of this
18 hearing I'll concede that the October 20th interview
19 does not present any issues with regarding
20 voluntariness or Miranda.

21 BY MR. TREACY:

22 Q The October 25th interview, at that point when
23 you -- you had them come into the sheriff's
24 department. At that point you had already had the
25 autopsy report from Dr. Woodard. Did he not give

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1 you his findings on October 24th, that he believed
2 it was hypoxia caused by possibly suffocation?

3 A On the 24th I did speak with Dr. Woodard and I
4 think he had a preliminary, but there was no
5 finalized report at that point. He just -- he knew
6 there was hypoxia was the cause of death.

7 Q And hypoxia, your understanding is is the lack
8 of oxygen to the brain right, brain?

9 A That's the way for me to describe it.

10 Q The brain suffocates, essentially.

11 A Well, the lack of oxygen to the brain, by
12 whatever means.

13 Q He also told you at that point that he did not
14 believe she had lupus, is that right? He had
15 already done the autopsy at that point, right?

16 A The autopsy was completed, but I think there
17 was a bunch of tests still pending, that he couldn't
18 give me a lot of finalized results at that point
19 because I was asking questions that he told me he
20 would have to wait until the labs came back or until
21 other analysis were done.

22 Q When -- this is clear, though, when they came
23 in on the 25th and you handed them their
24 questionnaires, you took them to separate rooms and
25 gave them the questionnaire there and left them

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1 there to fill it out, is that correct?

2 A Correct.

3 Q And it's clear that you did not mirandize them
4 before you gave them those questionnaires, is that
5 right?

6 A No.

7 Q You did not.

8 Now, at some point in the afternoon, according
9 to your notes, I believe it was 12:40 -- let me ask
10 you this. Were you present when Investigator Jean
11 Sutton performed the polygraph interviews?

12 A I was monitoring them, but I was not in the
13 room.

14 Q You weren't there taking notes as well?

15 A I was taking notes and monitoring it, but I was
16 not present in the room.

17 Q So you were looking in through a window or
18 something?

19 A That's correct.

20 Q But you were experiencing it with your senses?

21 A I could see and could hear by audio monitoring.

22 Q Because I noticed that your notes carry through
23 during that interview, is that correct?

24 A Right.

25 Q And what -- at the beginning of your notes,

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1 what's the first time that you note on your notes to
2 yourself when you started taking notes?

3 A I think I -- are you talking about when I got
4 him out of the room where he had filled out the
5 questionnaire?

6 Q Right, the upper left hand.

7 A It's at 12:40 p.m..

8 Q So they had been there from what time in the
9 morning? What time did they arrive, do you recall,
10 to do the questionnaire?

11 A According to my notes, Derek Shane Carter was
12 given the questionnaire at 9:05 a.m.. He completed
13 it at 11:45 a.m.. And then the other defendant
14 times are irrelevant.

15 Q How long did you talk to him before you gave
16 him the questionnaire, before you made that note to
17 yourself at 9:05?

18 A Well, I think we asked them to be there at nine
19 o'clock, and they came and they were on time, or
20 whatever. And I carried him back to one room and
21 gave him the questionnaire by five after nine, and
22 he completed it at 11:45. Then after I gave him the
23 questionnaire and let him read over the instructions
24 to make sure he didn't have any questions, I went
25 back and got his wife and took her back at 9:15.

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1 Q All right. Let me ask you this. At 12:46
2 y'all executed a miranda waiver form, is that
3 correct?

4 A Uh-huh.

5 Q What information did you gain between 9:05 in
6 the morning and 12:46 p.m. that led you to believe
7 that they may be in custody at that point, that you
8 needed to mirandize them?

9 A That's not the way it happened. To help you
10 understand, the policy of our polygraph examiner,
11 Investigator Sutton, is any time she gives a
12 polygraph examination, she always reads them Miranda
13 before the test. That's her policy. I have no
14 control over that. He came in of his own free will.
15 We asked him to fill out the questionnaire. He did.
16 And then when I took him into her office and we sat
17 down waiting for her to get in there, you know, she
18 came in, we got out the Miranda form. That's her
19 policy, is part of her polygraph examination
20 procedure. Every polygraph she's ever done on any
21 case I have had, she's done that.

22 Q It's your testimony that he was not mirandized
23 because you thought it was necessary? You just did
24 it as a matter of protocol, that's just what you
25 did?

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1 A That's correct.

2 Q Did you ask any questions to Derek Carter to
3 establish his emotional well-being?

4 A At what point?

5 Q At any point that morning did you ask him how
6 he was feeling?

7 A Maybe small talk going back to the room where
8 he filled it out, like, you know, did you get enough
9 rest last night? Do you mind filling this out?

10 Q Did you ask him how much sleep he had the night
11 before, specifically?

12 A I don't think I asked that specifically. I
13 think that's one of the questions that Investigator
14 Sutton asks people before the polygraph.

15 MS. WHITE: Your Honor, it might expedite, I
16 have still got to put Detective Sutton up and she
17 will be answering those questions on the polygraph,
18 and review before and after the polygraph.

19 BY MR. TREACY:

20 Q At any point did you ask him how the funeral
21 went?

22 A I don't recall the question.

23 Q Do you know when the funeral was?

24 A I don't know off the top of my head. I think
25 during the interview when I talked to him, he

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1 mentioned that on Friday, when she asked him about
2 the money with the envelope in it, that they were
3 leaving the funeral, and that's I think how I knew
4 the funeral was on Friday.

5 Q That would have been the day before, or -- when
6 was the 25th? A Saturday? Does anybody know the
7 date?

8 A No, I feel certain that if we were all at the
9 office, it was on a weekday.

10 Q It was on a weekday?

11 A We -- as a matter of fact, I think when we
12 talked to him at the house on the 20th, we told him,
13 you know, we will let you get the funeral over and
14 everything. And then if you can, pick a good time
15 for when it's good for you to come in and fill out
16 these questionnaires so that we can maybe figure out
17 and have a better idea what happened.

18 Q So they picked the time completely in and of
19 themselves?

20 A I think we agreed on it. I looked at my
21 calendar what dates I had open so I would be there
22 to give them the questionnaires, and they agreed to
23 the time that it would be -- you know, that wouldn't
24 mess up their schedule. That's when they came in.
25 I didn't tell them when they had to come in.

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1 Q Did you actually debate different days, or did
2 you say the 25th is okay, and they said yes?

3 A I don't recall. I mean, we discussed it on the
4 20th at the house and set it up, but I don't recall
5 exactly how the conversation went.

6 Q Did you ask him if he had had any food to eat
7 that day?

8 A I don't remember. I don't think I asked him
9 that.

10 Q Did you eat lunch that day?

11 A I think I did. I don't recall, but I believe I
12 did.

13 Q What time would you have eaten lunch, or at
14 what stage of this process would you have eaten
15 lunch?

16 A If I remember correctly, someone brought
17 something to the office. And while I was monitoring
18 the interview with Investigator Sutton, I was behind
19 the monitoring glass and that's when -- I think
20 that's when I ate, because we were asking --
21 somebody went and got food for us, because we asked
22 Michelle if -- she finished the -- she finished her
23 questionnaire fifteen minutes before he did and we
24 told her she could go get something to eat. Asked
25 her if she wanted to get something for Derek. Do we

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1 need to ask Derek what he wanted, and she said she
2 wasn't hungry and didn't go get anything. But after
3 that someone -- I don't know one -- I think I
4 probably called them on the cell phone, or
5 something. One of the detectives brought something
6 up there for me.

7 Q And what time did he come back to you after
8 being with Jean Sutton?

9 A I began my interview with him separate or
10 outside the presence of Investigator Sutton at 6:07
11 p.m..

12 Q So at that point he had been at the sheriff's
13 department in your investigative wing from 9:05
14 until six o'clock p.m., is that correct?

15 A To my knowledge, yeah, he was there all day, as
16 far as I know.

17 Q Had you given him anything to eat?

18 A I didn't give him anything. I think we offered --
19 again, like I said, to have Michelle go get
20 something and --

21 Q Did you discuss that with Mr. Carter?
22 Obviously they are separated at this point. Did you
23 ever have a conversation with Mr. Carter about
24 whether he needed anything to eat?

25 A I don't recall if we between some of the

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1 interviews offered him to go or not. I know we
2 talked about it to Michelle, because she finished
3 first, but I don't know -- I don't remember.

4 Q Did you have a discussion with him about
5 whether or not he needed something to drink during
6 that period of time, nine a.m. until six p.m.?

7 A I don't recall.

8 Q Do you recall whether -- he was in the presence
9 of you or Investigator Sutton that entire period, is
10 that correct?

11 A No, there was times in which he was left alone
12 while we were going over the questionnaire, so we
13 could read his answers to know how to ask questions.

14 Q But he was left in the same room?

15 A He moved from where he did the questionnaire,
16 to Investigator Sutton's office, into the polygraph
17 room, and then back to the room where he was. I
18 don't remember whether I mentioned to him about
19 having the little machines downstairs or not.

20 Q Did he have any contact with Michelle during
21 that period of time, that you know of?

22 A I don't recall. I mean, because I wasn't with
23 one or the other of them all the time. Sometimes I
24 was in my office doing paperwork when she was
25 interviewing. I don't know whether they had any

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1 conversation or not.

2 Q Was it safe to say that probably part of your
3 design was to have -- not have contact with each
4 other during the interview? I mean, wouldn't that
5 be part of your protocol?

6 A Normally we would keep witnesses separated. I
7 would think that would be pretty safe to say.

8 Q Do you know if he had any contact with anyone
9 else, other than Michelle, other than the law
10 enforcement officers, during that period of time?

11 A I don't recall.

12 Q Was he allowed to use the phone, for example,
13 or anything like that?

14 A That morning I offered to him if he needed it,
15 that it was available. I told him where my office
16 was around the corner, but I don't remember him
17 asking to use it or anything.

18 Q You interviewed him again from 6:07 p.m. until --
19 now, your last notation on page seven of your notes
20 says 2100, the top left-hand corner. Is that when
21 you started that page?

22 A Yes.

23 Q So that interview ended sometime between 2100
24 hours and however long it took you to ask him about
25 all this stuff that's on that page, is that fair to

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1 say?

2 A I started at the top of page seven of the
3 interview notes at 2100 hours. Subsequent to
4 finishing that page is when we started the written
5 statement that he signed.

6 Q And again from six p.m. to -- 2100 is nine, is
7 that right?

8 A Uh-huh.

9 Q To nine p.m., Mr. Carter didn't have anything
10 to eat and didn't have anything to drink, is that
11 correct?

12 A No.

13 Q And was he allowed to go to the bathroom during
14 this day?

15 A If asked. I don't know -- I don't remember him
16 asking, but I don't recall.

17 Q And what time is the statement signed off on?

18 A 10:30 p.m..

19 Q So Mr. Carter was at the sheriff's department
20 in the investigative wing from 9:05 a.m. until ten --
21 what was it?

22 A 10:30 p.m. is when --

23 Q 10:30 p.m.?

24 A -- is when we -- well, we went downstairs and
25 had the deputy that was working the desk witness the

1 signature on the statement.

2 Q Mr. Carpenter, let me ask you this. At what
3 point during your interview with him did you advise
4 Mr. Carter that his wife, Michelle Carter, had
5 confessed to choking Minor Child to death?

6 A Ask that again.

7 Q At what point during this day of interviewing
8 did you advise Derek Carter that his wife, Michelle
9 Carter, had confessed -- who is separated from him,
10 had confessed to choking her to death?

11 A I don't remember telling him that.

12 Q It's your testimony that you never told him
13 that? You never explained to him --

14 A I told him that she was interviewed and
15 provided a statement, I think, if I remember
16 correctly. Let me see here.

17 Q Do you recall having a conversation with him
18 where you explained that the autopsy showed it was
19 hypoxia caused by smothering, and that Michelle had
20 confessed to choking her to death? You don't recall
21 making that statement?

22 A I remember telling him the cause of death and
23 explaining that I don't know how the oxygen didn't
24 get to her brain, because at that point we didn't
25 have the definitive results from the autopsy. But I

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1 remember telling him that she died because oxygen
2 didn't get to her brain. I said I don't know how
3 she did it, or whatever else, but that Michelle was
4 being interviewed. I don't remember telling him
5 that Michelle choked her to death. I don't believe
6 I said that.

7 Q You don't remember having any kind of
8 conversation with him explaining to him that she had
9 already confessed to it and that there was nothing --
10 essentially nothing else that he could do? It
11 wouldn't hurt you to go ahead and tell the truth,
12 something do that effect, that she had already
13 confessed to it?

14 A At that point I don't know if we had a
15 statement from her or not.

16 Q Well, at some point you did, is that fair to
17 say?

18 A No, I don't remember telling him that she
19 confessed to choking the child and that's why he
20 needed to talk to me.

21 I remember telling him the child died because
22 she didn't have oxygen getting to her brain and that
23 Michelle was in there writing out the questionnaire
24 on what happened. And then I told him that, you
25 know, whatever he knew, he needed to go ahead and

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1 tell me, because we wanted to get to the truth, but
2 I don't remember telling him that Michelle
3 confessed, because at that point I don't think that
4 we had a statement. We just had the questionnaire.

5 Q Well, in fact, Michelle never actually
6 confessed to strangling her to death, did she? She
7 confessed to -- just as you did with Derek Carter,
8 she in describing events, that at one point prior to
9 her going to the hospital, she had, in her words,
10 choked her, but she never actually said I choked her
11 to death that day?

12 A I have never seen a statement that said that
13 from Michelle.

14 Q You don't recall a clear point where he was led
15 to believe that his wife had said I essentially
16 killed her that day?

17 A I told him that she had written out on the
18 questionnaire what happened that day and that we
19 wanted to get to the truth. And if there is
20 anything he knew, he needed to tell us, but I don't
21 remember telling him that she wrote out a confession
22 or anything to that effect. What she wrote out that
23 day was the questionnaire similar to the one that he
24 filled out.

25 Q Well, when Derek Carter was describing the

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1 activity, such as restraining her in the harness,
2 popping her on the vagina with the belt, that type
3 activity, did he give you any kind of time frame
4 about when that activity happened?

5 A As the interview flowed, we started out when
6 they lived together on Scarboro Road. We then
7 transitioned to [REDACTED] All the events that
8 he described at [REDACTED] would have occurred
9 in a period after Halloween, up until October the
10 14th, when she was taken to the hospital. So they
11 were all within that one year period.

12 Q He never limited the activity, such as the
13 harness, as being specifically after her April 2000
14 head injury?

15 A I don't believe he specified a date when it
16 started.

17 Q He didn't explain to you that her -- their
18 ability to control her as a child dropped
19 significantly after that head injury? Did he ever
20 explain that to you?

21 A The only control problems they had was with her
22 potty training. And then he did tell me about
23 Michelle told him about the child running away, or
24 whatever, that the doctor said to get one of those
25 harnesses to not lose the child at the store or the

1 mall, but he didn't say when that happened.

2 Q Isn't your testimony when he described the bad
3 history with Anderson Area Medical Center, that he
4 didn't explain to you what he meant by that?

5 A He said that there was some of the medical
6 staff that said something to the effect of if you
7 keep coming in here with injuries like this,
8 somebody is -- we are going to have to call DSS, and
9 I don't know who the medical staff was. He said
10 that somebody said something to that effect, and
11 that they were not real happy about it and Michelle
12 got upset.

13 Q So he didn't explain to you that one of the
14 doctors there had almost -- in his view, almost
15 killed his wife when she was giving birth to their
16 baby by giving her codeine, when it was on her chart
17 not to have it? He didn't explain that to you?

18 A No. The only explanation with her bad history
19 of Anderson Area Medical Center was the -- that he
20 described to me was the medical staff threatening to
21 call DSS if they kept coming up with more injuries
22 that were suspicious.

23 Q When Mr. Carter signed the statement at 10:30,
24 was he visibly upset?

25 A He wasn't crying, or anything like that, but

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1 you could tell that it had been difficult to talk
2 about and that -- I mean, he was kind of like down,
3 but he was almost kind of relieved because he, you
4 know, had told what had happened. So, I mean, he
5 wasn't like crying or anything, but you could tell
6 that he was --

7 Q Was he heavy?

8 A -- heavy, but to a point of relieved almost.

9 Q Was he arrested right after that statement was
10 taken?

11 A Well, no, he was transported to the detention
12 center, until I could get a warrant, and then he was
13 arrested.

14 Q Was he given any food at the detention center?

15 A I did not transport him. I think I told him to
16 mention to the officers that if he wanted something,
17 that he had been up to the sheriff's office that
18 day, to ask them if they had something. Oftentimes
19 the detention center keeps the little bag lunches
20 for inmates that come in late, or whatever. So I
21 think I remember mentioning that to him. He hadn't
22 really made a request all day for anything to eat,
23 but I think I do remember mentioning that to him.

24 MR. TREACY: That's all I have, Your Honor.

25 THE COURT: Redirect?

1 MS. WHITE: No, sir.

2 THE COURT: Thank you, sir. You may step down.

3 MS. WHITE: Your Honor, I have one more witness
4 that will take about five minutes on the Jackson
5 v. Denno. I don't know if you want to do that now
6 or if you feel you have got a good enough idea of
7 what we are looking at here, to move onto the other.
8 I don't know how you want to handle that.

9 THE COURT: Let's move on with the other and
10 we'll revisit the Jackson v. Denno, to the extent
11 necessary.

12 MS. WHITE: Your Honor, as to the severance,
13 the State has charged homicide by child abuse and
14 child abuse felony.

15 Your Honor, I have Dr. Woodard, who was the
16 pathologist here. The State is going forward in
17 this. The abuse is admissible under Lyle for
18 intent, lack of accident, common scheme and plan,
19 but also that it's admissible as part of Battered
20 Child Syndrome.

21 The South Carolina Supreme Court has indicated
22 that Battered Child Syndrome is admissible. I have
23 those cases, Your Honor, here. The State is
24 prepared to show that Battered Child Syndrome,
25 Kemp's article in 1962, being the central article on

1 it, where he defines it as repeated injuries of a
2 nonaccidental means. And the State has Dr. Woodard
3 here, if you care to hear testimony on that. I
4 don't know if you do or not, but the point is this
5 is like a woman who is raped. I think it's the
6 State v. Smith, or the Hall case, where she's
7 attacked in the front of a pool house. She dragged
8 behind and she's raped at knife point and she's --
9 they could charge ABHAN, kidnapping and the CSC.
10 It's all part of one continuing incident.

11 This is Battered Child Syndrome and --

12 THE COURT: Are you searching for a case?

13 MS. WHITE: Yes, sir.

14 THE COURT: I'd like to see it.

15 MS. WHITE: It's sitting right in front of me.

16 I'm sorry, I was looking through there.

17 Your Honor, I have got the joinder cases
18 separate from that. And so it's not just going
19 under Lyle.

20 Your Honor, in Estelle v. McGuire, that's the
21 U.S. Supreme Court case where they talk about the
22 Battered Child Syndrome, the court held there that
23 the continuing injuries were admissible.

24 State v. Lopez, which is South Carolina Supreme
25 Court, where it says "we, therefore, conclude that

1 testimony regarding the Battered Child Syndrome and
2 the Shaken Baby Syndrome is admissible when given by
3 a properly qualified expert."

4 Dr. Woodard is a forensic pathologist. He is
5 prepared to define Battered Child Syndrome and to
6 say that this is a classic case of Battered Child
7 Syndrome.

8 Your Honor, one of the cases that the State --
9 or the defense, I believe, cited is State v. Pierce.
10 I'll hand that up as well. In this one there was a
11 prior injury on this child. It's nothing like the
12 case that we have now, but the State attempted to
13 get the prior injury in under Lyle.

14 In the footnote, the court talks about how it
15 was offered as to prove common scheme or plan, not
16 Battered Child Syndrome. And it says that "whether
17 the evidence would have been admissible to establish
18 Battered Child Syndrome is not before us." That was
19 a one-time prior injury. It didn't amount to
20 anything like what we have got now.

21 Finally, Your Honor, State v. White. This was
22 actually my case that went up on appeal. It's not a
23 child abuse case. This is a spouse abuse case. But
24 the court did allow several prior acts of violence
25 from the husband to the wife, and it held, in

1 particular, "such evidence was probative on the
2 issue of wife's intent to control and intimidate
3 Faye, who was the wife." I would hand those up at
4 this time.

5 Your Honor, I do have separate cases on the
6 joinder. But on the joinder issue, Your Honor --

7 THE COURT: Respond to Mr. Treacy's reliance on
8 State v. Smith.

9 MS. WHITE: Your Honor, State v. Smith is a
10 different child. That's a whole different child.
11 That's not Battered Child Syndrome at all. This is
12 a classic Battered Child Syndrome case.

13 Your Honor, if you look at the joinder issue,
14 here we have kind of two crimes that are occurring
15 simultaneously. We have got the fatal, which is
16 going to be repetitive head injury, starting with
17 the April head injury, and then repeated striking.
18 I have got neighbor's, another child in the house,
19 several others that talk about how the defendant and
20 his wife would punch her in the face. They would
21 smack her up side the head. They would do all of
22 this repeated head injury to her. And the April
23 injury, being the start of it, the defendant came
24 into the hospital and said the child fell off the
25 bunk bed, hit heads with this other child in the

1 house. The child is going to be testifying today
2 that never happened. He was told to tell the
3 doctors that, and he doesn't know how Minor Child got
4 that first injury, but that was the first of many
5 injuries that Dr. Woodard would talk about that
6 ended up in her death.

7 However, at the same time we have this other
8 evidence that is nonfatal evidence. We have
9 cigarette burns on her back. We have the ice with
10 the ice was tore off her skin on the front. We have
11 the injuries on each one of her toes. Some toenails
12 missing. All different ages. We have the swollen
13 ear, which was probably a blow to her head, or which
14 was, according to them. We have nose injuries. We
15 have other sores and bruises on her. And so these
16 injuries are occurring at the same time.

17 In the joinder cases, they talk about when it's
18 proper to sever or not.

19 One, do they arise out of a single chain of
20 circumstances. And I'll hand these cases up.

21 Two, are they proved by the same evidence.

22 Three, are they of the same general nature.

23 And four, no real right of the defendant has
24 been jeopardized.

25 Your Honor, I would hand up several cases on

1 that as well. That's a separate issue.

2 THE COURT: I have got those cases.

3 MS. WHITE: All right.

4 The other thing, Your Honor, the defense in
5 this case is, yes, the child was abused, but she
6 died a natural cause, such as lupus, or something
7 like that.

8 And so if the State goes forward on this case,
9 and the jury believes, yes, there is abuse, but
10 maybe not fatal, I'm really unable to tell the court --
11 I haven't dealt with this issue. I have done a lot
12 of child abuse cases, but this child abuse felony
13 offense is a new one. And to be honest with you, I
14 haven't had this one yet, because I think it was
15 just passed last year in May, and I'm not sure if
16 felony child abuse is a lesser included of homicide
17 by child abuse. But if you want to hear my view on
18 that, because I think that is important, the reason
19 why I think it might not be is homicide by child
20 abuse is causing the death of a child under the age
21 of eleven while committing child abuse or neglect.
22 And then you go to the child abuse felony, Easler
23 and the other cases on double jeopardy, of course,
24 now hold that we are under that new test, Easler,
25 where if there is one element that's different --

1 would you care for me to hand that case up, Your
2 Honor?

3 THE COURT: I'm familiar with that.

4 MS. WHITE: I know I'm kind of jumping around
5 with different things.

6 THE COURT: I'm familiar with that.

7 MS. WHITE: Do you need it, or not?

8 THE COURT: I don't need it.

9 MS. WHITE: Okay. If there is one element
10 that's different in the crime, then that would not
11 be a lesser included offense. It would be a
12 separate offense.

13 And Easler, as you know, they charged ABHAN and
14 felony DUI death. Felony DUI -- bodily injury,
15 felony DUI death and some others. So they were
16 saying, no, the elements are different for the same
17 act, you can charge these.

18 Well, in homicide by child abuse, it says that
19 the child must be under the age of eleven.

20 In the child abuse felony, it just says a
21 child, which, of course, in all of our Section 20
22 Code, and so forth, the child is seventeen and
23 below. And so that would be a different element.

24 Also you have got the extreme indifference to
25 human life in a homicide by child abuse.

1 So to boil it down, the State is asking that we
2 be able to bring both of these indictments, number
3 one, because they are different crimes occurring
4 during the same crime period, just like a CSC,
5 kidnapping, ABHAN would be.

6 And number two, under their theory, they may or
7 may not find the death. And if not, we would need
8 the jury to pick between which one, if this is not a
9 lesser included offense. And I don't know if it's a
10 lesser included offense. Actually I called down to
11 Columbia. I talked to the people who drafted the
12 laws. I have talked to -- because, again, I have
13 not dealt with this. And to be honest with you,
14 nobody seemed to have a definitive answer, so I
15 don't know, but that wouldn't be an issue if it's
16 for different conduct during the same time.

17 THE COURT: Remove from the analysis the issue
18 of the child to just say between one individual and
19 another, there is a crime of violence - ABHAN,
20 ABWIK, whatever it may be - and there is a pattern
21 or course. Eventually the victim dies. Are you
22 suggesting that each individual act is a separate
23 and independent offense?

24 MR. TREACY: No, sir, I'm not, but there are
25 certain courses that are nonfatal and there are

1 certain courses that are not. That's what I'm
2 suggesting. In other words, with the kidnapping,
3 CSC and ABHAN, during a course of events, several
4 different crimes can occur during that course. And
5 that's our view on that.

6 THE COURT: Under that approach, an act which
7 caused injury that is causally related to the death,
8 would those events, those cumulative effect of those
9 that give rise to the cause of death, would those
10 constitute a separate offense? And I may not be
11 articulating the question, but say, for example, you
12 do have evidence of ice on the skin, or the
13 cigarette burns, things of that nature. If true,
14 bad acts give rise to criminal conduct, but are not
15 associated, not the nexus which gives rise to the
16 cause of death.

17 MS. WHITE: Yes, sir.

18 THE COURT: Those which give rise to the cause
19 of death, do those support a separate and
20 independent basis for a conviction?

21 MS. WHITE: For homicide by child abuse.
22 That's the basis for the homicide by child abuse.
23 The other is the basis for the felony child abuse.

24 THE COURT: All right. I may come back and
25 have more questions. I want to hear Mr. Treacy's

1 take on this.

2 MR. TREACY: Your Honor, I apologize. Now we
3 have the Lyle issue jumped in and I was trying to
4 keep it separate, but it is relevant.

5 The problem that you picked up on with that you
6 said where you have an ABHAN, CSC and kidnapping, is
7 those are three totally separate charges. You can't
8 charge somebody in a stabbing that ends up -- the
9 person ends up dying. Where the stabbing act is the
10 cause of death, you can't charge them and try them
11 for ABWIK and murder.

12 THE COURT: I understand.

13 MR. TREACY: And that is which -- she's jumped
14 around it, but she can't tell you that that's not
15 what she's doing. If she's arguing that the serious
16 bodily injury, which is the basis of the felony
17 child abuse, is the head injuries, because that's
18 the only thing I have heard arguably that would
19 constitute serious bodily injury. The other stuff
20 is horrible, but in my opinion it clearly this
21 statute says more specifically.

22 THE COURT: Now, tell me which section that you
23 are reading from so I can follow you.

24 MR. TREACY: Okay. I'm reading from 16-3-95.

25 THE COURT: I'm with you. Go ahead.

1 MR. TREACY: Subsection C.

2 "For the purposes of this section, great bodily
3 injury means bodily injury which creates a
4 substantial risk of death, or which causes serious
5 or permanent disfigurement, or protracted loss, or
6 impairment of the function of any bodily member or
7 organ."

8 While the things that have been described are
9 awful or horrible, they don't rise to that. There
10 were no broken bones. There are no serious
11 permanent disfigurement. No loss of impairment to
12 an organ. So what you have is child abuse. And you
13 have a death that's being explained as caused by
14 acts which led -- of blows to the head that caused
15 death.

16 I think you can try him for child abuse and
17 homicide by child abuse, saying the child abuse is
18 the cigarette burns, the slapping of the vagina,
19 pouring alcohol, all that horrible stuff, but the
20 only thing that's -- where there is a nexus between
21 the homicide and the abuse is going to be the blows
22 to the head.

23 THE COURT: You said they could try both. You
24 said and. Do you mean or? A few moments ago you
25 said the State could try the homicide.

1 MR. TREACY: I mean misdemeanor. I mean the
2 regular child abuse statute. I don't mean felony
3 child abuse.

4 THE COURT: All right.

5 MR. TREACY: I mean the child abuse neglect
6 statute that carries ten years. It's like ABHAN.

7 And with regards to the prior bad acts, Your
8 Honor, in my memorandum, Pierce is directly on point
9 and we are talking about -- and Smith is directly on
10 point. She said Smith -- she tried to say it
11 doesn't apply here because it's another child, but
12 they directly address the issue of this kind.
13 Smith, Pierce and -- Smith and Pierce are both --
14 unlike the other Lyle cases that she handed up are
15 cases about child abuse and whether priors acts of
16 child abuse are admissible in a homicide by child
17 abuse case. So they are -- to me they are the
18 squarest look at this issue by the Supreme Court
19 that you have got.

20 THE COURT: Point to Smith. I have a copy you
21 have provided, and I appreciate it.

22 MR. TREACY: Yes, sir.

23 THE COURT: Show me in Smith the language that
24 you would draw my attention to that you believe
25 supports your position for severance.

1 MR. TREACY: Well -- okay. Just like the
2 solicitor has argued to you that -- with Lyle -- or
3 Lyle analysis, that these statements of prior bad
4 acts would allow, if we separated these trials,
5 charges for separate trials, would allow -- if she
6 convicted him of felony child abuse, would allow
7 them to come in in a later homicide by child abuse
8 case. This case says no.

9 THE COURT: Let me jump ahead. Under your
10 view, if the court accepts your argument and
11 requires severance, then assume hypothetically the
12 State elects to go on the homicide --

13 MR. TREACY: Yes, sir.

14 THE COURT: -- by child abuse.

15 MR. TREACY: Yes, sir.

16 THE COURT: Would you then object to the
17 evidence of chain, the harness?

18 MR. TREACY: Yes.

19 THE COURT: Cigarette burns, the ice?

20 MS. WHITE: Yes.

21 THE COURT: The belt, hosing down?

22 MR. TREACY: Yes, sir.

23 THE COURT: Etcetera?

24 MR. TREACY: Yes, sir.

25 THE COURT: Because you believe it would be

1 improper for the evidence. It would be inadmissible
2 under Lyle?

3 MR. TREACY: Yes, sir, because that evidence
4 clearly isn't related to the homicide. I think they
5 could talk about the prior statements that may,
6 according to the pathologist, have something to do,
7 with like such as choking or the hitting to the
8 head. The prior statements about that would have to
9 be allowed in.

10 THE COURT: How would you -- and I'm just
11 thinking out loud with both of you. I'm trying to
12 get up to speed with counsel.

13 How do you reconcile your approach with the
14 Battered Child Syndrome that specifically recognizes
15 the admissibility of such evidence when there is
16 repeated pattern course of conduct resulting in harm
17 through means other than accident?

18 MR. TREACY: Because, Your Honor, the Battered
19 Child Syndrome doesn't get you around having to do
20 the Lyle analysis. It is recognized, but you have
21 to do the Lyle analysis. And what the court said in
22 Pierce is their pathologist refer to this prior
23 whipping with the belt and all that stuff as
24 Battered Child Syndrome. The majority in that
25 opinion said "while he may have testified and called

1 it Battered Child Syndrome, we're performing a Lyle
2 analysis and saying no, legally that is not Battered
3 Child Syndrome."

4 THE COURT: Let's look at Pierce.

5 MR. TREACY: Yes, sir.

6 MS. WHITE: I want to be specific here.

7 MR. TREACY: Yes, sir.

8 THE COURT: I have Pierce in front of me, a
9 copy I think you furnished, and I appreciate. I
10 would like for you to draw my attention to the
11 particular page and language that supports your
12 argument, sir.

13 MR. TREACY: I apologize for taking the time.

14 THE COURT: No, take your time. Make sure that
15 we are thorough.

16 MR. TREACY: Your Honor, in the footnote -- the
17 majority made it's analysis. And in response to the
18 dissent, which is rather lengthy, and refers to the
19 pathologist's testimony as being Battered Child
20 Syndrome, in footnote two, on page 179 of the
21 opinion, the court says "contrary to the dissent --

22 THE COURT: Are you in the dissent or are you
23 in the majority?

24 MR. TREACY: I'm in the majority. I apologize.
25 It's page two of eight on the computer prinout.

1 THE COURT: I'm with you. Thank you, sir.

2 MR. TREACY: "Contrary to the dissent's
3 assertion, the testimony of the Access person," the
4 hospital personnel, "regarding the prior lip and eye
5 injuries was not offered to prove Battered Child
6 Syndrome. It was offered to prove a common scheme
7 or plan under Lyle, and the trial court admitted the
8 testimony because it tended to establish a pattern
9 of child abuse. Whether this evidence would have
10 been admissible to establish the Battered Child
11 Syndrome is not before us."

12 So they're not overruling the Battered Child
13 Syndrome as a recognized legal entity, for lack of a
14 better word. What they did is they rejected
15 allowing, because you call it Battered Child
16 Syndrome, to get past the Lyle analysis. You still
17 have to say is there enough similarity between this
18 child abuse with the child abuse that's causally
19 related to the death. And there is not -- there is
20 not enough -- there is not a nexus between slapping
21 her or beating her on the toes, pouring -- as
22 horrible as all of that stuff is, there is no nexus
23 between them. It's just like whipping. In Pierce,
24 the torso was bruised -- they beat the poor child
25 with a belt, but it had nothing to do with whether

1 it eventually caused the child's death.

2 MS. WHITE: That was a different child.

3 THE COURT: I'm just trying to apply a little
4 gentle logical pressure to your argument.

5 MR. TREACY: Yes, sir, I appreciate the
6 pressure.

7 THE COURT: To see if it withstands scrutiny.

8 MR. TREACY: Yes, sir.

9 THE COURT: The truth will withstand scrutiny.

10 MR. TREACY: Yes, Your Honor.

11 THE COURT: If I accept your premise and if
12 that's the law, then take any case involving child
13 abuse and a pattern of abuse over a period of time
14 and there would be a myriad of different injuries.
15 They don't have to mirror what is allegedly
16 presented here, but they could be a host of variety
17 of injuries. There could be broken bones or there
18 could be cigarette burns. There could be excessive
19 physical beatings. A whole host of things. And
20 then in the end, let's assume that the child is shot
21 with a gun and killed. Under your argument, all of
22 the other injuries were really not life threatening.
23 They were bad, shouldn't have been done, but they
24 are not life threatening. They are not causally
25 related to the death; i.e., firing of the weapon.

1 Therefore, all of the other evidence is
2 inadmissible.

3 MR. TREACY: Yes, sir.

4 THE COURT: That just strikes me as --

5 MR. TREACY: Yes, sir. You just presented
6 Justice Burnett's dissent. That's exactly what he
7 said in his dissent. And the analysis has to be are
8 the prior bad acts similar, connected enough with
9 what's being alleged to have caused the death, that
10 it overrides the prejudice to the defendant. And in
11 Pierce they said that that type of abuse, because
12 it's not similar enough -- I mean, there is -- there
13 is a huge gap between restraining your child in a
14 harness and beating it -- beating your child in the
15 head causing its death.

16 MS. WHITE: Your Honor, may I please be heard?

17 THE COURT: I will. One of the things that I
18 want you to do, and you can tell me whatever you
19 want to tell me to your heart's content to respond,
20 but I want you to address his argument --

21 MS. WHITE: Yes, sir.

22 THE COURT: -- that this doesn't even
23 constitute a violation of Section 16-3-95,
24 Subsection C, because none of the injuries fall
25 within Subsection C. That's what I'm curious about.

1 MS. WHITE: Yes, sir.

2 Your Honor, if you look at that, it says the
3 definition of great bodily injury means bodily
4 injury which creates a substantial risk of. Not
5 that it did, but a substantial risk of. When you
6 take a belt and you whip a four year old child on
7 the vaginal area, is that a substantial risk? Dr.
8 Woodard is prepared to testify that yes, it does
9 meet this definition.

10 So, the question is is it a substantial risk.
11 When you tie a child into a bathroom and have them
12 sleep in there, is that a substantial risk? Of
13 course, it's not a substantial risk. What if a fire
14 broke out or something. And it says which causes
15 substantial risk of death, or serious, or permanent
16 disfigurement. In fact, there was scarring all
17 along the back of this child's back from the
18 cigarette. Or protracted loss, or impairment of a
19 function of a bodily member or organ, where skin is
20 a bodily organ. The largest one, as a matter of
21 fact. So first I would like to address that.

22 Second of all, the cases that the defendant is
23 citing were all cited 3-2. Justice Finney in the
24 majority, he's now no longer in the majority. In
25 fact, Chief Justice Toal is in the majority. She

1 was one of the dissenters, but if you look at those
2 cases, Your Honor, most of them are on a different
3 child. On one you have got prior injury on the same
4 child that was -- I don't remember what the time
5 before was, but this child was killed by head
6 injury, and you had in the doctor's office the
7 mother yanked the child up by the arm and sat the
8 child on the stroller. That is a far cry from what
9 we have got here.

10 And I want to also emphasize. In the Pierce
11 case, they tried to get that in only under common
12 scheme or plan and Lyle. And the court says we do
13 not address whether or not it comes in under
14 Battered Child Syndrome. Already the court has said
15 Battered Child Syndrome is admissible. Battered
16 Child Syndrome does not say they have to all be the
17 same. In fact, Dr. Woodard would be testifying to
18 that if a child is malnourished. Here the child was
19 almost starved to death. If the child has not an
20 accidental -- repeated nonaccidental injury, this is
21 a classic battered child case.

22 So, first of all, we are not just saying it
23 comes in under Lyle common scheme. It's Lyle common
24 scheme. It's Lyle intent. It's Lyle lack of
25 accident. You have the same victim.

1 But second of all, it comes in under the
2 Battered Child Syndrome. And I do not understand at
3 all where we are you do a Lyle analysis on battered
4 child. In fact, the footnote shows you do not do
5 that, because they say it doesn't come in under
6 common scheme. Actually the prosecutor in that case
7 limited himself or herself by doing -- just trying
8 to get it in under one. And, again, you had one act
9 that was way before that had nothing to do with the
10 rest. Here we have a repeated. In fact, the
11 testimony will be that the defendant said that there
12 were a few days in the last year of the child's life
13 that she was not punished. We will have neighbors
14 testifying that this was an ongoing daily thing.

15 MR. TREACY: Your Honor, if I could please
16 respond?

17 THE COURT: Yes, sir, go right ahead.

18 MR. TREACY: First of all, I think it's
19 interesting to point out the solicitor now is
20 worried that what the future Supreme Court might
21 say. I think the law as it stands right now is
22 obviously what you have got to follow. If they want
23 to appeal it, that's fine, but Pierce and Smith are
24 the law right now, and whether one of the affirming
25 justices is no longer on the court, I think is

1 irrelevant. But I take -- I really disagree with
2 the solicitor and I would ask Your Honor to draw
3 your attention to again this Subsection C of the
4 felony child abuse statute. She is construing this,
5 I believe, incorrectly. She's reading that it
6 creates a substantial risk of death. And she is
7 also applying substantial risk to the remainder of
8 that sentence. And I ask you if Your Honor applies
9 normal rules of construction, that is not how that
10 is worded.

11 And I would submit, Your Honor, if the
12 legislature intended substantial risk to apply to
13 the rest of the sentence, then every instance of
14 child abuse would be felony child abuse, because any
15 time that you assault a part of a body, there is a
16 substantial risk that you might cause permanent
17 disfigurement or impairment. Substantial risk of
18 death is the language, or which causes serious or
19 permanent disfigurement, or protracted loss or
20 impairment of the function of any vital limb or
21 organ. That's the way it's to be read. And in that --
22 if you read it that way, none of these other
23 activities, as horrible as they are, meet that
24 standard.

25 THE COURT: If I believe that Section 16-3-95

1 on the infliction of great bodily injury is a lesser
2 included offense upon the side by child abuse, would
3 you still proceed with 16-3-95 on the unrelated?

4 MS. WHITE: I do think there are two legs, and
5 that is one, and I would have to discuss that. I
6 mean, I would have to discuss that, but I feel I
7 need it in case it's not a lesser included anyway,
8 because if their defense is it's not -- if they are
9 going to say it's not a lesser included, but our
10 defense is it might have been serious bodily injury,
11 not death, then I'm out if we get to the jury. So,
12 you know, I would need both of them. So I think
13 that's sort of the number one question, is it a
14 lesser included.

15 THE COURT: What's your view?

16 MR. TREACY: Whether felony child abuse is a
17 lesser included offense of homicide by child abuse?

18 THE COURT: What's your answer?

19 MR. TREACY: Well, Your Honor, my only thought
20 is that the statute for felony child abuse contains
21 specific language that is not in the regular
22 definition of child abuse, which I would assume is
23 the lesser included -- is also a lesser included of
24 homicide by child abuse. The language in Subsection
25 C is not in there.

1 THE COURT: What's your answer?

2 MR. TREACY: No.

3 MS. WHITE: Then, Your Honor, in that case we
4 would have to charge both. And if nothing else,
5 give the jury the option. Then all this debate has
6 been for nothing. It's like the Easler case, the
7 ABHAN and the felony DUI and seriously bodily
8 injury, if they are conceding that there are
9 different elements, then --

10 THE COURT: You see, that's a matter of subject
11 matter jurisdiction..

12 MR. TREACY: I don't follow that last one that
13 you said.

14 THE COURT: That's not something that can be
15 waived or consented to.

16 MS. WHITE: I agree they can't waive or
17 consent, but if that's the argument that it's not a
18 lesser included, then it would be like the CSC,
19 kidnapping and the ABHAN that we have talked about.
20 There are different crimes.

21 MR. TREACY: The lesser included analysis is
22 different from the analysis though.

23 THE COURT: There are a host of issues.

24 Number one is the motion of severance. Issue
25 of admissibility is a different issue.

1 Based on what's been presented, the motion to
2 sever is denied. The law is clear that separate
3 offenses may be joined if they arise out of a single
4 chain of circumstances. Here it's the pattern of
5 care given to this child over a period of
6 approximately five months. The evidence is also
7 proved by the same general evidence of the same
8 general nature, and I can discern no legal right of
9 the defendant that would be prejudiced by the
10 joinder. And, therefore, I deny the motion for
11 severance.

12 The issue of admissibility, particularly under
13 the Battered Child Syndrome and/or 404(b) is not
14 before me at this moment and would require
15 additional thought and we will address before we
16 actually begin the trial.

17 Having denied the motion for severance, that
18 does not mean that we may revisit the issue in a
19 different context during the course of the trial.
20 For example, at the directed verdict stage, there
21 may be, based on the evidence that is presented, a
22 lack of evidence as to the definition of great
23 bodily injury as included in the Code of Laws of
24 South Carolina. I'm simply saying on the front end,
25 based on what's been presented, that it would be

1 appropriate to try these offenses together.

2 And consistent with my questioning, if the case
3 develops in a manner consistent with the State's
4 theory, the jury would have to be carefully
5 instructed that the cause of death and injuries that
6 directly related to the cause of death are limited
7 to the homicide by child abuse. The other variety
8 of behavior that occurred, for example, but not by
9 way of limitation, cigarette burns, ice, belt,
10 harness, etcetera, those may support a charge under
11 16-3-95. But the offense giving rise to great
12 bodily injury, in my judgment, must be segregated
13 from the homicide charge itself, because I find that
14 if an act which gives rise to great bodily injury is
15 a proximate cause of the resulting death, then it
16 would be a lesser included offense.

17 I have not addressed the issue of
18 admissibility. I have not addressed Jackson
19 v. Denno issues. I would like to reserve that for
20 further discussion and perhaps testimony, once the
21 jury is selected.

22 The record will reflect the defendant's
23 exception to my ruling on the motion for severance.

24 Anything further at this time, from the State?

25 MS. WHITE: Your Honor, so for planning

1 purposes for my witnesses, can I basically tell them
2 we are doing motions today and we will start the
3 testimony tomorrow morning? Is that pretty safe to
4 assume?

5 THE COURT: I hope we are in a position to
6 start tomorrow morning. We may be doing motions
7 tomorrow morning. It really depends on the voir
8 dire of the jury, how extensive that becomes, based
9 on their responses.

10 MS. WHITE: But it definitely won't be today?

11 THE COURT: There will be no substantive
12 evidence today, that's correct.

13 MS. WHITE: Your Honor, the only other thing.
14 I sent up my proposed voir dire, and I believe that
15 the defense has given me his. I do have a couple of
16 objections to his, and I would like to add some
17 things to his, if, in fact, the judge so chooses to
18 instruct the jury on those -- or ask the jury about
19 them.

20 THE COURT: What are your objections?

21 MS. WHITE: Your Honor, I would object to
22 number two. I just think any time that you ask them
23 about a homicide case would you rather be somewhere
24 else, because it's hard to deal with, and they will
25 say yes. I believe we have other questions that

1 adequately cover that.

2 On number three, I have no objection to that,
3 as long as we also ask if those people have been
4 accused of. In other words, we get the flip side
5 that been a victim of or been accused of.

6 Number four, I would object to that, has ever
7 any jury panel member been wrongfully accused of a
8 crime. I don't think that's appropriate. You have
9 already instructed them as to the burden on the
10 State and the presumption of innocence. I think
11 that's covered.

12 Number five, I would ask -- they are asking if
13 any juror is a member of an organization for law
14 enforcement or that supports criminal defense. I
15 just ask that flip side.

16 Number six, they are asking if anybody is
17 related to law enforcement. I would ask that we
18 also ask or that works in a criminal defense law
19 firm.

20 Number eight, I would object. If you go to the
21 top of the next page, which is page three, I would
22 object to the top two lines. Understanding that
23 news accounts are often inaccurate, do not take into
24 account all circumstances and facts, I would ask
25 that instead it read if so, can you put aside

1 everything that you have heard, can you put aside
2 any opinions or views that you have formed, and not
3 make that side comment.

4 Number nine, I would object. I think that's
5 covered already by your preliminary instructions and
6 by the instructions that the jury would get later.

7 MR. TREACY: Your Honor, I think I can probably
8 help you make some of these decisions.

9 MR. TREACY: I'll withdraw number nine.
10 I'll withdraw number eight, based on your
11 current instructions to the jury already.

12 MS. WHITE: Now, number eight is just
13 withdrawing those two sentences, or the whole thing?

14 THE COURT: I'm going to ask a question
15 consistent with what I told the jury I would ask
16 them.

17 MR. TREACY: I'll withdraw number four, but I
18 respectfully request the other two given.

19 THE COURT: You are withdrawing number four?

20 MR. TREACY: Number four, yes, sir.

21 I respectfully ask for one, two, three, five
22 six, seven, with the changes that the solicitor
23 suggested.

24 Your Honor, I just would ask you to consider
25 the serious nature of these charges when you are

1 considering one, two and three.

2 THE COURT: One, two, three. What other ones
3 do you want?

4 MR. TREACY: One, two, three, five, six, seven.

5 THE COURT: And I'll certainly give an
6 opportunity for counsel at the end of the voir dire
7 to put whatever objection they want on the record.
8 We will be meeting at the court reporter station a
9 good bit. I'm sure there will be many jurors we
10 have to voir dire individually up front at the court
11 reporter station.

12 MS. WHITE: And, Your Honor, you have got my
13 questions as well? As I want to make sure.

14 MR. TREACY: I don't have any objection to
15 those.

16 MS. WHITE: I'll hand up another copy of those.

17 THE COURT: I have got it.

18 Y'all be back in fifteen minutes, please.

19 * * * * *

20 (Whereupon, the jury was voir dired by the
21 court)

22 (Whereupon, the jury panel was seated)

23 * * * * *

24 (Whereupon, Proceedings were adjourned until
25 June 12, 2001, at 9:00 a.m.)

STATE OF SOUTH CAROLINA))
COUNTY OF ANDERSON) IN THE COURT OF GENERAL SESSIONS

THE STATE)
-vs-) TRANSCRIPT OF RECORD
DEREK SHANE CARTER,) 2001-GS-04-1204
Defendant.) 2001-GS-04-763
JUNE 12, 2001
ANDERSON, SOUTH CAROLINA

B E F O R E:

HONORABLE JOHN W. KITTREDGE, JUDGE; and a jury.

A P P E A R A N C E S:

DRUANNE D. WHITE, SOLICITOR
Attorney for the State.

ROBERT E. TREACY, JR., ESQUIRE
Attorney for the Defendant.

Michael R. Watts
Circuit Court Reporter

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1 (Proceedings, June 12, 2001)

2 THE COURT: Do we have some additional matters
3 in the Jackson v. Denno? I believe there is an
4 additional witness. And I know there are some other
5 motions as well, and counsel may have some
6 predetermined plan as a way to approach those
7 motions. I don't, so if counsel has any preference,
8 I'll certainly be open to that.

9 MS. WHITE: I was just going to ask if we could
10 finish the Jackson v. Denno. I have the pathologist
11 coming at 9:30 on the other matter, and I figured we
12 could finish up the Jackson v. Denno and then go
13 into the other.

14 THE COURT: Does that suit you?

15 MR. TREACY: Yes, sir, that's fine, Your Honor.

16 I think it might be appropriate to put formally
17 on the record to go ahead and address the motion for
18 change of venue, that you deny that motion. And I
19 would have to concede to you that you went above and
20 beyond the call of duty in your voir dire with the
21 jury. I think you handled that appropriately. And,
22 in fact, I will withdraw my motion.

23 THE COURT: Okay. But I will tell you this,
24 and certainly I understand your motion, and because
25 of what counsel informed me about the nature of the

1 pretrial publicity, I tried to be extra diligent in
2 asking questions several different ways and doing my
3 best to prompt any recollection of the case and a
4 response from each juror. And what I would do
5 during various parts of the trial is to ask the jury
6 again, knowing that they have already responded or
7 not responded, but there is additional publicity
8 during the progress of the trial, and I will ask the
9 jury occasionally during the trial if they have been
10 exposed, even inadvertently, and that happens from
11 time to time. Someone will hear the initial part of
12 a radio broadcast or sees a caption in a newspaper
13 articles but doesn't read further. And oftentimes
14 it's innocuous and nothing of substance is read, and
15 there is no opinion that has been formed, but
16 sometimes jurors will bring that to my attention,
17 and I will try to do that throughout the trial.

18 You may proceed, ma'am.

19 MS. WHITE: The State calls Jean Sutton.

20 OFFICER JEAN SUTTON, having been first duly
21 sworn, testified as follows:

22 THE CLERK: Please state your full name and
23 spell your last name for the record.

24 THE WITNESS: Jean M. Sutton, S-u-t-t-o-n.
25

INVESTIGATOR JEAN SUTTON - DIRECT BY MS. WHITE

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1 DIRECT EXAMINATION BY MS. WHITE:

2 Q What's your occupation?

3 A I'm an investigator with the Anderson County
4 Sheriff's Office.

5 Q While we are outside the presence of the jury,
6 not in the presence of the jury, what are your
7 duties?

8 A I am a licensed polygraph examiner.

9 Q I'm handing you State's Exhibit 2 for
10 identification. Do you recognize that?

11 A Yes, I do.

12 Q What is that?

13 A This is a Miranda advise of rights form.

14 Q And I believe that you were here yesterday when
15 Detective Carpenter testified, is that correct?

16 A That's correct.

17 Q And was the defendant in your -- how many years
18 have you been in law enforcement?

19 A Twelve years.

20 Q And you have been in the detective division
21 just about the whole time, is that right?

22 A The entire time.

23 Q In your opinion, was the defendant properly
24 mirandized?

25 A Yes, he was.

INVESTIGATOR JEAN SUTTON - DIRECT BY MS. WHITE

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1 Q And did he at any time ask for an attorney?
2 Was he at any time threatened, coerced, or promised
3 anything?

4 A No, ma'am.

5 Q Did he ever ask for an attorney or ask to
6 remain silent?

7 A No, he did not.

8 Q Now, after the defendant waived his Miranda
9 Rights, did you begin talking to him?

10 A Yes, I did.

11 Q And when you began talking to him, at any time
12 while you were with him, did you offer him food,
13 drink, bathroom privileges? Was any of that
14 withheld at all while he was at the sheriff's
15 department?

16 A It was not withheld. As a matter of fact, I
17 specifically asked the defendant if he wanted
18 anything to eat or anything to drink.

19 Q And his response was?

20 A He did not.

21 Q So at any time was he refused anything?

22 A No, he was not.

23 Q How about bathroom privileges?

24 A No, he was not.

25 Q What is your habit, as a matter of fact, before

INVESTIGATOR JEAN SUTTON - DIRECT BY MS. WHITE

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1 you give a polygraph, since it takes awhile?

2 A After the pretest interview, before the
3 instrumentation portion, I always ask the individual
4 if they need to use the bathroom, get a drink of
5 water.

6 Q Now, did you prepare a polygraph report of what
7 the defendant told you?

8 A Yes, I did.

9 MS. WHITE: Your Honor, this has been provided
10 to the defense, and I don't know if you want her to
11 go through it. It's several pages, or we can just
12 hand it up.

13 BY MS. WHITE:

14 Q You prepared the polygraph report and that's
15 what he told you, is that correct?

16 A That's correct.

17 MR. TREACY: I would like to proceed.

18 MS. WHITE: Proceed with her testifying?

19 MR. TREACY: For the judge to read it.

20 MS. WHITE: If that's all right, we will just
21 hand it up. It's got everything that he said on it.

22 THE COURT: And this deals with just the basic
23 interview or with a polygraph examination?

24 MS. WHITE: This is all the notes from the
25 interview. And then after the polygraph, of that

INVESTIGATOR JEAN SUTTON - DIRECT BY MS. WHITE

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1 too. Obviously I won't be asking her anything about
2 the polygraph in front of the jury. I'm just going
3 to ask what he told her during the interview.

4 THE COURT: Okay.

5 MS. WHITE: But this has all the notes.

6 THE COURT: This is something Mr. Treacy has?

7 MS. WHITE: Yes, sir, I have provided
8 everything. All of my --

9 THE COURT: So I'm the only one that hadn't
10 read it?

11 MS. WHITE: Yes, sir.

12 THE COURT: Okay. I'll follow Mr. Treacy's
13 lead. Give me just a moment to review it, please,
14 ma'am.

15 (off the record)

16 (back on the record)

17 BY MS. WHITE:

18 Q Detective Sutton, the judge has read the
19 report, but for the record, since that won't be
20 introduced, did you ask the defendant before you
21 began speaking with him what his educational
22 background was?

23 THE COURT: You can mark that as a Court's
24 Exhibit, if you want to. It would be just part of
25 the appellate record.

INVESTIGATOR JEAN SUTTON - DIRECT BY MS. WHITE

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1 MS. WHITE: Your Honor, that's fine. I would
2 ask that we mark it as a Court's Exhibit.

3 (Polygraph Report marked as Court's Exhibit No.
4 1 for identification)

5 BY MS. WHITE:

6 Q Detective Sutton, I believe you did ask him and
7 he said he did graduate from high school, he could
8 read and write. When I say he, I'm talking about
9 the defendant, is that correct?

10 A That's correct.

11 Q And he stated that he had no health problems,
12 was not under a physician's care when you talked to
13 him?

14 A That's correct.

15 Q In your opinion did he freely and voluntarily
16 agree to talk to you all without counsel?

17 A Yes, he did.

18 Q And after you finished talking to him, if we
19 can kind of get the chronology, I believe yesterday
20 we heard John Carpenter went to the defendant's
21 house on 10-20. The defendant came in and completed
22 the questionnaire on 10-25. Then y'all got him and
23 mirandized him. Then you talked to him, and then
24 John took the written statement. Is that sort of
25 the chronology of what happened?

INVESTIGATOR JEAN SUTTON - CROSS BY MR. TREACY

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1 A That's correct.

2 MS. WHITE: No further questions, Your Honor.

3 CROSS EXAMINATION BY MR. TREACY:

4 Q Investigator Sutton, how many Jackson v. Denno
5 hearings have you participated in in your career?

6 A I would probably estimate twenty-five.

7 Q And in the course of preparing your notes in an
8 investigation, are you mindful of how things you do
9 are going to affect the case later on if it goes to
10 trial?

11 A I simply take notes and then transcribe my
12 notes. I'm not sure I understand.

13 Q Are you mindful of that in your everyday duties
14 that what you do can affect --

15 A Certainly.

16 Q And when you take your notes, is it fair to say
17 that you are very conscientious and thorough in your
18 notes?

19 A Yes, I am. When I take my notes, it's a type
20 of shorthand that I use, and then I prepare my
21 written reports within twenty-four hours of the
22 interview.

23 Q Do you tape record --

24 A No, I do not.

25 Q -- the interview. Why do you not tape record

INVESTIGATOR JEAN SUTTON - CROSS BY MR. TREACY

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1 the interview?

2 A That's not my procedure, and I have also found
3 it's rather difficult for people to talk with a tape
4 recorder in front of them.

5 Q Now, in your notes you mentioned that you
6 obviously discussed medication with Mr. Carter, is
7 that correct?

8 A That's correct.

9 Q And you discussed whether he's under a doctor's
10 care?

11 A Yes, I did.

12 Q And you noted that he stated that he drank one
13 beer yesterday?

14 A That's correct.

15 Q You also noted that he stated he had between
16 three and four hours of sleep in the past
17 twenty-four hours?

18 A That's correct.

19 Q And can you show the judge where in these notes
20 that you made a notation about discussing whether or
21 not he wanted something to eat?

22 A I didn't make a notation of that, because I do
23 that with everyone. In other words, when I'm
24 talking with someone, it's a rather lengthy pretest
25 interview. I always ask the person if they need to

1 use the bathroom or get anything to drink.

2 Q Do you not always ask them if they are under a
3 doctor's care?

4 A Yes.

5 Q And that's part of your routine too?

6 A Well, specifically as the polygraph examiner,
7 I'm not -- I am prohibited from testing with certain
8 medical conditions. And the reason that that is in
9 the report is because it's actually a part of the
10 polygraph process.

11 Q Uh-huh.

12 A The other things, such as how much sleep they
13 get, are also germane to whether or not they can be
14 asked questions under instrumentation.

15 Q And is your opinion as to whether or not
16 somebody has been denied food or sleep for a long
17 period of time is not relevant to your ability to be
18 allowed to continue your interview with them?

19 A Well, you know, he did not indicate he wa
20 denied food. He also advised me that the three or
21 four hours of sleep that he had, that that was his
22 average for him for the last several weeks. I
23 understood that the defendant was under emotional
24 distress. He would be, having just been advised a
25 few days earlier that his daughter had passed away,

INVESTIGATOR JEAN SUTTON - CROSS BY MR. TREACY

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1 and that would be normal, I think, to have some sort
2 of sleep problem after that.

3 Q And you noted in the bottom of the first page
4 that you advised that the pathologist who conducted
5 the autopsy on Minor Child determined that the cause
6 of death was hypoxia and not a natural disease
7 process. The subject was advised that hypoxia was
8 lack of oxygen to the brain and would have been
9 caused by smothering. Is that accurate?

10 A That's accurate. That's what the pathologist
11 told me.

12 Q The pathologist didn't say it could have been
13 caused by smothering, among other things?

14 A He just told me that it was caused by
15 smothering, in his opinion.

16 Now, he said the smothering could be caused by
17 a variety of things.

18 Q Okay.

19 A He said -- I think he mentioned putting a bag
20 over the child's face, or over the head, or another
21 object up, you know, to smother the child, but the
22 pathologist used the word smother.

23 Q So he didn't discuss any other ways that
24 hypoxia could have been caused? He just discussed
25 other ways that smothering could have been caused?

INVESTIGATOR JEAN SUTTON - CROSS BY MR. TREACY

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1 A Those were the pathologist's words to me.

2 Q And did you ever have a conversation with him
3 at that point, or any other point during the time
4 that you were with him, explaining to him that
5 Michelle had confessed to strangling?

6 A No, sir, absolutely not.

7 Q How long did your interview last?

8 A He was brought -- the defendant was brought
9 into my office I believe at 12:40 p.m.. And
10 according to my notes, he was turned back over to
11 Investigator Carpenter at approximately six p.m..

12 Q Did you eat lunch that day?

13 A No, I did not.

14 MR. TREACY: That's all I have.

15 THE COURT: Any redirect?

16 MS. WHITE: No, sir.

17 THE COURT: Thank you, Investigator Sutton.
18 Appreciate it, ma'am.

19 MS. WHITE: Your Honor, I have one other person
20 who was on the written statement, just signed off as
21 witnessing it. I do not plan on calling them,
22 depending on what the defense presents in this
23 hearing. I don't see any need for it at this point.

24 THE COURT: All right. Regarding the Jackson
25 v. Denno issue on the admissibility of the

DEREK SHANE CARTER - DIRECT BY MR TREACY

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1 statement, would you like to present anything by way
2 of testimony?

3 MR. TREACY: Yes, Your Honor.

4 THE COURT: Very good.

5 MR. TREACY: My client would like to testify on
6 that tissue.

7 THE COURT: You may proceed, sir.

8 MR. TREACY: Call Derek Shane Carter.

9 DEREK SHANE CARTER, having been first duly
10 sworn, testified as follows:

11 DIRECT EXAMINATION BY MR. TREACY:

12 Q Mr. Carter, is this the first time that you
13 ever testified in court?

14 A Yes, it is.

15 Q You need to speak clearly and make sure that
16 Your Honor can hear your responses.

17 On October 25th of 2000, at what time did you
18 report to the Anderson County sheriff's department?

19 A It was about 8:30, nine o'clock.

20 Q Can you explain to the judge the conversation
21 that you had with Investigator Carpenter previous in
22 that week about scheduling that hearing, that
23 meeting?

24 A He came I think it was the 20th and we talked
25 for a little while and then they left. He said we

DEREK SHANE CARTER - DIRECT BY MR TREACY

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1 may have to come in and sign some more statements or
2 make some more -- fill out the questionnaire. And I
3 think it was the next day he called, and I told my
4 wife that we had to be in the following day.

5 Q So was it your understanding that this was
6 something that you could do at your convenience?

7 A Yes.

8 Q Were you given options of different times or
9 dates that you could do it?

10 A No. I mean, he just called the day before and
11 told us to be there I think it was eight o'clock,
12 but I had called about 7:45 and told him that we
13 would be running late because he had to take the
14 little baby to the baby-sitter.

15 Q And what time did you get there?

16 A It was about 8:30, nine o'clock.

17 Q And when you went into the sheriff's
18 department, where did you go in the sheriff's
19 department?

20 A The front lobby.

21 Q And where did you go after that?

22 A Mr. Carpenter came in and took me to one of the
23 small rooms.

24 Q Where was Michelle taken?

25 A I don't know. She was still in the lobby when

DEREK SHANE CARTER - DIRECT BY MR TREACY

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1 I left.

2 Q And what did Mr. Carpenter say or do at that
3 point?

4 A He sat me down in the room and showed me a
5 little questionnaire, read over it, and just told me
6 to fill that out. And when I got done, to bring it
7 to his office around the corner.

8 Q And you did that?

9 A Yes.

10 Q And at what time do you recall going to
11 Investigator Jean Sutton's office?

12 A I have no idea what time it was.

13 Q And during that morning period, before you went
14 to Investigator Sutton's office, were you ever
15 offered any food or water?

16 A No.

17 Q Did you feel like you could ask for food or
18 water?

19 A No.

20 Q Were you allowed to go to the bathroom?

21 A I wasn't allowed, but after I left Ms. Sutton's
22 office, we was going down the hall, me and Mr.
23 Carpenter, and we passed by the restroom and the
24 water fountain, so I asked if I could and he allowed
25 me.

DEREK SHANE CARTER - DIRECT BY MR TREACY

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1 Q Did they ever leave you unattended?

2 A A couple of times they did.

3 Q Did they ever indicate to you that you were
4 free to go whenever you wanted to?

5 A No.

6 Q Were you, in fact, behind a door that has a
7 locked security access? Do you recall that?

8 A I'm not sure I was -- I mean, he closed the
9 door behind him. I'm not sure if it locked or not.

10 Q Were you in the investigative detective
11 division of that wing where their offices are? Were
12 they describing these rooms as their offices?

13 A I think they were describing it as like
14 interrogation rooms where they interviewed
15 witnesses.

16 Q And during the period of time that you were
17 with Investigator Sutton, were you -- did she ever
18 ask you if you wanted any food or water?

19 A No, sir, she did not.

20 Q Did she ever ask you when the last time that
21 you had something to eat was?

22 A No.

23 Q Were you allowed to get up and leave at all
24 during that period of time that you were with
25 Investigator Sutton?

DEREK SHANE CARTER - DIRECT BY MR TREACY

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1 A No.

2 Q Did you -- after being interviewed by
3 Investigator Sutton, were you taken to another room
4 to continue with Investigator Carpenter, or were you
5 left in the same room?

6 A She left and I guess she discussed with him,
7 and then he came back with her and he took me to
8 another room.

9 Q And how long did the interview with
10 Investigator Carpenter continue after that point?

11 A I have no idea. It was a pretty good while.

12 Q At what point do you recall signing the
13 statement that he wrote out, the formal statement?

14 A It was right before I went in to do the
15 polygraph with Ms. Sutton.

16 Q Not the Miranda Rights. I mean, the --

17 A Oh, the --

18 Q The formal written statement that John
19 Carpenter wrote out of what you said.

20 A Repeat that again.

21 Q At what time do you recall signing the formal
22 statement?

23 A 10:30. It was about 10:30.

24 Q At any period between the time that you left
25 Investigator Sutton's office and 10:30, were you

DEREK SHANE CARTER - DIRECT BY MR TREACY

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1 asked if you wanted anything to eat or drink?

2 A No.

3 Q How much sleep had you had in the previous five
4 days?

5 A I would say about twelve hours total.

6 Q And your child Minor Child died five days -- I'm
7 sorry.

8 A On the --

9 Q Eight days?

10 A On the 17th.

11 Q Eight days before that, right?

12 A Yes.

13 Q Do you recall the day of the funeral?

14 A It was the following Saturday.

15 Q And then there was a few days before you went
16 in to give this interview?

17 A Right.

18 Q What kind of emotional condition were you in at
19 that point?

20 A Naturally I was pretty devastated at that
21 point.

22 Q Did you feel completely in control of your
23 actions and judgment on that day?

24 A No. No, I didn't.

25 Q At some point during interviews by either

DEREK SHANE CARTER - CROSS BY MS. WHITE

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1 Investigator Sutton or Investigator Carpenter, did
2 they come in and explain to you that your wife,
3 Michelle Carter, had confessed to strangling
4 Minor Child to death?

5 A They came in, I think it was when I was sitting
6 down with Sutton. I think she was the first one
7 that mentioned it, before they issued the polygraph,
8 that she said that -- that the doctors had stated
9 that she didn't have lupus, that she died of
10 hypoxia, and that Michelle had told them that she
11 had confessed to choking her or strangling. Not
12 exactly strangling, but putting her hands around her
13 neck and causing her death. And so if I needed to
14 say something, now was the time.

15 Q And was your understanding from that comment
16 that your wife had admitted responsibility for
17 murdering your child?

18 A Yes.

19 Q How did you feel about that?

20 A Well, naturally I was upset.

21 Q Please answer any questions that the solicitor
22 would have for you.

23 CROSS EXAMINATION BY MS. WHITE:

24 Q You were devastated by your daughter's death,
25 is that what you are telling this judge?

DEREK SHANE CARTER - CROSS BY MS. WHITE

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1 A Yes, ma'am.

2 Q This child that had cigarette burns, injuries
3 on her feet, head injuries, ice pulled on her skin
4 while she was in your care, sir?

5 A Alleged. Some of that someone alleged.

6 Q Well, alleged by you in your statement. Didn't
7 you sign that?

8 A Yes, ma'am, I did.

9 Q You were given a copy, weren't you?

10 A Yes, ma'am.

11 Q When did you call these investigators and tell,
12 them that you hadn't told the truth?

13 A When did I call them?

14 Q Sure.

15 A I told Mr. Carpenter as soon as he come in the
16 second time, when he interviewed me.

17 Q But you signed the statement during that
18 interview.

19 A As you can look at the previous statement
20 before the polygraph and the one after, my story
21 changed.

22 Q Yeah.

23 A I told Mr. Carpenter that I had lied previous.

24 Q You said that you had lied in the previous
25 statement, isn't that right? At first, you said

DEREK SHANE CARTER - CROSS BY MS. WHITE

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1 this was an accident and you were going to get the
2 van fixed.

3 A Yes, ma'am.

4 Q And then you flunked the polygraph and that's
5 when you changed your story. They didn't make up
6 any story about choking your daughter, did they?

7 A Yes, they did.

8 Q Well, sir, would you care to look at the
9 polygraph report as to when you changed your tune as
10 to what had happened about the death of your
11 daughter?

12 A I have already seen it.

13 Q It wasn't after somebody said that she were
14 choked. It was after you had failed the polygraph,
15 isn't that right?

16 A No.

17 Q And you were confronted about your false
18 answers.

19 A No, ma'am. She told me this before she issued
20 the polygraph.

21 Q You didn't want food or water, did you? They
22 asked you repeatedly if you did and you said no.

23 A No, they did not.

24 Q And you had water at the water fountain, as you
25 told the judge and --

DEREK SHANE CARTER - CROSS BY MS. WHITE

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1 A Yes.

2 Q -- you were able to use the bathroom during
3 this. You are not telling this judge that you did
4 not use the bathroom for eighteen hours, or whatever
5 it was, did you?

6 A No.

7 Q Twelve hours?

8 A No.

9 Q Now, while your child was lying there in the
10 hospital comatose, and you didn't know she was going
11 to live or die, you lied to the doctors about what
12 happened, didn't you?

13 A Did I lie? About -- only thing I lied about
14 was the reason I went to Greenville Hospital.

15 Q And you lied about what happened to her ear.
16 You lied about the scars. You lied about the
17 vaginal injuries. You lied about the toes.

18 A I only told it the way it was explained to me.

19 Q But now you want the judge to believe you, when
20 you say that you were coerced into making a
21 statement, is that right, sir?

22 A Yes, ma'am.

23 Q But you were willing to let your daughter die
24 because of not being diagnosed properly because of a
25 false history, but now you're believable?

1 A I didn't allow my daughter to die, no.

2 MS. WHITE: I have got no further questions.

3 THE COURT: Redirect?

4 MR. TREACY: That's all I have.

5 THE COURT: Thank you, sir. You may step down.

6 Anything further by way of testimony from the
7 defendant on the Jackson v. Denno issue?

8 MR. TREACY: No, sir.

9 THE COURT: Would there be any reply on that
10 issue, solicitor?

11 MS. WHITE: Not on Jackson v. Denno. Well, no,
12 sir, she's already testified. No, sir.

13 THE COURT: Mr. Treacy, you are the movement in
14 this motion to suppress the defendant's statements
15 and I'd like to hear from you on your argument
16 first, sir.

17 MR. TREACY: Your Honor, I'm sure that you are
18 very familiar with the standard in this issue, so
19 I'm not going to talk about the law.

20 I think this testimony has evidenced to you
21 that my client was interviewed from nine a.m. until
22 10:30 p.m., continuously interrogated by two very
23 experienced detectives with the Anderson County
24 Sheriff's Department. He has no experience with the
25 criminal justice system. He was -- it was the first

1 time that he was ever put in a position like that.
2 He -- it was a week after this child's death, less
3 than a week after this child's funeral. He had very
4 little sleep. He was still emotionally distraught.
5 He was not allowed to have or offered food or
6 breaks. He wasn't allowed -- or suggested that he
7 could speak to somebody, if he wanted to speak to
8 somebody else. And, Your Honor, my position is that
9 that environment overtook his ability to rationally
10 and voluntarily decide to make those statements.
11 And I would ask that the statement -- the statements
12 after Investigator Jean Sutton interviewed him.

13 When he went back to John Carpenter, I think at
14 that point in time it became unreasonable for them
15 not to allow him to have access to food, because at
16 that point you are talking about between nine a.m.
17 to, I assume, three or four in the afternoon,
18 something like that, before he went back to
19 Carpenter to continue until 10:30.

20 I ask you to also to consider the fact that
21 it's our position that these investigators lied to
22 Mr. Carter. They did not have information that
23 Michelle Carter had confessed to strangling and
24 causing the child's death. They did not have that,
25 but that's what they told him and led Mr. Carter to

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1 believe, and he has told you that is the reason why
2 he gave many of the details in that statement that
3 he signed at 10:30 in the afternoon when he's
4 talking to Mr. Carter. It's not because he had
5 failed the polygraph, but because they had -- in the
6 conditions they had him in, led him to believe that
7 his wife, whom he trusted, had actually confessed to
8 killing his daughter. And obviously that would have
9 a devastating emotional effect on somebody.

10 THE COURT: All right. Thank you, sir.

11 Solicitor, I would like to hear your response.

12 MS. WHITE: Yes, sir.

13 Your Honor, as I understand it, we are not
14 arguing on the 10-20 statement? They have conceded
15 that he was not in custody, so I'll put my comments
16 then to what happened on the 25th.

17 Your Honor, the defendant came in, was offered
18 the questionnaire. They drove of their accord to
19 the sheriff's department. They went in their own
20 room without any police in there and filled out the
21 questionnaire.

22 First of all, that was never said that Michelle
23 had confessed. In fact, she hadn't even talked to
24 the police. That came later when she confessed.

25 But second of all, even if it had happened,

1 even if they had told the defendant that, under the
2 case law that's fine to do that. They didn't do it,
3 but that would be -- that would not violate any law.
4 That would not violate any rule, and that would not
5 invalidate a Miranda waiver.

6 Your Honor, we would argue that the defendant
7 was not in custody when he first came in and took
8 the questionnaire. And, Your Honor, if, in fact,
9 you find that he was, I would cite Oregon v. Elstad,
10 which is a U.S. Supreme Court case, saying that once
11 you are mirandized, even if there has been an
12 invalid statement that has been given, once you are
13 mirandized and you sign the waiver, anything from
14 henceforth is admissible. So the written statement
15 and the oral interview with John Carpenter would be.

16 Your Honor, I think when you consider the
17 credibility of this defendant, the reason why he was
18 at the sheriff's department all this time is because
19 he kept lying about what happened. It wouldn't have
20 taken so long if he had told the truth right off,
21 and his credibility is certainly not very good.
22 Anybody who is willing to lie to protect himself and
23 his wife when their child is lying there and needs
24 accurate history for a diagnosis is not very
25 reliable.

DR. BRETT WOODARD - DIRECT BY MS. WHITE

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1 THE COURT: Anything further in regard to that
2 issue?

3 MR. TREACY: Your Honor, only there is no
4 evidence that he lied about the history, other than --
5 all he did was relate what his wife told him. There
6 is no evidence that he actually lied about that.

7 THE COURT: Thank you, sir.

8 Let's move to the next issue. What issue do
9 you want to address next, counsel? Do y'all have a
10 preference?

11 MS. WHITE: Your Honor, I have the pathologist
12 here, so I would ask that we go ahead and go into
13 the Battered Child Syndrome.

14 THE COURT: That's fine. I'll be glad to hear
15 testimony on that.

16 MS. WHITE: The State calls Dr. Woodard.

17 DR. BRETT WOODARD, having been first duly
18 sworn, testified as follows:

19 THE CLERK: State your full name and spell your
20 last name for the record.

21 THE WITNESS: I'm Brett H. Woodard,
22 W-o-o-d-a-r-d.

23 DIRECT EXAMINATION BY MS. WHITE:

24 Q Dr. Woodard, I know a lot of times when you
25 testify we kind a do a cursory go through your

DR. BRETT WOODARD - DIRECT BY MS. WHITE

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1 credentials, but I would ask that you be very
2 thorough.

3 Would you please tell the judge what your
4 educational background is?

5 A I received a Baccalaureate Degree from the
6 University of Pittsburgh. Then attended Tulane
7 University School of Medicine and received my
8 medical degree.

9 Q When was that?

10 A In 1974.

11 Q And after that what did you do?

12 A I did an internship at the Charity Hospital on
13 the Tulane Service in pediatrics.

14 I then did a residency at Duke University
15 Medical Center in anatomic and clinical pathology.

16 I then taught on the Duke University Medical
17 Center faculty in pediatric and surgical pathology,
18 before I came to Anderson, South Carolina in 1982.

19 Q And so you said that you taught in pediatric
20 and anatomical pathology?

21 A Surgical pathology.

22 Q Is that correct?

23 A That's correct.

24 Q When you came to Anderson, what did you do?

25 A I came to work with Piedmont Pathology

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1 Associates in Anderson, South Carolina.

2 And in 1994, I returned to North Carolina to do
3 fellowship training at the North Carolina Medical
4 Examiners Office to finish my pathology
5 certification for forensic pathology.

6 Q And have you been licensed as a forensic
7 pathologist?

8 A I'm licensed in medicine and surgery by the
9 State of South Carolina. I am board certified by
10 the American Board of Pathology, and subspecialty in
11 forensic pathology, as well as the general fields of
12 anamotic and clinical pathology.

13 Q And what is the difference between being
14 certified as a pathologist and as a forensic
15 pathologist?

16 A Forensic pathology is a subspecialty of
17 pathology that deals with injuries to the human
18 body, how those injuries may manifest themselves,
19 and how they may compromise the human body's
20 function, where general pathology deals more with
21 natural diseases.

22 Q Now, as part of your training as a forensic
23 pathologist and in part of your experience as a
24 forensic pathologist, have you worked on cases
25 dealing with child abuse and child fatalities?

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1 A Yes, I have served on the Governor's panel on
2 child fatalities. I have testified in both
3 Anderson, Laurens, and Horry County concerning child
4 abuse concerns.

5 Q And have you also acted as a consultant on
6 child abuse cases as to cause of injury, even when
7 there are no fatalities?

8 A Yes, I have.

9 Q And approximately how many times or -- I don't
10 know if you can do that, but approximately how many
11 times have you testified as an expert in forensic
12 pathology?

13 A Hundreds.

14 Q Doctor, I believe that you have had, count up
15 here, approximately forty-five -- you have been the
16 author on approximately forty-five articles in
17 medical journals regarding pathology and forensic
18 pathology, is that correct?

19 A Certainly over forty. I don't remember the
20 exact number.

21 Q And have you received any training in the field
22 of child abuse?

23 A I have taken multiple seminars by the American
24 Academy of Forensic Sciences and have attended the
25 state-sponsored seminars sponsored by SLED, and I am

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1 an active member in the American Society of
2 Pediatric Pathology.

3 Q Of Pediatric Pathology?

4 A That's correct.

5 Q All that means dealing with children and the
6 injuries that cause their death?

7 A Diseases and injuries of children.

8 MS. WHITE: Your Honor, I would ask that the
9 witness be recognized as an expert in the field of
10 forensic pathology.

11 THE COURT: Do you wish to voir dire the
12 witness at this time?

13 MR. TREACY: I have one question.

14 THE COURT: Certainly.

15 VOIR DIRE EXAMINATION BY MR. TREACY:

16 Q Dr. Woodard, what expertise or training do you
17 have with regard to the disease of lupus?

18 A The general training of pathology, both
19 anatomic and clinical, would deal with both
20 serologic and anatomic finding of lupus
21 erythematosus.

22 Q Do you believe that you would be qualified and
23 competent as an expert in lupus?

24 A Certainly the pathologic presence and the
25 serologic manifestations of lupus, yes.

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1 Q What type of specialty or specialist
2 traditionally treats the disease of lupus?

3 A A rheumatologist. Pediatric or medical
4 rheumatologist traditionally treat patients with
5 those diagnoses..

6 Q Are you a rheumatologist?

7 A I am not.

8 Q So is it fair to say that your knowledge of
9 lupus would be the same as anyone trained in general
10 pathology?

11 A Yes, that would be part of your general
12 pathology training.

13 Q So do you not have any specialized training
14 with regards to lupus?

15 A No, I do not.

16 MR. TREACY: Your Honor, I would simply ask
17 that his qualifications as an expert in pathology be
18 limited with regard to the issue of lupus.

19 THE COURT: Well, he's qualified as an expert,
20 and let's just see where the testimony goes. And if
21 it dwells into that area to the extent that you
22 believe you need to object because of the lack of
23 expertise, then you may certainly do so, but I'm not
24 going to foreclose any specific area on the front
25 end until we have an opportunity to pursue it,

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1 particularly outside the presence of the jury.

2 MS. WHITE: And, Your Honor, I would like to
3 note he did say that is part of his training on how
4 they interpret all that. That's part of his
5 training as a pathologist.

6 CONTINUED DIRECT EXAMINATION BY MS. WHITE:

7 Q All right. Dr. Woodard, did you perform an
8 autopsy on Minor Child

9 A Yes, I did.

10 Q And when did you perform that autopsy?

11 A On the 18th of October, the year 2000, at
12 approximately 9:30 a.m..

13 Q What was Minor Child size?

14 A Minor Child was forty-one and a half inches in
15 length and weighed twenty kilograms.

16 Q What is that?

17 A That would be about forty-two pounds.

18 Q Now, before you came in here to testify, did
19 you review her medical records from Dr. Maddox, Dr.
20 Legarda, Dr. Cottingham, Anderson Hospital,
21 Greenville Hospital, and Dr. Hunter?

22 A Yes.

23 Q Did you review the statements given by the
24 defendant and Michelle Carter?

25 A Yes, I did.

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1 Q Did you review the photographs that were taken
2 of Minor Child while she was in the hospital?

3 A Yes, I did.

4 Q Did you review the test results from all of the
5 tests that she was given?

6 A Yes, I did.

7 Q Now, let's talk about her outer body first.

8 Let's start with her vaginal area. Will you
9 please describe for the judge what you found in
10 Minor Child vaginal area?

11 A She had two large bruises in her vaginal area.
12 One was at the anterior or toward the front of the
13 body in the general area where the urethra comes
14 into the vaginal area, represents swelling adjacent
15 to and involving the opening of the urethra. One
16 was on the side wall of the vaginal tissues, and
17 then there was a large tear at the back of the
18 vagina where the skin would separate the back of the
19 vagina from the rectum.

20 The external surface of the vaginal area
21 demonstrated marked scarring and atrophy, though
22 there were no bruises associated with that or cuts
23 at the time I saw her.

24 Q What about the color?

25 A In the photographs at the time that she

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1 presented to the Greenville Hospital that were taken
2 by police investigators, there was a very strong red
3 coloration, indicating inflammation and irritation.
4 By the time I saw her some five or six days later,
5 that redness had gone away and the skin was atrophic
6 and scared, extending up to above the pubic bone and
7 all around the external orifice of the vagina.

8 Q What are some causes of this atrophy and
9 scarring? What could have caused this?

10 A Chronic chemical irritation to this surface
11 skin. Certainly the repetitive blows to the surface
12 skin would produce these kinds of injuries.

13 Q Would this be consistent or inconsistent, in
14 your expert opinion, with sitting in feces, urine,
15 that sort of thing for an extended period of time?

16 A It would be consistent with it.

17 Q Why?

18 A The urine and feces are an irritant to the
19 skin. This is why young children often get diaper
20 rashes if they're not changed frequently, and those
21 chemicals will produce permanent injuries to the
22 skin. We often see this in older patients who, for
23 instance, have senility or horrible bladder control.

24 Q Now, doctor -- one moment, let me find
25 something.

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1 Doctor, in your opinion, is this bodily injury
2 which creates a substantial risk of death, or which
3 causes serious or permanent disfigurement, or
4 protracted loss, or impairment of a function of any
5 bodily member or organ?

6 A Certainly the bruising in the area where the
7 urethra comes out would reduce the function of
8 bladder activity and urination.

9 The tear at the back of the vagina that
10 extended toward the rectum would produce pain on
11 defecation. And that tear, if unaddressed
12 medically, would produce permanent scarring. So
13 later sexual activity -- there could be pain on
14 sexual activity.

15 There would be permanent scarring of the
16 exterior tissues of the vagina.

17 Q Let's clear one thing up right off. Is skin
18 the largest organ of the body?

19 A Yes, it is.

20 Q And was this skin permanently damaged?

21 A Yes, it was.

22 Q All right. Let's go next to the -- I believe
23 in your report you said there were some -- I'm not
24 good at pronouncing these medical words and I may
25 mispronounce it, atrophic skin areas and scars, is

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1 that correct?

2 A Yes, there were several --

3 Q Let's stop there. Let me just --

4 MS. WHITE: Your Honor, may I have a minute to
5 mark the pictures and we'll show the pictures as we
6 go of the injuries, so that you will know what we
7 are talking about, or do you care to do that at this
8 point?

9 THE COURT: You can if you want. My primary
10 purpose on the front end is just to hear sufficient
11 evidence that allows me to address whether the
12 evidence that was debated yesterday between you and
13 Mr. Treacy, vis-a-vis 404(b) analysis or Battered
14 Child Syndrome.

15 BY MS. WHITE:

16 Q All right. Let's not be quite as detailed then
17 at this point. Did you notice other injuries on her
18 body?

19 A Yeah, there were multiple areas of superficial
20 and deeper tissue scarring on both the front and
21 back of her body.

22 Q All right. And just in general, what locations
23 of the front and back?

24 A The front locations in general were the upper --
25 excuse me, the lower part of the upper left chest,

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1 and sort of extending across the anterior abdomen,
2 somewhat obliquely lower on the right side than the
3 left. Irregular patches -- irregular areas of
4 scarring were seen on the back from approximately
5 the nipple line downward. And then circular smaller
6 scars were seen on the back extending onto the
7 buttocks, irregularly scattered across the back.

8 Q And these circular scars, were they consistent
9 or inconsistent with the size of a cigarette burn?

10 A They were consistent with the size of a
11 cigarette burn.

12 Q And, doctor, all these scars that you are
13 talking about that are circular and so forth, are
14 those injuries which would cause serious or
15 permanent disfigurement, or protracted loss, or
16 impairment of the function of any bodily member or
17 organ; in particular, permanent disfigurement?

18 A They would produce permanent disfigurement.
19 Clearly the circular scars would. The other scars
20 would produce less disfigurement, but would have a
21 persistent signature on the skin.

22 Q Let's go briefly to the feet. Can you talk to
23 the judge about the feet?

24 A There were multiple blows across the toes and
25 nails of the feet that had produced hemorrhage and

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1 elevation of the nails themselves, which would
2 produce loss of the nails. And then there were
3 blows that extended up the first, the great toe the
4 left foot. There were multiple irregular blows
5 along that prominent bony structure of the left foot
6 and the tarsal.

7 Q I'm going to try to kind of breeze through some
8 of these. Also nose injury, is that correct?

9 A Yes, there was a prominent injury to the nose.
10 The little piece of skin that connects the two
11 nostrils and extending up into the nostril
12 approximately an eighth of an inch.

13 Q And tell us about the hair, scalp.

14 A There were multiple areas in the scalp where
15 portions of hair had been forcefully removed from
16 the scalp, and so there were bald spots.

17 Q Did you examine the inside of Minor Child

18 A Yes, I did.

19 Q And what, if anything, did you find in the way
20 of brain injury?

21 A She had massive swelling of her brain. That
22 massive swelling of the brain didn't allow the blood
23 to flow to the brain, and so the nerves inside
24 scattered throughout her brain didn't receive enough
25 oxygen, or sugar, or other nutrients that they need

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1 on a very regular basis, and it produced permanent
2 death of those nerves.

3 Q And what, if any, injury did you find on the
4 brain?

5 A There was a subdural hematoma that was between
6 four and six days of age.

7 Q And you did this autopsy when?

8 A I did it on the 18th.

9 Q And the child was brought into the hospital on
10 the 14th, is that correct?

11 A That's correct.

12 Q Now, just briefly define what is a subdural
13 hematoma?

14 A It's a bleed that's -- the brain is covered by
15 a thick fibrous sac called the dura, and this bleed
16 occurs below that fibrous sac. The brain's veins
17 come up and they go through the cerebral spinal
18 fluid and connects to this fibrous sac. So when
19 rotational injuries occurred to the head, these
20 little vessels can be torn and bleeding will occur
21 in those area.

22 Q And what, if any, amount of infliction would
23 cause a subdural hematoma on someone?

24 A A significant amount of force that is not
25 achieved by an individual's own momentum and

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1 activities that the size of this child was has to be
2 applied.

3 Q Discuss briefly the nutritional health of this
4 child.

5 A The child was severely undernourished. There
6 was essentially no remaining subcutaneous fat on the
7 anterior abdomen. The cheek pouches and facial fat
8 was markedly atrophic.

9 Q All right. All together, about how many
10 injuries did you find in the nature of scarring and
11 head injury and these various things did you find?

12 A Twenty to twenty-five injuries, depending on
13 how you wish to separate them, were present on the
14 child, including a large bruise and swelling of the
15 left ear and a bruise of the left scapula area.

16 Q And this was on a four year old, forty-two
17 pound child?

18 A That's correct.

19 Q All right. Now, doctor, what is Battered Child
20 Syndrome?

21 A Battered Child Syndrome is a medical term used
22 to indicate a child who suffers multiple
23 nonaccidental traumas, usually at the hands of a
24 caregiver.

25 Q Now, I'm handing you an article entitled The

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1 Battered Child Syndrome, written by Kent, and other
2 articles, 1962, that appeared in the journal -- I
3 never know what those initials are. Journal of --

4 A This is the Journal of American Medical
5 Association, JAMA, J-A-M-A.

6 Q And is that one of the sort of the major first
7 article that started this syndrome, that discussed
8 this syndrome?

9 A This is one of the first major articles that
10 was published in a wide distribution journal that
11 defined the Battered Child Syndrome, the problems of
12 the medical diagnosis of the Battered Child
13 Syndrome, as well as what the potential outcomes of
14 this syndrome would be to children.

15 Q And is that article a reliable authority still
16 today?

17 A Yes. It's one of the ground-breaking articles.
18 Certainly some of the questions that they raise have
19 been addressed in future articles.

20 For instance, the psychologic profile of the
21 perpetrators and how best can we manage these cases.

22 Q Is that article still cited --

23 A Yes, it is.

24 Q -- as the leading authority on it?

25 A That's correct.

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1 Q Doctor, I would ask that you read the parts
2 that I have put the black pen on as to the
3 definition of Battered Child Syndrome.

4 A "In some clinical manifestations are limited to
5 those resulting from a single episode of trauma, but
6 more often the child's general health is below par
7 and he shows evidence of neglect, including poor
8 skin hygiene, multiple soft tissue injuries, and
9 malnutrition. One often obtains a history of
10 previous episodes suggestive of parental neglect or
11 trauma. A marked discrepancy between clinical
12 findings and historical data are supplied by the
13 parents is a major diagnostic feature of the
14 Battered Child Syndrome. Subdural hematoma with, or
15 without, fracture of the skull is, in our
16 experience, an extremely frequent finding, even in
17 the absence of fracture of the long bones."

18 Q And I believe you said that you found evidence
19 of neglect?

20 A That's correct.

21 Q Malnutrition?

22 A Correct.

23 Q Multiple soft tissue injury?

24 A Correct.

25 Q Marked discrepancy --

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1 Did you read the history that was given to the
2 doctors regarding each one of these injuries that
3 you discussed?

4 A Yes, I read the history that was supplied to
5 the Greenville Hospital and the history relating to
6 a head injury in April of that year that was
7 supplied to the Anderson Area Medical Center.

8 Q And, in your opinion, the injuries that we
9 discussed - the toe injuries, the injury on the
10 chest, running into a heater, that sort of thing -
11 were those consistent or inconsistent with the
12 history given? Were the injuries consistent or
13 inconsistent with the history given?

14 A Inconsistent.

15 MS. WHITE: Your Honor, I would just like to
16 pass up. I know I have already passed up Estelle
17 v. McGuire, but it does define Battered Child
18 Syndrome, and I have just copied that one page where
19 it's still defined basically the same.

20 BY MS. WHITE:

21 Q Doctor, is this a recognized diagnosis,
22 Battered Child Syndrome?

23 A Yes, it is.

24 Q And, doctor, in your expert opinion, did

25 Minor Child suffer from Battered Child

DR. BRETT WOODARD - DIRECT BY MS. WHITE

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1 Syndrome?

2 A Yes, she did.

3 Q Let's go over some of the reasons why you think
4 that she did.

5 Let's discuss first the ages of her injuries.
6 What was important to you about the age of her
7 injury?

8 A The -- certainly the subdural hematoma and
9 swelling of the brain were consistent with an injury
10 that occurred on the day that she was hospitalized
11 and are inconsistent with injuries that would have
12 been produced multiple days or weeks earlier.
13 However, the bruises and the injuries to the feet
14 are of various ages and time periods, which indicate
15 multiple episodes of trauma to the feet.

16 Similarly, the bruises to the ear and back are
17 consistent with a time frame that would be
18 consistent with the general injury that produced
19 that acute hospitalization.

20 The injuries to the skin are of an older time
21 period than that. They were well scabbed at the
22 time that the child presented to hospital in
23 Greenville.

24 The injury that was documented in April, the
25 head injury at the Anderson Area Medical Center, was

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1 inconsistent with the falling out of a bunk bed or
2 bumping heads with a sibling, a ten, twelve year old
3 sibling, in the confines of a space that would be
4 available in a home. That injury is consistent with
5 an abusive or a nonaccidental trauma. Again it
6 represents another trauma at a different time.

7 Q And that also had some subdural in it, is that
8 correct?

9 A That's correct.

10 Q And, again, doctor, how much force is required
11 to cause a subdural in a child?

12 A A significant force, coupled with rotational
13 injury, which is traditionally not produced outside
14 of falls from massive height, third story windows,
15 or above, or automobile accidents.

16 Q Now, I'm not going to go through each injury,
17 but let's just go over the general location of the
18 injuries. What is the importance of seeing
19 injuries, significant scarring on the abdomen on the
20 back areas like that, on the child?

21 A Well, the feet, the back, the abdomen, the
22 vaginal area are all concealed when one wears usual
23 clothing and don't allow other casual observers who
24 wouldn't see the child unrobed to identify these
25 injuries.

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1 Q And when a child falls, is it common or
2 uncommon to get injuries on the abdomen, the back,
3 those type areas, or is it more common to find it on
4 the hands, the arms, the appendages?

5 A Because of the height of a child and the
6 traditional distances that they would fall in
7 accidental events, the exposed extremities - the
8 knees, the hands, the elbows - are more common sites
9 of accidental trauma.

10 Also when they fall, they don't produce
11 multiple impact injuries over a very confined space,
12 such as the surface of their toes and the upper
13 tarsal, the bone of the foot as it goes to the big
14 toe.

15 Q How important is it when you are diagnosing
16 Battered Child Syndrome to know that the parents
17 changed their stories?

18 A That is a classic or characteristic feature of
19 the Battered Child Syndrome. The parents try to
20 adjust their story to offer an explanation that will
21 be accepted by the medical community, and,
22 therefore, will be overlooked as accidental.

23 Q How important -- I believe in the definition
24 that you read they talked about neglect. How
25 important would it be to hear that the child was,

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1 for instance, chained inside a bathroom for extended
2 periods, made to run for extended periods, things
3 like that?

4 A Certainly those would represent abusive or
5 neglectful behaviors.

6 Q How important is it to you that the prior April
7 injury that was reported to DSS from Anderson
8 Hospital and the defendants passed Anderson Hospital
9 and went to Greenville Hospital for treatment in
10 this case, even though Anderson was much closer when
11 the child was comatose?

12 A That would be important to me, because again it
13 would suggest a pattern by which one is trying to
14 conceal something.

15 Q Doctor, what was Minor Child 's cause of death?

16 A Her cause of death was hypoxia to the brain
17 produced by brain swelling.

18 Q And how could that have occurred?

19 A Minor Child suffered multiple blows to the head.
20 Clearly we have two that can be medically documented
21 without any history. One is the April blow and the
22 second would be the blow that's coupled with the
23 bruise to the ear and the back at the time she
24 presents to the Greenville Hospital. So we clearly
25 have two blows.

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1 Children are well known to suffer more swelling
2 of the brain with blows to the brain than an adult
3 would be. And when one is in the recovery period
4 from a severe blow to the head or post-concussive
5 period. Just like Aikman, the quarterback who got
6 so many concussions that they wouldn't allow him to
7 play football, or fighters that aren't allowed to
8 fight any more, the child is more susceptible to
9 developing what we refer to as malignant cerebral
10 edema.

11 Knowing just these two blows, without knowing
12 any other blows that may have occurred before the
13 April blow or between the April and the October
14 blow, the child is sufficiently at risk for what we
15 refer to as the Second Blow Syndrome, where she
16 would develop malignant --

17 Q I'm sorry. Go ahead.

18 A The malignant cerebral edema.

19 Q But if you heard, and you did, I believe. You
20 read both defendants statement, and if you heard
21 witnesses say that there were multiple strikes to
22 the head in between these two blows, would that be
23 important to you?

24 A Absolutely. It would be even stronger evidence
25 that the brain was prepped, because it was

DR. BRETT WOODARD - DIRECT BY MS. WHITE

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1 chronically swollen because of these lesser blows
2 that occurred. So when another significant blow
3 occurs, the brain swelling would go out of control.

4 Q And after the April incident, the child did
5 have papilledema all the way up to October, is that
6 correct?

7 A Yes.

8 Q What's that?

9 A That's --a papilledema is a signifier that
10 there is increased pressure inside the brain. And,
11 in fact, the pressure was measured by the
12 neurologist who saw the child, did a spinal tap, as
13 an elevated, though not massively elevated, cerebral
14 spinal fluid pressure.

15 Q So from the time of the April injury on, what
16 happened to her eyes? I'm talking about if you just
17 looking at her from the outside.

18 A Her eyes became crossed. She lost the muscular
19 control that allows us to see in stereo where we
20 look through our two eyes.

21 Q Doctor, going back a minute to the malnourished
22 state that she was in, in your opinion would that
23 cause serious or permanent disfigurement, or
24 protracted loss, or impairment of function of any
25 bodily injury or organ?

DR. BRETT WOODARD - DIRECT BY MS. WHITE

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1 A Well, certainly nutrition in a growing child is
2 extremely important. They would never reach their
3 full stature, especially with a serious nutritional
4 deficit at this young age. Probably between three
5 and eight or nine years old, serious malnutrition
6 will markedly reduce growth. It also limits the
7 potential of their brain matter, as far as its
8 potential to achieve its maximum expression.

9 Q So is that a yes then to that?

10 A That's correct, that would be yes.

11 Q Thank you.

12 Doctor, there was --

13 MS. WHITE: Judge, do you want me to get into
14 at this point why it wasn't lupus, or are you
15 interested in hearing that at this motion?

16 THE COURT: We will let Mr. Treacy fight that
17 battle.

18 MS. WHITE: All right.

19 BY MS. WHITE:

20 Q Doctor, in conclusion, in your expert opinion,
21 did Minor Child considering all the abuse -
22 the locking in the bathrooms, the running the laps,
23 the injuries that you saw, the malnutrition, all of
24 that - good she suffer from Battered Child Syndrome?

25 A Yes, she did.

DR. BRETT WOODARD - CROSS BY MR. TREACY

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1 Q And how sure are you that that is an accurate
2 diagnosis in of Minor Child case?

3 A That's a medical certainty.

4 THE COURT: Your witness. And the issue now is
5 not to a fact finder.

6 MR. TREACY: Right.

7 THE COURT: To choose between two. The issue
8 is admissibility of a particular stream of evidence
9 argued by the State. The State believes it's
10 admissible, and what you have contended is not
11 admissible.

12 MR. TREACY: Yes, sir, and I'll limit my
13 cross-examination.

14 CROSS EXAMINATION BY MR. TREACY:

15 Q Dr. Woodard, is it your testimony that the
16 injuries that you observed to Minor Child
17 skin would not have healed over time?

18 A They heal by scarring, so there was permanent
19 change to the skin.

20 Q And you would consider a scar on your skin to
21 be a permanent disfigurement?

22 A Yes, I would.

23 Q And in your investigation did you discover any
24 broken bones?

25 A No, no broken bones.

DR. BRETT WOODARD - CROSS BY MR. TREACY

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1 Q You reviewed Dr. Cottingham's records, I
2 assume?

3 A Remind me which doctor he was.

4 Q He's the pediatrician that treated Minor Child
5 before Michelle entered the picture.

6 A Okay, yes.

7 Q And do you recall a October 26th, 1996 notation
8 of Dr. Cottingham, it says "area that is
9 bothersome," he notes familial vaginitis, should
10 give them Lotrium?"

11 A Yes, she had Candida.

12 Q She had what?

13 A Candida.

14 Q What's that?

15 A It's a fungus that lives in our
16 gastrointestinal tract.

17 Q Would that manifest itself with inflammation
18 and irritation?

19 A It can.

20 MR. TREACY: Limiting myself to the issue at
21 hand, I can't think of anything else.

22 THE COURT: I understand that, because we are
23 not at this point presenting to a fact finder.

24 MS. WHITE: Just one follow up question, Your
25 Honor.

DR. BRETT WOODARD - REDIRECT BY MS. WHITE

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1 REDIRECT EXAMINATION BY MS. WHITE:

2 Q That's a yeast infection, right?

3 A That's correct.

4 Q Women get those all the time?

5 A Yes, they do.

6 Q Does that cause any permanent disfigurement?

7 A No, it should not.

8 THE COURT: All right, Dr. Woodard, thank you,
9 sir, and you may step down.

10 Does the State have anything else in response
11 to this motion?

12 MS. WHITE: Your Honor, just -- I would hand up
13 kind of like a DSM-IV is the Bible of psychology,
14 the evidence in child abuse and neglect cases by
15 Myers. He's the one that --

16 Your Honor, may I ask that the doctor be
17 excused? I know we are not going to be starting
18 this case until eleven and --

19 THE COURT: Sure.

20 MS. WHITE: -- if he could be excused by 11:30.

21 Your Honor, and, of course, Myers is the one
22 that wrote for child abuse and -- child sex abuse
23 prosecutors and defense attorneys sort of Bible on
24 the law in this area. And I would note, and I'll
25 hand up the section, that he does cite, of course,

1 this article that we are talking about, cites the
2 definition, and in this he takes about how Battered
3 Child Syndrome is an accepted medical diagnosis. He
4 cites the cases and talks about how it's accepted.
5 It says "with the exception of two recent decisions,
6 every appellate court to consider the syndrome has
7 approved it. And, of course, our court has approved
8 it, but it does cite cases in the various
9 jurisdictions. And I would just hand that up also.
10 It's kind of a quick little overview of the law
11 across the country on Battered Child Syndrome. And
12 I believe I have already cited the cases from
13 yesterday.

14 Your Honor, I would like to make clear for the
15 record, though, we are asking that this be admitted
16 under Battered Child Syndrome, but also for appeal
17 purposes I would like to put on the record we are
18 also asking under Lyle. This is very different than
19 the cases -- the Cutro decision, they found no clear
20 and convincing evidence. Here we have the
21 defendant's statements as well as witnesses.

22 In the other decision, what is it, Smith, that
23 was injury to another child.

24 In the one decision that was held -- no, I
25 think it was -- what was it, Smith? It get Pierce,

1 I think it was, where they said no, it wasn't under
2 common scheme or plan. That was one isolated event
3 that occurred one year before. That was nothing
4 like the head injury the child suffered here. If
5 you look at our pattern, it's a continuous thing.

6 If you look at -- if you look at the White
7 case, which is the case that I handed up, it's not
8 child abuse, it's spouse abuse, but they talk about
9 how it is common scheme and plan, because it's this
10 desire to intimidate, humiliate, and so forth. We
11 do have that here.

12 I would also like to ask that the record
13 reflect that under 404(b), we are also looking at
14 intent. Lack of accident. Yesterday in the
15 statement you heard how the defendant said she was
16 clumsy, she had big feet. And so I would like to
17 put all those grounds on the record.

18 THE COURT: What other motions do we have to
19 address? I know that we have --

20 MS. WHITE: Sequestering is our last motion, I
21 believe, Your Honor.

22 THE COURT: And I want to -- we'll address
23 that.

24 I want to give --

25 MS. WHITE: That's all.

1 THE COURT: -- Mr. Treacy an opportunity --

2 MS. WHITE: Oh, I'm sorry.

3 THE COURT: Go ahead.

4 MS. WHITE: I'm sorry, Your Honor. I forgot.

5 I do have search -- I don't know if they are going
6 to contest the search warrant. I haven't discussed
7 that.

8 MR. TREACY: No.

9 MS. WHITE: Those were the only other. I have
10 a couple of searches. If they are not going to
11 contest, we don't need to take it up pretrial.

12 THE COURT: So is that your understanding as
13 well, Mr. Treacy, that once we resolve these issues
14 that have been brought to my attention, are there
15 any other pretrial motions that need to be
16 addressed?

17 MR. TREACY: Just the sequestration.

18 MS. WHITE: Your Honor, I do have a videotape
19 and some pictures, and I don't know if you are going
20 to want to take those up pretrial or not, but that's --
21 I don't know when you want to take those up.

22 THE COURT: I don't know what they are. Are
23 they matters which there is objection to some or
24 all?

25 MR. TREACY: I want every picture in.

1 THE COURT: Excuse me?

2 MR. TREACY: I want everything in. So if you
3 are wanting everything in, I would want everything
4 in, so there won't be any disagreement.

5 MS. WHITE: He's not objecting to the -- now,
6 this is a -- Your Honor, the videotape I have
7 provided this to the defense.

8 The videotape -- the family turned over the
9 family videos of the defendant and his wife, and we
10 have taken the video and done a montage of it of
11 taking out just the victim. The purpose of it being
12 to show you start with when she was like ten months
13 old and go all the way through. And I understand
14 you are not supposed to get prior pictures of the
15 victim in, unless there is a reason. Well, the
16 reason for this, you hear in the statements she's
17 clumsy, she bruises easily, you know, it didn't
18 happen like this. She ran into a heater. You will
19 get all of that later. And what I did is I asked
20 the person who is in charge of videos out at the
21 sheriff's department to go through all of these
22 videos, do it chronologically and take out the
23 portions showing Minor Child I want to show her
24 coordination. I want to show whether she has any
25 injuries. I want to show the body fat, to show this

1 is not some kind of normal -- you know, that she
2 wasn't just born thin in the start, because the
3 video shows a dramatic difference once the natural
4 mother dies and the stepmother comes in, and it is
5 about a thirty-five minute video. So I don't know
6 when you want to handle that, but that's a possible.

7 MR. TREACY: There is not going to be an
8 objection to it.

9 MS. WHITE: Okay.

10 THE COURT: All right. If there is some matter
11 of evidence that you know there is an objection to,
12 I'll be glad to look at it early on. Apparently
13 there is not, but if there is, bring it to my
14 attention, I'll be glad to do so.

15 MS. WHITE: In that case, if there is no
16 objection to that, then we will just be dealing with
17 this and sequestering and that will be it. No
18 objection to the searches either.

19 THE COURT: I want to give you a chance to
20 respond. I know the solicitor has just sort of had
21 her final say on -- she took a couple of the minutes
22 to mention Smith, Lopez, Pierce, etcetera. And if
23 you want to have a similar opportunity, I'll give
24 you a chance to sum up, and then we will take a
25 break. I'll sort of marshall my thoughts together

1 and come back and announce my decision preliminarily
2 on these motions.

3 MR. TREACY: Thank you.

4 Your Honor, first of all, let me -- forgive me
5 if I ramble or I'm not as organized as I should be.
6 Let me start by saying that it is not our position
7 that Battered Child Syndrome is not a legally
8 recognized medical diagnosis. Clearly it is. The
9 courts have recognized it. The medical
10 professionals have recognized it.

11 My argument to Your Honor is that simply
12 because Battered Child Syndrome as recognized is
13 admissible for pathologists to get on the stand and
14 refer to a child's injury as Battered Child
15 Syndrome, I'm not suggesting or moving to suppress
16 his ability to do that. What my argument is to you
17 is that under 404, Lyle analysis, as it is set forth
18 in Pierce, that simply because it is described as
19 Battered Child Syndrome does not relieve the court
20 from having to make decision as to each prior bad
21 act of whether it appropriately is admissible under
22 Lyle.

23 It is our position that, as indicated in the
24 opinions of Pierce, Cutro, Smith, that in a homicide
25 by child abuse case, prior bad act evidence of bad

1 acts that have no similarity to the act that is
2 opined as causing the death should not be admitted
3 when they don't have that necessary requisite
4 similarity under Lyle, because all it does is
5 prejudice the jury, and clearly overwhelmingly
6 prejudices the jury against my client. I'm going to
7 be faced with arguing from trying to get the jury to
8 see the evidence, whether there is evidence or not
9 of homicide, through this just overwhelming
10 distraction that clearly he committed some child
11 abuse. And they are going to be so distracted by
12 these acts of child abuse, that could not have
13 caused her death, they are just going to -- I mean,
14 how in the world is he supposed to get a fair trial
15 on the homicide case?

16 I realize that it would be admissible if what
17 he was looking at is just the great bodily injury
18 charge, because it's going to -- you are talking
19 about -- there is a question of fact for them to
20 decide whether it's serious enough or not, whether
21 those acts are serious enough to be considered, acts
22 that he could be convicted of the felony child abuse
23 for. That was the point in my motion for severance.

24 If we are going to have both of these charges,
25 and Your Honor was clear in his ruling that you

1 believe -- I think your ruling was, in fact, one is
2 going to be instructed as a lesser included of the
3 other, but to interpret your ruling -- you are --
4 part of your reasoning was is that you think it
5 would be a lesser included, so you are going to --
6 they are going to be given homicide by child abuse,
7 great bodily injury upon a child, and we will have
8 to get later on into the case about whether or not
9 they get another lesser included of child abuse and
10 neglect, if it's not felony child abuse. That is
11 the overwhelming prejudice I'm facing. And under
12 404(b), I'm asking Your Honor to say that the acts
13 that are not similar enough to then to cause of
14 death do not come in.

15 If Your Honor is going to rule that the jury
16 could very well find that those are the injuries
17 that Dr. Woodard testified to could very well be
18 acts that prove guilt of felony child abuse, and
19 that's what Ms. White was getting at, was asking him
20 do you think that scarring of the skin is a serious
21 and permanent disfigurement. And I think -- I get
22 the sense that that's where we are going with this,
23 that those things are going to come in. What I'm
24 asking, Your Honor, is that there are other bad acts
25 that were not brought up by Ms. White in this

1 testimony. You have heard some of them, but it
2 wasn't addressed with Dr. Woodard. Restraining her
3 in her harness, making her run laps around the
4 house, things of that nature, that clearly don't
5 have any causal connection to homicide by child
6 abuse and don't have any causal connection to great
7 and bodily injury upon a child. I would at least
8 ask that those types of bad acts be suppressed.

9 THE COURT: All right. Thank you, sir.

10 Number one, I would like you to respond to that
11 later argument, and do so briefly. And it seems to
12 me to be an argument that beyond what's been brought
13 out today, is referenced yesterday, the laps, other
14 things that were not directly related to injury that
15 would come either as direct evidence to the cause of
16 death or to the infliction of great bodily injury.
17 The harness, for example. I would like to hear your
18 position.

19 MS. WHITE: I would ask that those do come in
20 under all Lyle and the Battered Child Syndrome. If
21 you look at the definition of the Battered Child
22 Syndrome in Kent's article, it talks about the -- it
23 shows evidence of neglect, poor skin hygiene,
24 multiple soft tissue injuries, malnutrition,
25 subdural hematomas. All of that supports the

1 diagnosis of Battered Child Syndrome, and certainly
2 all of it goes to intent. All of it goes to lack of
3 accident. All of it goes to a pattern to
4 intimidate, to subdue, treat this child as if she is
5 a nonentity, basically. And I think that evidence
6 is just as telling under the Battered Child Syndrome
7 and Lyle as the others.

8 THE COURT: Let's take about a ten minute
9 break. I'll come back and announce my ruling on
10 these preliminary matters, and then hopefully we
11 will have a few minutes to take a break before we
12 bring the jury in.

13 MR. TREACY: Your Honor, in response to the
14 court's job, trying to schedule things, after you
15 make your ruling, I would respectfully ask that I
16 have a few minutes to discuss your ruling with my
17 client to explain his options to him at that point.

18 THE COURT: Very good.

19 MR. TREACY: Okay.

20 THE COURT: All right. We will be in recess
21 for ten minutes, please.

22 (Proceedings recessed)

23 (Proceedings reconvened)

24 THE COURT: I'll address the motions that are
25 before the court and then we'll address the motion

1 to sequester.

2 I appreciate the fact both sides have made what
3 I believe to be very good arguments and advocated
4 their sides very well.

5 The first thing I would like to address is the
6 rulings, both yesterday and today, are based on what
7 I perceive from careful study to be the law in South
8 Carolina. And I understand this is an area,
9 particularly in the area of the homicide by child
10 abuse and infliction of great bodily injury upon a
11 child, is somewhat of a novel area and there is not
12 a great deal of consistent firm precedent in the
13 area, both as to the substantive law and evidentiary
14 issues as well. Oftentimes the Supreme Court speaks
15 with a divided voice, and my ruling is not based, as
16 able defense counsel would perhaps suggest, hedging
17 bets on a change in the makeup of the State Supreme
18 Court.

19 I do reiterate my decision yesterday to permit
20 both charges to be presented. They arise out of the
21 same factual scenario. They were presented by the
22 same type of general evidence. And I understand the
23 defendant's position of the argument of prejudice by
24 allowing both indictments to be presented. Even if
25 I granted the motion to sever, we would still be

1 left with the thorny evidentiary issue of the
2 admissibility of the abuse in general and the same
3 evidence, the same evidentiary obstacle would have
4 to be addressed. And I understand that sense of
5 prejudice, but I do not believe it rises to a level
6 of legal prejudice. Oftentimes a court is
7 confronted with extreme and bad facts. Horrible
8 crimes occur, and that's the regrettable reality of
9 life, but I don't believe the Constitution requires
10 that I insulate a fact finder, i.e. the jury, from
11 evidence which reflects that truth. There are
12 certainly times to be sure when evidence must be
13 excluded because of its legally prejudicial nature.
14 I do not believe that the evidence the State seeks
15 to enter is legally prejudicial to the defendant.

16 I would further point out, as I have again
17 studied the cases that were presented, State
18 v. Pierce, for example, a case on which the
19 defendant relies. State v. Pierce made the clear
20 finding that there was no finding by the trial judge
21 and there was no evidence in the record of a clear
22 convincing nature that the defendant in that case
23 inflicted the injuries.

24 Also in the Pierce case there was never an
25 attempt in the lower court to admit the evidence

1 pursuant to the Battered Child Syndrome.

2 Under State v. Smith, another case on which the
3 defendant relies, I do believe it is significant
4 that there are two separate victims. But beyond
5 that, when the case is carefully reviewed, the
6 Supreme Court points out in part, "there was no
7 evidence appellant, rather than Yolanda, committed
8 the homicide offense. In fact, there was no
9 evidence appellant had ever hit Dwitasia."

10 I believe these cases factually are easily
11 distinguished from what's been presented here thus
12 far. The Battered Child Syndrome, undisputed by
13 both sides it is recognized medically, and has been
14 recognized both in South Carolina, and Lopez, and
15 throughout this country as a recognized syndrome and
16 evidence regarding that is admissible.

17 I also recognize that Battered Child Syndrome
18 in 404(b) have some interplay intention between the
19 application of the two, an application that's
20 perhaps not always easily resolved. 404(b) I
21 recognize is a rule of exclusion. It does require
22 initially the court make a finding that the evidence
23 of other acts is of a clear and convincing character
24 and has been established to that standard, and if
25 admissible, is limited for a limited purpose, as set

1 forth under 404(b), such as intent, common plan or
2 scheme, absence of mistake or accident.

3 Much of the evidence bears directly upon one of
4 the two indictments. Only a small portion of what
5 has been presented thus far would fall outside of
6 the two indictments and constitute 404(b) evidence.

7 I initially find that based on what's been
8 presented, such as Dr. Woodard's testimony, that
9 evidence of the Battered Child Syndrome would be
10 admissible in this case and perhaps 404(b). I'll
11 have to address 404(b) issue and assess the initial
12 clear and convincing standard later outside the
13 presence of the jury. I'm well aware of the
14 defendant's statement, but I am told, and apparently
15 from what the defendant is already well aware of,
16 there will be additional evidence. I'm simply not
17 aware of that at this point, but I need to address
18 that myself and I will put that on the record at the
19 appropriate time. It may well be that the evidence
20 is admissible both under the Battered Child Syndrome
21 and 404(b). At this time, however, I'm limiting the
22 admissibility to the Battered Child Syndrome.

23 We will revisit 404(b) upon a further factual
24 finding sufficient for me to determine admissibility
25 under 404(b) of clear and convincing evidence. If I

1 determine that the clear and convincing standard has
2 not been met, we may need to revisit the issue again
3 on multiple grounds.

4 I next address the Jackson v. Denno issue on
5 the voluntariness of the statement. There is by
6 stipulation no issue as to the statements made on
7 October the 20th.

8 I initially find that the voluntary trip to the
9 sheriff's office on the 25th of October did not
10 constitute custodial interrogation, and there is no
11 issue of any Miranda or Fifth or Sixth Amendment
12 privilege at that time.

13 Subsequent in the morning, or early afternoon,
14 the defendant was advised of his rights. I find
15 based on the record before me that he was properly
16 and fully advised of his both Fifth and Sixth
17 Amendment Rights. He understood those rights and he
18 freely and voluntarily waived those rights.

19 I have considered all facts and circumstances,
20 the presentation on both sides, including, but not
21 limited to, the time factor from his arrival, to the
22 time the final statement was signed, and I am
23 persuaded by the requisite standard that the State
24 has established that the statement, both verbally
25 and signed by the defendant, were given freely and

1 voluntarily, not the product of coercion or exertion
2 of any improper influence.

3 Based on the record before me, to the extent
4 that I find the facts on the admissibility level, I
5 find no credible evidence that the defendant was
6 deprived the restroom breaks or drink, and that his
7 rights were properly satisfied.

8 I further find no credible evidence that law
9 enforcement lied or misrepresented the status of
10 information that had been gained from his wife
11 Michelle. In any event, even if the defendant was
12 so informed or perceived that Michelle had
13 implicated herself or had made incriminating
14 statements against this defendant, such evidence
15 would not necessarily render an otherwise voluntary
16 confession inadmissible. Both the United States
17 Supreme Court and the South Carolina Supreme Court
18 have held that misrepresentations of evidence by
19 police, although a relevant factor, do not render an
20 otherwise voluntary confession inadmissible. The
21 law is very clear in that a defendant's will is not
22 overborne when police misrepresent the facts leading
23 him to believe that information of his guilt is
24 greater than it actually is. So even if the record
25 supported that finding, and find it does not, but

1 even in that event it would be a relevant factor, it
2 would not require the statement to be deemed
3 involuntary.

4 The same showing is made in terms of foundation
5 and advisement of his rights. I would admit the
6 statements of the defendant.

7 Those are my various rulings on the pretrial
8 matters. The record will reflect the defendant's
9 exception to my ruling.

10 The final issue we need to address then, we
11 will take a short break, is that of sequestration.
12 And I believe that's the defendant's motion, and I
13 would like to know the State's position, if the
14 State objects to sequestration of witnesses.

15 MS. WHITE: Your Honor, we would ask that there
16 not be any sequestering. I have talked to all of
17 the witnesses obviously that I'm going to call, but
18 some have been by phone. This monitoring, it would
19 be very difficult.

20 Second of all, if you did decide to sequester,
21 Your Honor, I would ask that Detective Carpenter,
22 who is the detective on the case, that might get to
23 stay in, because he is the forensic I.D. person. In
24 the sheriff's department, they divide it. The
25 detective talks to people. The other people do the

1 crime scene. So I need each of them here.

2 Your Honor, I would also ask that -- we have
3 several family members who are going to be
4 testifying. Some I'm not sure if I'm going to call,
5 but several grandparents and step-grandparent that
6 are going to be called. Minor Child mother Angie,
7 her dad would be one. The defendant's father and
8 stepmother and his mother.

9 I understand that the -- actually there is some
10 kind of typo in the code and I was unable to sort
11 this out, but it does say -- 16-3-1550, it says a
12 person may not be sequestered from a proceeding
13 adjudicating an offense of which he was a victim.

14 Then if you go to 16-3-1520, it defines victim
15 as includes the family members of a crime victim who
16 is a minor or a homicide victim.

17 And then you go to the supplement, and that's
18 where you get some kind of typo, and I don't know.
19 It says that there is a 1998 change to this defining
20 victim also includes an individual's spouse, parent,
21 child, or lawful representative of the victim who is
22 dead. So that's a little different from the
23 definition in the main volume. But what I mean by
24 typo, they say that Sections 1, 2 and 3 are changed
25 in the main volume, and there are only two sections,

1 and I think they have got a wrong code number. I
2 have never seen it happen before, and you have to
3 look at it and understand what I'm talking about.
4 But, at any rate, if that has been changed and
5 victim no longer means a family, it means a spouse,
6 parent, child or lawful representative of a victim,
7 these people do not technically meet the definition
8 of that. However, in this case where the parents
9 are the ones being tried, they are the nearest
10 relatives, and I would just ask that the aunts and
11 uncles and grandparents, they have waited a long
12 time and they are very adamant with me that they
13 just absolutely have to stay in here to find out
14 what happened to their grandchild, and I would ask
15 that they be allowed to do that. I'll hand these
16 up. This is the main volume, and then that was the
17 supplements and notes from the supplement, but it is
18 unclear.

19 THE COURT: How many of these family members
20 are going to testify?

21 MS. WHITE: Your Honor, I have several on the
22 list. I'm actually planning on calling four, which
23 would all be the grandparents. Three grandparents
24 and a step-parent grandparent.

25 THE COURT: Well, the aunts and uncles,

1 etcetera, will not be subject to the rule anyhow.

2 MS. WHITE: And I have them on my witness list,
3 because they did see some things, depending -- I'm
4 not planning on calling them in my case in chief.
5 But, you know, if the defendant got up and said
6 something and they knew something to the contrary,
7 then I would want to call them, but I'm not planning
8 on calling them in my case in chief.

9 THE COURT: What about the family members?

10 MR. TREACY: Your Honor, my motion addressed
11 the issues that I would want it limited to
12 grandparents. I mean, I wanted them beyond
13 grandparents. My motion doesn't ask that the
14 grandparents be excluded, so I have no problem with
15 Mr. Carter's stepmother, father, mother and Angie
16 Carter's parents. I have no problem with that.

17 And as the other family members aren't
18 testifying, I don't have a problem -- in her case in
19 chief, I don't have a problem with them staying in
20 here. But my main concern were other ones, not
21 them.

22 MS. WHITE: Oh, Your Honor, one other person.
23 I would ask that Dr. Woodard be exempt from that,
24 because I am going -- if they present any kind of
25 expert testimony or any other witnesses, I'm going

1 to need him to listen to that to help me with cross.

2 THE COURT: And I would reciprocate. If there
3 is a witness on the defense side, an expert that
4 goes to that issue, I want that witness privy to the
5 testimony that deals with that issue.

6 MS. WHITE: Yes.

7 THE COURT: It goes both ways.

8 Under the rule sequestration is committed to
9 the discretion of the court. I don't know if there
10 is really an objection to this, based on what I have
11 heard.

12 This is a fact-intensive case, coupled with the
13 fact that there are family members, extended family,
14 who are very interested in the case, I'm sympathetic
15 to that. I'm well aware of the Victims Rights Acts
16 which grants certain rights to be present during
17 court proceedings. That must be weighed against the
18 right of any individual to a fair and impartial
19 trial.

20 I'm going to grant the motion in part. The two
21 officers that you requested remain present. There's
22 a very valid reason for that. I would permit that.

23 I will also permit the grandparents to be
24 present.

25 Anyone else beyond the grandparents who you

1 anticipate to be a witness in your case in chief
2 would need to be excluded until his or her testimony
3 is received.

4 If a witness is not planned to testify during
5 your case in chief, but is a potential reply
6 witness, such a witness may remain in the courtroom,
7 if only a potential reply witness.

8 So some of the rules of sequestration, we are
9 excluding the two officers. Dr. Woodard, if there
10 is any testimony that relates to injuries that bear
11 upon in any way, directly or indirectly, with the
12 Battered Child Syndrome. And the grandparents.

13 And then I know you have a host of other
14 individuals here. I know that that's a difficult
15 thing to monitor, but I'm going to ask you and your
16 office to do the best you can. I don't know who
17 these good people are on either side, and I'm going
18 to ask counsel on both sides to assist me. And if
19 we have someone who comes in during a break
20 inadvertantly and is here only a brief period, we
21 can work through that very easily, because I know
22 it's going to be difficult when you are focused this
23 way and you are trying a case and the pressures of
24 trying a case. I don't mean to put that burden that
25 you have got to look behind you every few seconds,

1 but let's make a good faith effort to do so and
2 honor sequestration at that point, so I'm granting
3 the motion to that extent.

4 Now, do you have anybody on your side who's a
5 potential expert, Mr. Treacy, that you would like to
6 exempt from the ruling?

7 MR. TREACY: No, sir.

8 THE COURT: I know we are running a little bit
9 behind, but let's take a short break so we will be
10 on the same clock as the jury, and we will start
11 back in, let's say, at 11:20. 11:20, please. Thank
12 you.

13 (Proceedings recessed)

14 (Proceedings reconvened)

15 THE COURT: Well, we are on the record in Mr.
16 Carter's case.

17 I was approached possibly an hour ago by the
18 defense counsel requesting an opportunity to discuss
19 the situation with his client, Mr. Carter, and was
20 recently informed by counsel that Mr. Carter wishes
21 to tender a plea of guilty to both indictments, and
22 we will proceed with the guilty plea voir dire at
23 this time.

24 If you will approach, please.

25 If you want to put anything further on the

1 record at this time, you may. I'd like to know if
2 there are any negotiations at this point.

3 MS. WHITE: Your Honor, the defendant is
4 pleading guilty to 763, which is great bodily injury
5 upon a child. I have crossed out (B). He is
6 pleading pursuant to (A).

7 He is also pleading under 1204 to indictment of
8 homicide by child abuse. Again, I want to make it
9 clear for the record that is (A). We do not have
10 any negotiations. I do agree in any guilty plea
11 they ought to get some consideration if somebody
12 pleads guilty and saves the State time, but this is
13 a straight-up plea.

14 THE COURT: Is that your understanding, Mr.
15 Treacy.

16 MR. TREACY: Yes, Your Honor, that is.

17 THE COURT: Now, Mr. Carter, you are under oath
18 for purposes of your earlier testimony. I'm going
19 to put you under oath again for purposes of this
20 guilty plea, the questions that I will ask you, sir.
21 If you will raise your right hand.

22 DEREK SHANE CARTER, having been first duly
23 sworn, testified as follows:

24 THE COURT: Mr. Carter, I have a series of
25 questions that I'm going to ask you, both as to your

1 background; to your indication, as reported by your
2 attorney, that you wish to plead guilty to these
3 charges, and a series of questions about that,
4 including your legal rights.

5 If at any point during the questioning you
6 don't understand the question, I'll be glad to
7 repeat it as often as necessary to ensure that you
8 do understand.

9 If at any point during my questioning that you
10 wish to take additional time to consult further with
11 your attorney, you may do so as well. Just let me
12 know and I'll accommodate any such request. Do you
13 understand that, sir?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Mr. Carter, how old are you, sir?

16 THE DEFENDANT: Thirty.

17 THE COURT: How far did you go in school?

18 THE DEFENDANT: Twelve years.

19 THE COURT: You graduated from high school,
20 correct?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And can you read and write?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Have you ever been treated for any
25 mental or emotional health problems?

1 THE DEFENDANT: No, sir.

2 THE COURT: At this time are you under the
3 influence of drugs, alcohol or medicine?

4 THE DEFENDANT: No, sir.

5 THE COURT: These two particular charges that
6 are included in these two indictments, do you
7 understand these charges?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And have you discussed these
10 charges and the elements of each charge with your
11 attorney Mr. Treacy?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you understand that the offense
14 of homicide by child abuse or neglect under state
15 law carries a penalty of not less than twenty years,
16 but up to life imprisonment?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you further understand that the
21 charge of infliction or allowing of infliction of
22 great bodily injury upon a child carries a penalty
23 of up to twenty years in jail? Do you understand
24 that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Are you satisfied with the services
2 of your attorney Mr. Treacy?

3 THE DEFENDANT: Yes, sir, I am.

4 THE COURT: Do you have any complaints of any
5 kind that you wish to make against him?

6 THE DEFENDANT: No, sir.

7 THE COURT: It's been reported to me, sir, that
8 you have indicated to Mr. Treacy that you wish to
9 waive your trial rights and plead guilty to both of
10 these charges, is that correct?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: The decision to plead guilty, sir,
13 as to both of these indictments, is that your
14 decision?

15 THE DEFENDANT: Yes, it is.

16 THE COURT: Has anybody forced you into that
17 decision?

18 THE DEFENDANT: No, sir.

19 THE COURT: Do you feel like Mr. Treacy in any
20 way has coerced you, or influenced you, or forced
21 you to make this decision?

22 THE DEFENDANT: No, sir.

23 THE COURT: And are you pleading guilty of your
24 own free choice?

25 THE DEFENDANT: Yes, I am.

1 THE COURT: Has anybody made any promises to
2 you as to what the sentence of the court would be if
3 you pled guilty?

4 THE DEFENDANT: No, sir.

5 THE COURT: And are you pleading guilty because
6 you are guilty?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Carter, by pleading guilty, you
9 give up all of your trial rights, because if you
10 plead guilty, there won't be a trial. Do you
11 understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: What I want to do is review with
14 you very carefully some of the more important or
15 fundamental trial rights that would apply to you if
16 we proceed with this trial.

17 Number one, at trial, you are presumed
18 innocent. And as you stand before me now, you are
19 presumed innocent.

20 At trial the burden of proof is on the State to
21 prove you guilty of each element of the offense
22 beyond a reasonable doubt.

23 Should the State fail to meet that burden of
24 proof, it would be the duty of the jury to find you
25 not guilty. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: At trial you would have the right
3 with your fine attorney to question the witnesses
4 against you, to confront those witnesses. Do you
5 understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Your attorney would also have the
8 right to assert any defenses that may apply to these
9 charges, perhaps to reduce them, or eliminate them
10 all together. Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You would be giving up that right
13 as well.

14 You also have the right to object to the
15 introduction of any evidence or testimony.

16 You have the right to challenge the search and
17 seizure of any evidence. But if you plead guilty,
18 you give up your right to object or challenge
19 evidence in any way. Do you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: I'll give you an example of that,
22 Mr. Carter. There has been a number of evidentiary
23 issues which we have addressed, both yesterday and
24 today, on what your attorney has made very forceful
25 and persuasive arguments.

1 If you plead guilty, you cannot challenge those
2 rulings on appeal. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: A guilty plea gives up and waives
5 any right that you have to challenge any issue in
6 that regard. Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You have the right to remain
9 silent, sir, because there is no burden on you.

10 At trial you are not required to prove or
11 disprove anything. You have the ability simply to
12 remain silent and not testify. Do you understand
13 that you have that right?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: On the other hand, sir, if you so
16 choose, you could testify in your own defense.

17 Further, you could bring in witnesses on your
18 own behalf and the court would assist you in that
19 regard. Do you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And you have the right to a jury
22 trial. As you know, we have selected a jury in this
23 case. The jury has been here for an hour and a half
24 and is ready and able to begin hearing the evidence
25 in this case. But if you plead guilty, the jury

1 will not hear this case and you will be giving up
2 your right to a jury trial. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Have you understood all of these
5 rights that I have addressed to you?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And have you carefully discussed
8 these rights and all of your trial rights with your
9 attorney?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And do you understand that if you
12 plead guilty, you will be giving up forever all of
13 these trial rights in connection with these two
14 particular charges?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Knowing that, do you still wish to
17 plead guilty, or do you want a jury trial?

18 THE DEFENDANT: I'm pleading guilty, sir.

19 THE COURT: Now, I would like the State to
20 briefly state a factual presentation for the record.

21 MS. WHITE: Yes, sir.

22 THE COURT: I'm aware of a substantial part of
23 the State's evidence, based on what's been presented
24 during the preliminary motions. So with that in
25 mind, I'll hand it over to you, solicitor, to give a

1 brief overview of the factual presentation.

2 Please pay close attention to what the
3 solicitor says, Mr. Carter.

4 MS. WHITE: Your Honor, I would ask that the
5 prior testimony be incorporated into this plea,
6 since you have heard that.

7 Basically, Your Honor, between the dates of
8 April and October of 2000, this child, who was four
9 years old, Minor Child suffered repeated head
10 injury. She ended up dying. She was brought into
11 the hospital on October 14th and died three days
12 later.

13 As to the great bodily injury, she had numerous
14 marks and injuries on her, including cigarette
15 burns, malnutrition, injuries to her feet, injuries
16 to her genital area, and so forth. These did cause --
17 as you heard Dr. Woodard, that he did say that these
18 rose to the level of the definition of great bodily
19 injury.

20 These occurred in Anderson County, South
21 Carolina.

22 THE COURT: Mr. Carter, is what the solicitor
23 said and based on the records that's been presented
24 by way of your prior statement to the police and
25 otherwise, is that information substantially true

1 and correct?

2 MR. TREACY: Your Honor --

3 THE COURT: Oh, go ahead.

4 MR. TREACY: I would simply interject at this
5 point to offer the facts as related by the solicitor
6 are correct, that those are the facts that would be
7 presented in the case against both Derek Shane
8 Carter and Ila Michelle Carter, his wife. And we
9 would -- he would agree with those facts and ask for
10 the opportunity to present to Your Honor some
11 mitigating circumstances and exactly what -- he does
12 not concede his knowledge to all of that, but he
13 does concede his knowledge to enough of it certainly
14 to satisfy these two charges.

15 MS. WHITE: Your Honor, now I'm not doing an
16 Alford Plea here. I do want him -- I mean, I
17 understand what you are saying in mitigation, but I
18 think for this plea we need to make sure we have got
19 a record of him acknowledging --

20 MR. TREACY: He certainly acknowledges.

21 THE COURT: Mr. Carter, you indicated a few
22 minutes ago that you pleading guilty because you are
23 guilty. Is that a truthful statement?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And I understand -- I'm going to

1 listen further and very carefully to you and your
2 fine attorney as to areas of mitigation you believe
3 that would impact the court's decision in
4 determining a proper and appropriate sentence.

5 In the first instance, however, the factual
6 presentation both provided by you as to your
7 knowledge and involvement given to the police and
8 the other evidence that's been part of this record,
9 is that information substantially true and correct?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Is that the basis on which you wish
12 to plead guilty?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Now, I have both sentence sheets
15 here and they indicate that you have signed on the
16 portion indicating your desire to plead guilty. Did
17 you, in fact, sign each of these sentence sheets?

18 THE DEFENDANT: Yes, sir, I did.

19 THE COURT: And did you do so of your own free
20 will?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you understood the questions
23 that I have asked you?

24 THE DEFENDANT: Yes, I have.

25 THE COURT: Have you answered those questions

1 truthfully?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And is it your desire of your own
4 free will to plead guilty to both of these charges
5 at this time?

6 THE DEFENDANT: Yes, sir, it is, sir.

7 THE COURT: Would you like any additional
8 opportunity to consult further with your attorney?

9 THE DEFENDANT: No, sir.

10 THE COURT: Do you have any questions of me,
11 sir, at this time?

12 THE DEFENDANT: No, sir.

13 THE COURT: Mr. Carter, I'll accept your guilty
14 plea with respect to each indictment.

15 You pled guilty freely and voluntarily, with
16 advice of excellent counsel with whom you say you
17 are satisfied.

18 You have been fully advised of your rights,
19 informed of your rights, and you have waived those
20 rights of your own free choice.

21 I further find there is a factual basis for the
22 plea with respect to each indictment.

23 I do accept the plea in each case at this time.

24 Having accepted the plea, the only matter
25 remaining is that of sentencing, and I'm going to

1 discharge the jury.

2 Solicitor, if you have any family members that
3 want to stand with you during sentencing or the
4 officers involved in investigating this case, they
5 have a right to do so.

6 The same privilege is extended to the
7 defendant. Mr. Carter, if he has anyone that would
8 like to stand with him during sentencing.

9 It will take me approximately three minutes to
10 discharge the jury and I'll return and we will
11 proceed with sentencing at that time.

12 (Whereupon the judge discharged the jury panel
13 in the jury room)

14 (Proceedings recessed)

15 (Proceedings reconvened)

16 THE COURT: Mr. Carter, I just want to make
17 sure that you understand a couple of points about
18 these guilty pleas that you have entered. The
19 offenses are both considered violent. Do you
20 understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And you have discussed that with
23 your attorney?

24 THE DEFENDANT: Yes, sir, I have.

25 THE COURT: And also the homicide by child

1 abuse and neglect is considered a most serious
2 offense under South Carolina law.

3 And I want you to understand fully that a
4 conviction for a most serious offense has important
5 consequences attached to it. If in the future you
6 are convicted of a second or subsequent most serious
7 offense, the court would have no discretion but to
8 sentence you to life without the possibility of
9 parole. Do you understand that, sir?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: I'd like to hear first from the
12 State. And if there is a spokesperson from the
13 family, I'd be glad to hear from any such person or
14 the investigating officer.

15 MS. WHITE: Your Honor, you have heard a good
16 bit of the evidence. However, the additional
17 evidence, there were neighborhood children and other
18 people who were in and out of the house. We made a
19 video that I discussed earlier. It's too long for
20 you to watch during a guilty plea, but you see the
21 progression. Minor Child is completely normal,
22 healthy, running around, cute little personality for
23 the first two years of her life when her mother was
24 dead. And then the defendant marries Michelle in
25 June of '99. And by October she is standing in the

1 video. She's completely lifeless. She's completely
2 emotionless. She has a bruise on her forehead, on
3 her face. Her nose and mouth are messed up. She's
4 got a bruise under her eye, and she's just standing
5 there looking at the camera, and all of the sudden
6 she urinates on herself. And the video just kind of
7 goes downhill from there.

8 The whole year of 2000, there are probably
9 fifteen or twenty family videos and the child is in
10 one, and that's all. And the reason, according to
11 the children in the home, is that she was locked in
12 the bathroom and chained. According to the brother,
13 she spent about ninety percent of her time back in
14 that bathroom. And I had no idea until I went out
15 to the scene what the bathroom looked at, but I
16 would like, if you don't mind, to look. We had
17 drawn the dimensions of the bathroom on this floor.
18 This was the cabinet in the half bath. This was the
19 toilet in the half bath. And this, Your Honor, is
20 where the child laid in a diaper. She had no shirt
21 and she was chained in. This is where this four
22 year old child lived.

23 She also had numerous injuries. I would hand
24 the pictures up. After her first injury she was
25 cross-eyed and had coordination problems. That's

1 how Minor Child looked then. I'll show you a picture
2 of her before. This was Minor Child at the beginning
3 of the marriage.

4 Your Honor, according to the neighbors, they
5 didn't see her much in the last year. The family
6 would be going off in a van and so forth, but
7 Minor Child would be nowhere to be found.

8 According to the neighbors, she would be
9 outside in scorching heat in the summer. She would
10 have to keep her same diaper on sometimes for days.
11 They could tell because the rip, feces would be
12 going down her leg and flies would be flying around
13 her and she would just stand motionless out in the
14 heat.

15 They would play fetch with Minor Child where
16 they would throw a ball. She would have to go run
17 and get it and bring it back, and she would be
18 crying the whole time.

19 She had numerous marks and injuries all over
20 her, according to some of the children in the
21 neighborhood. They would pick her up by the neck
22 and slam her against walls and so forth.

23 The family would eat in the kitchen, and there
24 were four chairs in the kitchen. Two for the
25 adults, two for the other children, and Minor Child

1 would have to stand nearby, according to Drew who
2 was another child in the house. She would stand and
3 get something that he thought smelled like cat food,
4 he didn't know what it was, and she would have to
5 eat to the count of five. If she didn't eat and
6 swallow each bite within the count of five, she
7 would have to bend over and get whipped or be
8 smacked up side the head.

9 THE COURT: Hold on a second.

10 MS. WHITE: Let's bring her a chair, please.

11 (off the record)

12 (back on the record)

13 MS. WHITE: This is the bucket that she stood
14 in with ice and water.

15 This is the fence that was put up so that she
16 couldn't reach the sink.

17 Clorox was placed in the toilet.

18 According to the neighbors, she was hungry and
19 thirsty all the time.

20 MR. TIMOTHY D. HARMON: My name is Timothy
21 D. Harmon, Angie's father, the biological
22 grandfather.

23 How do I get this out? I just want to say that
24 I even -- when I heard stuff in the background being --
25 her being cussed out and everything, saying "do I

1 have to beat the hell out of you to make you mind
2 me?"

3 I also tried to visit frequently. When I
4 called, they would be nice to me, but behind my back
5 they were telling Kaye, the one that just fell on
6 the floor, my ex-wife, she would be talking to them
7 and she said that he would make comments that I was
8 harassing him. He even told me that if I didn't
9 back off, that he would disappear like he had before
10 and I would never see her again. I had to really be
11 careful, but I think he knew that I was looking for
12 something, because the year that she passed away,
13 around May and June of that year, I did get to see
14 her twice. She had crossed eyes. She was frail,
15 just real skinny. I said "what has gone wrong with
16 her?" And they said "it's a special diet that the
17 doctor said that he had to put her on because of
18 lupus." I sat there and I said "are you sure that
19 the headache -- I mean "the eyes crossed isn't from
20 the injury that you said she had when she collided
21 back in April?" He said "no, it was lupus."

22 Every time she had a bruise, it was the lupus.
23 Everything was explained off to where, you know --

24 And whenever I got to see her, it was under
25 constant supervision, but that was the only say I

1 got to see her, which was twice. I was not allowed
2 to see her on her birthday, July the 16th the year
3 that she passed away, because she was being
4 punished. I told him not to punish her with me.

5 I also asked him, because he would -- both of
6 them would complain about how they could not control
7 her. And I told him in two cases -- I remember two
8 occasions I remember exactly that in multiple other
9 cases beside that -- occasion, shall -- I said
10 cases, but on occasions that I told him "if you
11 don't want her, give her to me," and he told me to
12 back off.

13 He took the only extension to my daughter. He
14 wouldn't let us see her.

15 He says that he doesn't know what was going on
16 in the thing, and I know he's pleaded guilty, but
17 all I know as a father, I know everything whenever
18 my kids were with their mother on visitation,
19 because we were divorced, or if they were at school,
20 if they got one bruise, I investigated. If it was
21 one scratch or anything, I made sure I got down to
22 it.

23 In my viewpoint I may not -- you know, he may
24 not have administered the blow, but in my viewpoint
25 he is just as responsible, because he is responsible

1 for that four year old. She looked at him for
2 safety and comfort and protection. When I went over
3 there to see her, I'd say "come to grandpapa," and
4 she would run and jump in my arms and hug me for as
5 much as an hour at a time. I thought it was because
6 she was missing me. Now I realize that I was
7 probably the only decent human being that she was
8 able to be with, maybe, but she knew that she could
9 trust me. And I resented the fact that he accused
10 me in his allegations that, because she talked to me
11 that she would wet on the floor. I'm beginning to
12 believe that she wetted the floor out of retaliation
13 because she wanted to be with me. But I sat there
14 and -- he's just as much as responsible because he
15 is responsible for her welfare and he should have
16 protected her. So, you know, it's real -- to me
17 it's something that not to be taken lightly.

18 THE COURT: Mr. Harmon, thank you, sir. I
19 appreciate your comments.

20 MR. TIMOTHY D. HARMON: Thank you.

21 MS. WHITE: That's all for the family, Your
22 Honor.

23 THE COURT: Mr. Treacy, I'll be glad to hear
24 from you, sir. And I appreciate your fine
25 representation of Mr. Carter under very difficult

1 circumstances. You are to be commended for your
2 representation of Mr. Carter, and I thank you.

3 I'll be glad to hear from you and I certainly
4 will be glad to hear fully from Mr. Carter.

5 MR. TREACY: Your Honor, I appreciate your
6 comment. Obviously this is not a position I'm
7 enjoying at the moment.

8 On behalf of Mr. Carter, what I have discovered
9 in the course of thorough review of all the evidence
10 in the case and what we were anticipating bringing
11 out at trial were the following circumstances that I
12 believe were significant in mitigating Mr. Carter's
13 case versus his wife's case.

14 Derek Carter lost his wife, Angie, to lupus in
15 1998, I believe.

16 THE DEFENDANT: 1999.

17 MR. TREACY: In 1999. And three months later,
18 after burying his wife, he had Minor Child his young
19 daughter, he met Michelle. Michelle had two older
20 boys. They fell in love, married, and what he
21 witnessed was for a considerable period of time it
22 was Michelle bonding very well with Minor Child

23 Derek worked fifty to seventy hours a week. He
24 has no prior record. He worked at Plastic Omnium
25 here in Anderson. And what he observed was a strong

1 disciplinarian, in his mind, in his wife, and that
2 became progressively worse. And he and Michelle
3 fought about her treatment of Minor Child And, in
4 fact, at one point he threatened to leave. He had
5 her packed in the van and was ready to leave.

6 This is going on at the same time he has an
7 understanding from what he's been told that his
8 daughter had medical problems. He's not a highly
9 educated man. And he also, without his knowing it,
10 he did not know a lot of things about Michelle's
11 background. He did not know, until I told him, that
12 before he and Michelle were married, she was
13 committed to the eight floor of Anderson Hospital
14 for major depression. There are a lot of things
15 about her that he did not know.

16 In reviewing statements from interviews of
17 Michelle's family, it's clear that she was a very
18 manipulative person. The children gave statements
19 that the mother would tell them to lie about how
20 things were happening with Minor Child And what
21 Derek was getting when he came home from work was
22 what Michelle was telling him and what the children
23 were told by Michelle to tell him.

24 He was also progressively through this
25 increasing his level of abuse himself, and he's

1 admitting to that. And he is admitting -- he fully
2 admits in the statement that he gave the sheriff's
3 department that abuse. And he acknowledges and
4 accepts -- he's accepted from my first interview
5 with him that that was wrong, horrible thing for him
6 to do.

7 He also discovered in the course of preparing
8 for this trial that what he believed was a head
9 injury to Minor Child while he was at work, he was
10 called home by his wife, told, and Drew went along
11 with Michelle's story, that the fall from the bunk
12 bed in April of 2000 is what caused Minor Child and
13 Drew to have head injuries. Derek took them to the
14 hospital, to Anderson Hospital, for that, to be
15 treated. Her eye crossed after that and she began
16 to, in his perception, decline after that.

17 He also took her to Dr. Hunter. Dr. Hunter
18 referred her to Dr. Legarda. Dr. Legarda is a
19 neurologist, was trying to figure out what was wrong
20 with her, the eye cross, with the subdural hematoma
21 in front, what he was told was the fall from the
22 bunk bed.

23 Dr. Legarda diagnosed Stephanie with speckled
24 lupus. Made that diagnosis. So Derek had
25 information that the mother had lupus, Minor Child is

1 diagnosed with lupus. Now -- we know after the fact
2 that that was a misdiagnosis, but Derek thought it
3 was an accurate diagnosis, that it was explaining in
4 his mind the most serious signs of abuse that he was
5 witnessing. And he acknowledges that his neglect
6 and ineptitude in recognizing that in his home, that
7 what was really happening was that Michelle had
8 caused the injury in April while he was at work and
9 that Michelle probably caused the injury while he
10 was at work on October 14th. There is no dispute
11 that he was at work when that injury occurred on
12 April 14th.

13 He realizes that that is gross neglect on his
14 part, not to have avoided taking -- removing
15 Minor Child from that situation and did not have --
16 accepted Michelle's explanations that these -- her
17 severe discipline were things that she had been
18 advised to do by doctors and so forth. He regrets
19 that he turned the parenting over to Michelle, to a
20 large extent, like unfortunately a lot of husbands
21 do. He realizes that was huge mistake, that he was
22 the only one who could have prevented Minor Child from
23 being exposed to what ultimately caused her death,
24 and he failed to do that. And he has on many
25 occasions acknowledged that sincere remorse with me

1 as his counsel.

2 Your Honor, he fell into -- and this was going
3 to be -- this is a huge problem with his family
4 believing him, with what the jury believing, with
5 law enforcement believing him, is that he went along
6 with Michelle's suggestions, to tell lies about why
7 they did certain things in order to cover her
8 insistence with him that if -- for example, if he
9 just went to Greenville Memorial Hospital without
10 having a legitimate excuse for bypassing Anderson
11 Hospital, the Greenville Hospital staff would
12 suspect her, because she was alone with the child
13 for abuse. So you need to say that you were on your
14 way to get the van fixed and she started having a
15 seizure and that's why he took her to the hospital.
16 He regrets very much that he went along with that
17 lie. And after his polygraph, when they picked up
18 on that deception, he immediately took that back and
19 said look, that's not what happened. What happened
20 is Michelle called me at work and said something has
21 happened to her, come home. I came home and I took
22 her to Greenville Hospital. And, Your Honor, he has
23 from the very beginning explained to law
24 enforcement, after the polygraph, and to me, the
25 reason why he went to Greenville Hospital was not

1 because Anderson was suspicious of him for child
2 abuse any more than anyplace else would have, but
3 that his wife when she died of lupus in Greenville
4 Hospital received excellent care. And when his wife
5 Michelle gave birth to their son Jared in Anderson
6 Hospital, after that she received very poor care.
7 And, in fact, she was given -- before the birth, she
8 was treated before the birth, she was given codeine
9 and a sulfa drug that was listed on her chart as
10 something that she was -- she had a severe allergic
11 reaction to twice during that visit by the same
12 doctor. She would go into code and have to be
13 revived. He observed that. He did not have any
14 confidence in Anderson Hospital.

15 He also, Your Honor, had taken Minor Child to Dr.
16 Legarda after the April 2000 fall and was being
17 treated by Dr. Legarda. She had -- she was
18 diagnosed with the speckled lupus. She had a lumbar
19 puncture to relieve pressure in her brain. And what
20 Derek was observing is this doctor treating her for
21 lupus and for the side effects of what was described
22 to him and to the doctors by Michelle as an
23 accidental fall.

24 Minor Child went to Dr. Legarda October 11th and
25 was seen by Dr. Legarda October 11th.

1 October 14th is the incident where, while he
2 was at work, something happened to her. And I
3 assume that the State was prepared to prove evidence
4 that Michelle is the one that caused that blow.

5 He is obviously clearly guilty of providing
6 false information in an effort to conceal, to
7 protect Michelle.

8 He's clearly guilty of homicide by child
9 neglect. He knows that.

10 He's clearly guilty of abuse to her that rises
11 to the level under the statute of great bodily
12 injury to a child.

13 He stands before you, Your Honor, sincerely
14 remorseful and has already suffered. Obviously God
15 is going to judge him in the end more than any of us
16 here can. He has suffered the loss of his child and
17 he has suffered the loss of his son that he and
18 Michelle had together. Obviously his rights to that
19 child will be terminated. He understands that. And
20 he understands that he is going to have to spend
21 many, many years in prison. And understanding that,
22 he asks Your Honor mercy to take into consideration
23 his plea, his acceptance of responsibility, and
24 fashion a sentence that takes that into
25 consideration, as well as the horrible circumstances

1 of this case, facts, and appropriately punish him in
2 relation to Michelle's culpability in this. And I
3 appreciate you in allowing me to make the comments.
4 And he would like to address the court.

5 THE COURT: Mr. Carter, be glad to hear from
6 you, sir.

7 THE DEFENDANT: I want to take time to say to
8 my family and everybody in this room, especially my
9 daughter, for putting everybody through this and
10 lying. I'm sorry. I can't change what's happened.
11 I wish I could. I just pray my family one day would
12 be able to look at me and forgive me. Sorry.

13 THE COURT: I have taken everything into
14 consideration. I do take into consideration the
15 defendant's decision to plead guilty, but I do not
16 accept defendant's efforts to minimize his blame.

17 Mr. Carter, through his willful acts and
18 omissions, participated in the abuse of this poor
19 child and the death of his own daughter Minor Child

20 While the defendant, Mr. Carter, may not have
21 been physically present nor had struck the final
22 fatal blow, defendant had already sentenced his own
23 daughter to death through his unspeakable and
24 inhumane treatment of Minor Child And my sentence is
25 a severe one and reflects my view of this tragic

1 crime.

2 The sentence of the court in respect to
3 Indictment 2001-1204, homicide by child abuse, the
4 sentence is the defendant is committed to the State
5 Department of Corrections for a period of thirty
6 years.

7 Indictment 2001-763, great bodily injury upon a
8 child, the defendant is sentenced to the State
9 Department of Corrections for a period of twenty
10 years.

11 That's the sentence in these two cases.

12 That concludes this matter.

13 Court is in recess.

14 MS. WHITE: Thank you, Your Honor.

15 (Child Abuse Publication marked as Court's
16 Exhibit No. 2 marked for identification)

17 (END OF REQUESTED TRANSCRIPT OF RECORD)

18

19

20

21

22

23

24

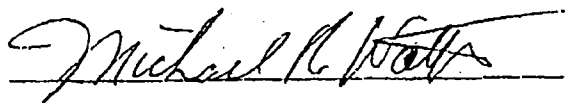
25

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the partial requested proceedings had and evidence introduced in the Jury Trial of the captioned cause, relative to appeal, in the Court of General Sessions for Anderson County, South Carolina, on the 11th day of June, 2001.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 9, 2003

A handwritten signature in cursive script, reading "Michael R. Watts", is written over a horizontal line.

Michael R. Watts

Circuit Court Reporter

STATE OF SOUTH CAROLINA

County of ANDERSON

In the Court of Common Pleas

C.A. No.: 02-CP-04-____(PCR)

Derek Shane Carter, #275938

Full name and prison number (if any) of Applicant.

Vs.

State of South Carolina,

Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEF

2002-CP-04-1791

A TRUE COPY

INSTRUCTIONS - READ CAREFULLY

JUL 9 2002

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention:

South Carolina Department of Corrections; Lieber Correctional Institution;P.O. Box 205; Ridgeville, SC 29472

2. Name and location of Court which imposed sentence:

Court of General Sessions, Anderson County

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ANDERSON SC
2002 JUN - 3 A 11:37
COMMON PLEAS AND
GENERAL SESSIONS

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 2001-GS-04-1204 (Homicide by child abuse)

(b) 2001-GS-04-0763 (Great bodily injury upon a child)

(c) N/A

4. The date upon which sentence was imposed and the terms of the sentence:

(a) June 12, 2001; 30-Years; See Page 7, Table of Contents, CLAIM 1

(b) June 12, 2001; 20-Years; See Page 7, Table of Contents, CLAIM 2

(c) N/A

5. Check whether a finding of guilty was made:

(a) after a plea of guilty Yes, but it was involuntary and unintelligent

(b) after a plea of not guilty No

(c) after a plea of nolo contendere No

6. Did you appeal from the judgement of conviction or the imposition of sentence?

No; See Page 7, Table of Contents, CLAIM 4

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(b) the result in each such Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(c) the date of each such result:

i. N/A

ii. N/A

iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. N/A

iii. N/A

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) See Page 7, Table of Contents CLAIM 4

(b) N/A

(c) N/A

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See page 7, Table of Contents, CLAIM 1

(b) See page 7, Table of Contents, CLAIM 2

(c) See page 7, Table of Contents, CLAIM 3

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) See page 7, Table of Contents, CLAIM 1

(b) See page 7, Table of Contents, CLAIM 2

(c) See page 7, Table of Contents, CLAIM 3

11. Prior to this application have you filed with respect to this conviction:

(a) any petition in the State Court under South Carolina Law? NO

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(b) the name and location of the Court in which each was filed:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion, or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

15. If any ground set forth in (9) has not previously been presented to any Court, State, or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) S.C. Code Ann. 17-27-20(a) and (b)
- (b) See Page 7, Table of Contents, CLAIM 4
- (c) Ward v. State, 535 S.E.2d 245 May proceed to circuit court to challenge statutes in first instance.

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? No, I plead guilty involuntary and unintelligently.
- (c) your sentencing? Yes

(d) your appeal, if any, from the judgement of conviction or the imposition of sentence? No

See Page 7, Table of Contents, CLAIM 4

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

17. If you answered "yes" to one or more parts of (16), list

(a) the name and address of each attorney who represented you:

- i. Robert E. Treacy, Jr, Esquire
P.O. Box 1965; Anderson, SC 29622
- ii. N/A
N/A
- iii. N/A
N/A

(b) the proceedings at which each such attorney represented you:

- i. Guilty Plea and Sentencing
- ii. N/A
- iii. N/A

18. State clearly the relief you seek in filing this application.

Guilty plea revoked and indictments remanded to Court of General Sessions for
further proceedings; Rights declared; Sentence(s) corrected; other relief as proper

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA

County of ANDERSON

} VERIFICATION

I, Derek S. Carter, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Derek S. Carter

Derek S. Carter

SWORN to and subscribed before me this 28Day of May

2002

BR Stevens
Notary Public

(L.S.)

My Commission Expires: 12/05/05

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Derek S. Carter, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Derek S. Carter

Applicant

Derek S. Carter

SWORN or affirmed to and subscribed before me this

28 Day of May 2002
BR Stevens
Notary Public

My Commission Expires: 12/05/05

FILED-CLERK'S OFFICE
ANDERSON SC
2002 JUN -3 A 11:37
COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2002-CP-04-1791
COUNTY OF ANDERSON	)	
	)	
Derek Shane Carter,	)	
S.C.D.C. No. 275938,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed June 3, 2002, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Anderson County Clerk of Court's orders of commitment. The Anderson County Grand Jury indicted the Applicant at the March 2001 and May 2001 terms of General Sessions for Homicide by Child Abuse (01-GS-04-1204) and Great Bodily Injury on a Child (01-GS-04-763). The Applicant was represented by Robert E. Treacy, Esquire. On June 11, 2001, the Applicant pled guilty as indicted. The Honorable John W. Kittredge sentenced the Applicant to thirty (30) years for homicide and to a concurrent twenty (20) year term on the great bodily injury indictment. The Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel (3 specific allegations);
2. Unconstitutional sentence;
3. Brady violation.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v.

State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065).

Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation that is not expressly admitted, qualified, or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be convened solely for the purpose of determining whether the Applicant received the effective assistance of trial counsel.

Respectfully submitted,

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTOPHER L. NEWTON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:



Attorneys for Respondent

Columbia, South Carolina

9-17, 2004

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

)

) IN THE COURT OF COMMON PLEAS

)

2002-CP-04-1791

Derek Shane Carter, #275938

Applicant,

vs

State of South Carolina,

Respondent.

)

)

)

) AFFIDAVIT OF SERVICE BY MAIL

)

)

)

)

)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Derek Shane Carter, #275938
 Lieber Correctional Institution
 136 Wilborn Avenue
 P.O. Box 205
 Ridgeville, SC 29472

DATED this 29th day of October, 2004.



 Gianandrea A. Maoli, Legal Assistant
 For Respondent

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2002-CP-04-01791

CARTER, DEREK SHANE

FILED - CLERKS OFFICE
ANDERSON SC

STATE OF SOUTH CAROLINA

#275938

2005 DEC -8

ENTERED
22
COMMON PLEAS AND
GENERAL SESSIONS

PLAINTIFF(S)

DEFENDANT(S)

- () JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY.
THE ISSUES HAVE BEEN TRIED AND THE VERDICT RENDERED.
- () DECISION BY COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT
THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION RENDERED.
- () ACTION DISMISSED.
- () RULE 12(B), SCRPC
- () RULE 41(A) (1) , SCRPC - BY THE PLAINTIFF OR STIPULATION
- () RULE 41(A) (2) , SCRPC - BY ORDER OF THE COURT
- () RULE 41(B), SCRPC - INVOLUNTARY DISMISSAL: NONSUIT
- () RULE 43(K), SCRPC - SETTLED
- () OTHER

A TRUE COPY

MAR - 1 2013

Richard X. Grigg
CLERK OF COURT

- () ACTION STRICKEN.
- () RULE 40(J), SCRPC - AGREEMENT/CONSENT IN WRITING BY ALL PARTIES
- () BANKRUPTCY
- () BINDING ARBITRATION, SUBJECT TO RIGHT TO RESTORE TO CONFIRM, VACATE
OR MODIFY ARBITRATION AWARD;
- () OTHER

Motion to Withdraw the PCR made by applicant. I quations
AND IT IS ORDERED AND ADJUDGED: () SEE ATTACHED ORDER

() STATEMENT OF JUDGMENT BY COURT

*Mr Carter & determine that he fully understands his request &
is making it freely, voluntarily knowingly & intelligently*
Motion Granted

DATED AT ANDERSON, SOUTH CAROLINA, THIS 8 DAY OF
December, 2005.

James Welborn
PRESIDING JUDGE

THIS JUDGMENT WAS ENTERED ON THE _____ DAY OF _____, 20____, AND A COPY
MAILED FIRST CLASS THIS 8th DAY OF December, 2005, TO ATTORNEYS OF
RECORD OR TO PARTIES (WHEN APPEARING PRO SE) AS FOLLOWS:

HUGH W WELBORN ✓

DANIEL E GRIGG ✓

Derek Shane Carter ✓

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR DEFENDANT(S)

FORM 5

STATE OF SOUTH CAROLINA)

County of Anderson)

IN THE COURT OF COMMON PLEAS

2001-CP-04-2033

Derek S. Carter, #275938)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

A TRUE COPY

MAY 15 2009

Cathy M. Allison
CLERK OF COURT

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Inst., P.O. Box 205, Ridgeville
South Carolina 29472
2. Name and location of Court which imposed sentence Court of General Sessions of
Anderson County, P.O. Box 8002, Anderson, South Carolina 29622
3. Name(s) of co-defendant(s) (if any) Ila Michele Carter
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2001-GS-04-1204 - S.C. Code Ann. § 16-3-85(A)(1)

(b) 2001-GS-04-763 - S.C. Code Ann. § 16-3-95(A)

(c) N/A

5. The date upon which sentence was imposed and the terms of the sentence:

(a) June 12, 2001 - 30 Years - Concurrent

(b) June 12, 2001 - 20 Years - Concurrent

(c) N/A

6. Check whether a finding of guilty was made:

(a) after a plea of guilty Yes

(b) after a plea of not guilty No

(c) after a plea of nolo contendere No

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. N/A

ii. _____

iii. _____

(c) the date of each such result:

i. N/A

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) Counsel did not file direct appeal, or notice of intent thereof

- (b) Counsel did not file direct appeal, or notice of intent thereof
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) S.C. Code Ann. § 16-3-85 is unconstitutionally ~~vague~~ vague
- (b) Applicant makes no challenge to S.C. Code Ann. § 16-3-95
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) statute does not provide ascertainable standards of guilt to protect
- (b) against arbitrary, erratic and discriminatory enforcement, and it
- (c) violates the Fourteenth Amendment due process requirement of notice
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Filed a PCR on June 3, 2002
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Court of Common Pleas of Anderson County
- ii. P.O. Box 8002, Anderson, SC 29622
- iii. _____

iv. _____

(c) the disposition thereof:

i. Applicant dismissed PCR in 2005

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. Nov/Dec. 2005

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) 10(a), above - This issue is so novel that its legal basis was
 - (b) not reasonably available to applicant or counsel at the time of
 - (c) the earlier proceeding. Reed v. Ross, 104 S.Ct. 2901, 2910 (1984).
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Robert E. Treacy, Jr.
DUNAWAY & ASSOCIATES
 - ii. 514 S. McDuffie St.
Anderson, SC 29622
 - iii. Michael D. Henthorne, Floyd K. Anderson, Charles A. Anderson,
Charles Welborn, Jr., and Hugh W. Welborn
 - (b) the proceedings at which each such attorney represented you:
 - i. pre-trial hearings, trial, and subsequent guilty plea
 - ii. _____
 - iii. PCR Attorneys

2009-CP-04-2033

19. State clearly the relief you seek in filing this application:

Vacate conviction and sentence as unconstitutionally vague, or correct
sentence to the terms of S.C. Code Ann. § 16-3-85(A)(2), pursuant to
S.C. Code Ann. § 17-27-80

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Anderson)

VERIFICATION

I, Derek S. Carter, #275938, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

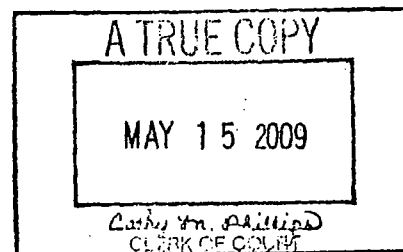
Derek S. Carter

Derek S. Carter, #275938 (APPLICANT)

SWORN to and subscribed before me this 7th
 day of May, 2009.

Diana J. Walker (L.S.)
 Notary Public

My Commission Expires: 4/4/2011



2009-CP-04-2033

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Derek S. Carter, #275938, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Derek S. Carter
Applicant

Derek S. Carter, #275938

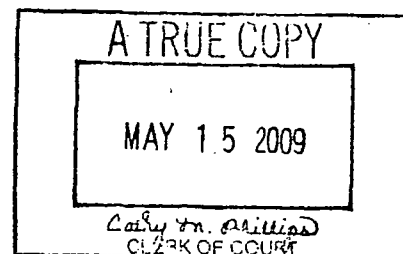
SWORN or affirmed to and subscribed before me this

7th day of May, 2009.

Dorinda P. Walker
Notary Public

My Commission Expires:

4/4/2017



STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 Derek S. Carter, #275938)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Docket No. 2009-CP-04-2033 (PCR)

MEMORANDUM OF LAW IN SUPPORT OF
 APPLICANT'S APPLICATION FOR
 POST-CONVICTION RELIEF (PCR)

A TRUE COPY

NOV 15 2012

Richard M. Kiley
 CLERK OF COURT

TO: THE HONORABLE COURT and the RESPONDENT:

PLEASE TAKE NOTICE AND BE ADVISED that the above-named Applicant, in support of his Application for Post-Conviction Relief (PCR), filed May 15, 2009, now provides a MEMORANDUM OF LAW IN SUPPORT OF APPLICANT'S APPLICATION FOR POST-CONVICTION RELIEF (PCR) pursuant to S.C. Code Ann. § 17-27-50 ("records or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached").

Respectfully submitted,

Derek S. Carter

Derek S. Carter #275938
 Kirkland Correctional Institution
 B-II-A5
 4344 Broad River Rd.
 Columbia, S.C. 29210

FILED
 2011 SEP 25 P 12:24
 CLERK OF COURT

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Statement of the Issues

- I. DOES THE APPLICATION OF S.C. CODE ANN. § 16-3-85 TO APPLICANT VIOLATE HIS DUE PROCESS RIGHT TO ASCERTAINABLE STANDARDS OF GUILT TO PROTECT AGAINST ARBITRARY, ERRATIC OR DISCRIMINATORY ENFORCEMENT?

Statement of the Case

This matter is before the Anderson County Court of Common Pleas pursuant to an application for post-conviction relief filed by Derek S. Carter ("Applicant") on May 15, 2009. The Grand Jurors of Anderson County convened on March 27, 2001 and presented upon their oath an indictment charging Applicant with the statutory offense of S.C. Code Ann. § 16-3-95(A) - Great Bodily Injury Upon a Child (2001-GS-04-763); thereafter, Applicant was indicted on May 1, 2001 for the statutory offense of S.C. Code Ann. § 16-3-85(A)(1) - Homicide by Child Abuse (2001-GS-04-1204). Applicant was advised by counsel to plead guilty to both offenses on June 12, 2001 and was thereby sentenced to a term of thirty (30) years confinement for the offense of S.C. Code Ann. § 16-3-85(A)(1), and a concurrent term of twenty (20) years confinement for the offense of S.C. Code Ann. § 16-3-95(A).

Applicant's co-defendant, Ila Michele Carter, was similarly charged and found guilty pursuant to a trial by jury and was thereby sentenced to a term of life without parole for the offense of S.C. Code Ann. § 16-3-85(A)(1), and a consecutive term of twenty (20) years confinement for the offense of S.C. Code Ann. § 16-3-95(A).

On June 3, 2002 Applicant filed an application for post-conviction relief (2002-CP-04-1791) alleging several claims of ineffective assistance of counsel. Applicant was represented by numerous court-appointed attorneys of the Anderson County Bar, including Michael D. Henthorne, Esq., Floy K. Anderson, Esq., Charles L. Anderson, Esq., Charles Welborn, Jr., Esq., and Hugh W. Welborn, Esq. Applicant

filed an amended application for post-conviction relief on September 3, 2003, which was granted by the Honorable Judge J.C. Nicholson on October 15, 2003. Applicant subsequently moved to dismiss the application on December 6, 2005.

Applicant now submits this application for post-conviction relief alleging an illegal conviction and sentence for the offense of S.C. Code Ann. § 16-3-85(A)(1) because the statute, as applied to the facts of Applicant's case, does not provide ascertainable standards of guilt to protect against arbitrary, erratic or discriminatory enforcement, and therefore it violates the Fourteenth Amendment due process requirement of sufficient notice. However, Applicant does not claim any allegations of an illegal conviction or sentence for the offense of S.C. Code Ann. § 16-3-95(A).

Finally, Applicant submits S.C. Code Ann. § 17-27-20 states that a claim is available for post-conviction relief if "the conviction or sentence was in violation of the Constitution of the United States ...". The exception for successive applications under S.C. Code Ann. § 17-27-90 states that "[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted ..." (emphasis added) Applicant contends the ground for relief asserted in this application for post-conviction relief is a legitimate claim in a successive application under S.C. Code Ann. § 17-27-90 because it is "so novel that its legal basis was not reasonably available to counsel," or Applicant, at the time of the earlier proceedings. Reed v. Ross, 104 S.Ct. 2901, 2910 (1984). In fact, it is so novel that it was "not available at all." Smith v. Murray, 106 S.Ct. 2661, 2667 (1986).

Argument

- I. THE APPLICATION OF S.C. CODE ANN. § 16-3-85 TO APPLICANT VIOLATES HIS DUE PROCESS RIGHT TO ASCERTAINABLE STANDARDS OF GUILT TO PROTECT AGAINST ARBITRARY, ERRATIC OR DISCRIMINATORY ENFORCEMENT.

Standard of Review

An applicant may allege constitutional violations in PCR proceedings, see S.C. Code Ann. § 17-27-20(a)(1) (1976), unless the issue could have been raised by direct appeal. See Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975); S.C. Code Ann. § 17-27-20(b) (1976). A violation found to be unconstitutional after the time for appeal lapses is not a direct appeal issue and is not barred from PCR consideration. See Twitty v. Maass, 96 Or.App. 631, 773 P.2d 1336 (1989) (PCR proceeding is proper forum for claim based on change in constitutional law between time of direct appeal and PCR application). However, an applicant who does not raise an issue which could have been raised in a prior PCR hearing will waive his right to raise the issue in a subsequent application. See S.C. Code Ann. § 17-27-90 (1976). Therefore, the applicant will bear the burden to prove a sufficient reason why the present claim was not raised in his previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it. Yakus v. United States, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed.2d 834 (1944). A waiver, on the other hand, is the "intentional relinquishment or abandonment of a known right." U.S. v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). The important distinction between

forfeiture and waiver is that if an applicant waives a right (which is waivable), he cannot later raise an objection on the grounds that the failure to provide him with the waived right is error. *Id.*

Although "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with ... the rules of fundamental justice," Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941), the authority created by S.C. Code Ann. § 17-27-90 is clear. The involuntary nature of applicant's guilty plea "constitutes a 'fundamental defect' in his conviction which inherently results in a complete miscarriage of justice." Abreu v. U.S., 911 F.Supp. 203, 208 (quoting Hill v. U.S., 82 S.Ct. 468, 471 (1962)). A guilty plea to accept a sentence cannot be knowingly, intelligently, and voluntarily entered if it is later discovered that the application of the statute itself is unconstitutional and must be vacated in the interest of justice. U.S. v. Bell, 917 F.Supp. 681, 684 (1996) ("A plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.") An unconstitutional law is void and is no law. A conviction under it is not merely erroneous, but it is illegal and void, and cannot be a legal cause of imprisonment. See *Ex Parte Holman*, 79 S.C. 9, 60 S.E. 19 (1908).

Applicant contends this Court may determine the merits of this claim because it is "so novel that it's legal basis was not reasonably available to counsel," or applicant, at the time of the earlier proceedings. Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984). In fact, it is so novel that it was not "available at all." Smith v. Murray, 106 S.Ct. 2661, 2667 (1986). Indeed, this Court's holding that such a claim could be raised in a successive PCR rests in part on the very same reasoning that underlies the decision that plain error review should be available in like circumstances, namely, that in such a circumstance there will "almost certainly" have been no reasonable basis upon which

a litigant could have raised the novel issue in the earlier proceeding. Reed, 468 U.S. at 17, 104 S.Ct. at 2911.

Because the "nature of the error" is so "fundamental," United States v. David, 83 F.3d 638, 648 (4th Cir. 1996), that the "plain error was committed in a matter so absolutely vital to [applicant]," Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 41 L.Ed. 289 (1896), and, most importantly, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)), S.C. Code Ann. § 17-27-90 leaves the authority to correct the plain error within the sound discretion of this Court, and as such, this Court should "feel themselves at liberty to correct it." Wiborg, 163 U.S. at 658, 16 S.Ct. 1127.

Discussion

The Fourteenth Amendment due process clause requires criminal statutes to: (1) define the offense with sufficient definiteness so common people can understand what conduct is prohibited; and (2) provide ascertainable standards of guilt to protect against arbitrary, erratic or discriminatory enforcement. Thomas v. Davis, 192 F.3d 445 (4th Cir. 1999). A statute which either forbids or requires the doing of an act or omission in terms so vague that men of common intelligence must necessarily guess at its meaning or differ as to its application violates the first essential of due process of law. Boule v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); also State v. Standard Oil Co. of New Jersey, 195 S.C. 267, 10 S.E.2d 778 (1940).

Our S.C. Supreme Court has held that courts are not justified in departing from the plain meaning of words, especially in a penal act, in search of intention which words themselves do not suggest, and to determine that a case is within the

intention of the statute; its language must authorize the court to say so. Bouie, 378 U.S. 347, 84 S.Ct. at 1699; see also City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 543 S.E.2d 538 (2001)("In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.").

A "statute" is public law unless otherwise declared in the statute itself, and hence it is within the knowledge of the court. State v. Broad River Power Co., 177 S.C. 240, 181 S.E.2d 41 (1935). Until a statute has been judicially declared to be unconstitutional, the knowledge of its invalidity will not be imputed to members of the public who rely upon it in good faith. O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945). Therefore, statutes are presumed to be constitutional and will be construed so as to render them valid; a challenger must prove the statute is vague beyond a reasonable doubt. Mitchell v. Owens, 304 S.C. 23, 402 S.E.2d 888 (1991). The challenged statute is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the statute and not by examining hypothetical situations at the periphery of the statute's scope. Spokane v. Douglass, 115 Wash.2d 171, 182, 795 P.2d 693 (1990).

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). The due process requirement, "ascertainable standards of guilt," is violated if a statute lacks minimal standards or if it uses terms that are inherently subjective in the context in which they are used. Spokane, 115 Wash.2d at 180-81, 795 P.2d 693 (1990). Minimal standards protect against arbitrary, erratic and discriminatory enforcement. Spokane, 115 Wash.2d at 180, 795 P.2d 693. However, a statute violates the Fourteenth Amendment "only if it invites an inordinate amount" of law enforcement discretion. Spokane, 115 Wash.2d at 181, 795 P.2d 693.

a. Legislative History of S.C. Code Ann. § 16-3-85

The S.C. Legislature enacted the homicide by child abuse statute, S.C. Code Ann. § 16-3-85, in 1992 to define and target a specific societal problem. See 1992 S.C. Acts No. 412. Legislatively, the entirely new crime of homicide by child abuse was created instead of opting to enhance the punishment for involuntary manslaughter. In fact, a purpose given for enactment of the statute was the "creat[ion of] the felony criminal offense" of homicide by child abuse. 1992 S.C. Acts No. 412. The 1992 statute reads as follows:

(A) A person is guilty of homicide by child abuse who:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect as defined in Section 20-7-490 and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect as defined in Section 20-7-490 and the child abuse or neglect results in the death of a child under the age of eleven.

S.C. Code Ann. § 16-3-85 (1992)(emphasis added)

S.C. Code Ann. § 16-3-85 was amended by 2000 S.C. Acts No. 261, § 1. The effect of the 2000 amendment was the deletion of the specific reference to the definitions of abuse and neglect contained in section 20-7-490, and the addition of subsection (B), defining those terms as follows:

(B) For purposes of this section, the following definitions apply:

(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;

(2) "harm" to a child's health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;

(b) fails to supply the child with adequate food, clothing, shelter or health care, and the failure to do so causes a physical injury or condition resulting in death; or

(c) abandons the child resulting in the child's death.

S.C. Code Ann. § 16-3-85 (2000)

Based on the effect of the 2000 amendment, the deletion of the specific reference to the definition of "Abused or neglected child" contained in section 20-7-490, the statute no longer operates under the more narrow scope of prohibiting "acts or omissions of the child's parents, guardian, or other person responsible for his welfare," as defined in section 20-7-490(2). see Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997)("S.C. Code Ann. § 16-3-85 forbids any person **having legal custody of a child** from refusing or neglecting to provide proper care...")(emphasis added); also State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998); State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997); and State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996).

b. Prior Challenges of S.C. Code Ann. § 16-3-85

In State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct.App.2002), the defendant was convicted of homicide by child abuse, accessory before the fact of murder, accessory after the fact of murder, and three counts of unlawful conduct towards a child. Jarrell called EMS on June 25, 1998 and reported that her ten-month-old baby was not breathing. When paramedics arrived, they found the baby was dead and rigor mortis had begun to set in. After an autopsy, the coroner found the baby had suffered severe repeated sexual abuse and determined that he died from suffocation and smothering the previous day. After Jarrell's arrest, she admitted to police that she knew her husband was molesting the baby, and that she and her husband planned to kill the baby by smothering him to make it appear to be a SIDS death because the baby had an upcoming doctor's appointment and the abuse would be readily apparent to anyone examining the baby.

On appeal, Jarrell claimed the trial court erred in denying her motion for directed verdict because the State failed to prove the proper mental state. Jarrell defined "indifference," in the context of the homicide by child abuse statute, as

"impartial, unbiased, or disinterested." Under her definition, Jarrell claimed that any action, or failure to act in the face of a duty, would negate her indifference, thus making it impossible for her to be guilty under the specific homicide by child abuse statute.

In rejecting this claim, the S.C. Court of Appeals stated that Jarrell's definition "fails to focus on the term 'extreme indifference' as it has historically been interpreted in a criminal context." Jarrell, 350 S.C. 90, 564 S.E.2d at 367. The court further held that, "in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." Jarrell, 350 S.C. 90, 564 S.E.2d at 367.

After reviewing the record, the court found the State presented evidence of Jarrell's actions in planning the murder both before it occurred, and also presented evidence of her actions on the day of the child's death. In light of the historical definition of the term extreme indifference in the context of criminal statutes, the court held that substantial evidence supported the denial of Jarrell's motion for directed verdict.

More recently, in State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003), the defendant was convicted of homicide by child abuse. On May 15, 1999, McKnight gave birth to a stillborn five-pound baby girl. The baby's gestational age was estimated to be between 34-37 weeks old. An autopsy revealed the presence of benzoylecgonine, a substance which is metabolized by cocaine. The pathologist testified that the only way for the infant to have the substance present was through cocaine, and that the cocaine had to have come from McKnight. The pathologist further determined that the cause of the infant's death was intrauterine fetal demise with mild chorioamnionitis, funisitis and cocaine consumption.

McKnight claimed the application of the homicide by child abuse statute to her violated her due process right of adequate notice. Specifically, McKnight claimed she had no notice the statute could be applied to a woman whose fetus is stillborn.

In numerous cases dating since 1960, the S.C. Supreme Court has consistently held that a viable fetus is a person. Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984). In fact, in Whitner, supra, the court reiterated the fact that a viable fetus is a child within the meaning of the child abuse and endangerment statute. A viable fetus is both "person" and "child" as used in statutory aggravating circumstances which provide for death penalty eligibility. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998). Given the ample authority in this state finding a viable fetus to be a person, the court held that McKnight was on notice that her conduct in ingesting cocaine would be proscribed.

c. Present Challenge of S.C. Code Ann. § 16-3-85

Applicant claims section 16-3-85 is unconstitutionally vague because, as applied to the facts of this case, it does not provide ascertainable standards of guilt to protect against arbitrary, erratic or discriminatory enforcement, and therefore it violates the Fourteenth Amendment due process requirement of sufficient notice. A penal statute offends due process only when it fails to give fair notice of the conduct it proscribes. State v. Edwards, 302 S.C. 492, 397 S.E.2d 88 (1990); also State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980). The statute must give sufficient notice to enable a reasonable person to comprehend what is prohibited. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61, cert. denied, 449 U.S. 883, 101 S.Ct. 236, 66 L.Ed.2d 108 (1980).

1. Facts to Support Applicant's Claim

This Court must test the validity of section 16-3-85 by inspecting the actual conduct of the party who challenges it. As recognized by the Court in Curtis v.

State, 345 S.C. 557, 549 S.E.2d 591 (2001), one to whose conduct the law clearly applies does not have standing to challenge it for vagueness.

The record reveals that at the time of the alleged crimes, applicant resided in a mobile home in Anderson County for a period of about one year. Applicant was employed by a local automotive plant where he consistently worked a 7-day schedule. See State v. Ila M. Carter, #2001-GS-04-765,-1203 [Tr.pg. 445, Ln. 25; Tr.pg. 446, Lns. 1-24], herein referenced as ("IMC"). Applicant's wife, Ila M. Carter (co-defendant), step-mother to applicant's daughter, was unemployed and stayed home to care for the four children as applicant worked long hours.

In April of 2000, applicant received a phone call at work from co-defendant reporting that two of the children were injured while playing on the children's bunk beds [IMC - Tr.pg. 479, Lns. 21-25; Tr.pg. 480, Lns. 1-14]; also State v. Derek S. Carter, #2001-GS-04-763,-1204 [Tr.pg. 198, Lns. 7-15], herein referenced as ("DSC"). When applicant arrived at home the oldest step-son of the applicant, Drew, explained what had happened. Applicant then left with both children to go to the hospital while co-defendant remained at home with the other two children [DSC - Tr.pg. 198, Lns. 7-15].

On October 11, 2000, the pediatric neurologist, Dr. Stella Lagarda, examined applicant's daughter to determine the cause and prescribe treatment for some apparent "spells" she was experiencing since the April injury [DSC - Tr.pg. 201, Lns. 15-25]. Dr. Lagarda's examination revealed signs of improvement since the initial visit five months earlier. See Derek S. Carter v. State, #2002-CP-04-1791 (PCR) [Appendix of Documents at pg. 3], herein referenced as ("App.Doc.").

Sometime around noon on October 14, 2000, co-defendant called applicant at work "several times" and reported that applicant's daughter was experiencing "spells" again [IMC - Tr.pg. 661, Lns. 24,25; Tr.pg. 662, Ln. 1]. After co-defendant arrived at applicant's place of employment around 12:30 p.m., applicant rushed co-defendant and their infant son home and then rushed to Greenville Memorial Hospital.

Upon arriving at the hospital shortly after 1:00 p.m., applicant's daughter had become slightly unresponsive, although she did move her head and arm during the initial examinations as late as 2:42 p.m. See Greenville Hospital Records at pgs. 7 and 11 [DSC - #2002-CP-04-1791 (PCR)], herein referenced as ("GHR"). As the following days elapsed, her condition deteriorated, and she was pronounced brain dead on October 17, 2000. Applicant was arrested on October 25, 2000.

The facts in the record simply do not establish proof beyond a reasonable doubt that applicant directly committed an act which in and of itself caused death. There is no dispute in this case that the head injury which produced the acute hospitalization, and subsequent death, occurred on October 14, 2000 [DSC - Tr.pg. 199, Lns. 7-12]. The State presented evidence of a subdural hematoma that, according to the pathologist, Dr. Brett Woodard, was "inconsistent with injuries that would have been produced multiple days or weeks earlier" [DSC - Tr.pg. 143, Lns. 11,12]. Dr. Woodard further testified that "the bruises to the ear and back are consistent with a time frame that would be consistent with the general injury that produced that acute hospitalization" [DSC - Tr.pg. 143, Lns. 16-19].

Applicant's counsel, Robert E. Treacy, Jr. ("Counsel Treacy"), informed Judge John W. Kittredge that "what was really happening was that [applicant's co-defendant] had caused the [head] injury in April while [applicant] was at work and that [applicant's co-defendant] probably caused the [head] injury while [applicant] was at work on October 14th" [DSC - Tr.pg. 199, Lns. 7-12]. Counsel Treacy further acknowledged to Judge Kittredge that "the State was prepared to prove evidence that [applicant's co-defendant] is the one that caused that blow" [DSC - Tr.pg. 202, Lns. 3,4], and that [applicant] is "clearly guilty of homicide by child neglect" [DSC - Tr.pg. 202, Lns. 8,9].

Applicant would show this Court that there is further proof beyond a reasonable doubt that the State was prepared to prove evidence that applicant's co-defendant directly inflicted the blow on October 14, 2000 that caused death. During the closing

arguments of co-defendant's trial, Solicitor Druanne White ("Solicitor White") informed the jury that "[t]he State strongly maintains the first one applies to [co-defendant] because she struck the fatal blow" [IMC - Tr.pg. 680, Lns. 24,25; Tr.pg. 681, Ln. 1].

There is further proof beyond a reasonable doubt that Counsel Treacy recognized applicant did not directly inflict an injury which produced death. In a December 11, 2000 letter to applicant, Counsel Treacy stated that "[w]hat I am faced with in this case is an apparently abusive relationship with the child, but the very significant factor that [applicant was] not at home when the deadly injury occurred. [Applicant's] alibi of being at work is extremely significant..." [App.Doc., pg. 24]. In a November 15, 2001 letter to applicant, Counsel Treacy stated that "[t]he only reason [applicant] received a thirty year sentence was because I cut a deal in exchange for [applicant's] guilty plea before the judge fully comprehended the horrible acts that were perpetrated on [applicant's] daughter by [co-defendant] (and indirectly by [applicant])" [App.Doc., pg. 31].

2. Statute is Vague Beyond a Reasonable Doubt

General words in a statute must be construed in context and, under the doctrine of ejusdem generis, the meaning of such words may be restricted by words which precede them on the theory that if the legislature had intended the general words to be used in their unrestricted sense, there would have been no mention of the particular preceding word. State v. Patterson, 200 S.E.2d 68, 69 (S.C. 1973). This Court's primary function in interpreting section 16-3-85 is to ascertain the intent of the General Assembly, which must be gleaned from the language used in the statute's construction. Father v. S.C. Dept. of Social Services, 545 S.E.2d 523 (S.C.App. 2001). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Knotts v. S.C. Dept. of Natural Resources,

558 S.E.2d 511 (S.C. 2002). In order to strike down an act of the General Assembly, there must be a finding that the act offends a constitutional provision which limits and circumscribes legislative action in that area. Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975).

The legislature may use ordinary terms adequately interpreted in common usage and understanding; in addition, words defined elsewhere in statutory or case law retain their meanings when used without definition in a new law. However, applicant would show this Court the challenged terms are defined by section 16-3-85(B) (2000). See 2000 S.C. Acts No. 261, § 1 ("An Act to amend section 16-3-85..., so as to define the terms 'child abuse or neglect' and 'harm'"). This Court must consider these challenged terms in the context of the entire statute, not just the challenged terms. Russell, 69 Wash.App. 237, 848 P.2d at 749.

Viewing section 16-3-85 as a whole and with a practical eye, the statutory phrase "child abuse or neglect" becomes inherently subjective in the context in which it is used. Section 16-3-85(B)(1) defines the statutory phrase "child abuse or neglect" to mean "an act or omission by any person which causes harm to the child's physical health or welfare." (emphasis added) Therefore, the statute itself contemplates that the offense "is proven by evidence of multiple acts or omissions which show a systematic pattern of abuse." State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997).

By the disjunctive term "or" in section 16-3-85(B)(1), the statute reveals on its face that the legislators enacted this statute with the purpose of specifically distinguishing an act from an omission. Therefore, either an act or an omission violates the statute. If a defendant's conduct clearly constitutes an act, the State need not also prove an omission. However, the statutory phrase "child abuse or neglect" becomes inherently subjective in the context in which it is used because it invites an inordinate amount of law enforcement discretion.

The term "neglect" in the statutory phrase "child abuse or neglect" is preceded by the term "or" in subsections (A)(1) and (A)(2) of section 16-3-85. Because the

same disjunctive phrase is included in both subsections, it invites an inordinate amount of law enforcement discretion by allowing prosecutors to argue the inclusion of the term "neglect" legally justifies a conviction, or guilty plea, of someone who is guilty of child neglect.

Applicant can prove this point beyond a reasonable doubt by directing this Court's attention to co-defendant's transcript. During the closing arguments, the solicitor informed the jury that "[t]he State must prove each element beyond a reasonable doubt. So let's start with the elements of homicide by child abuse. The State has got to prove that the defendant caused the death of a child under eleven while committing -- I'm just going to put -- child abuse -- **and this is important -- or neglect**, and the death occurs under circumstances manifesting extreme indifference, ..." [IMC - Tr.pg. 679, Lns. 5-11] (emphasis added). Solicitor White further argued to the jury that "[t]he judge is going to read you the same statute. 'Child abuse or neglect,' -- **and this is very important** -- 'means an act or omission,' an act or omission, 'by any person which causes harm to the child's physical health or welfare.' In other words, if someone lives with another person and they see this other person committing abuse on a child repeatedly and they do nothing about it, then that would be considered an omission by a person... So just remember, **the important thing here, act or omission**." [IMC - Tr.pg. 679, Lns. 20-25; Tr.pg. 680, Lns. 1-5] (emphasis added).

The statutory phrase "knowingly aids and abets another person to commit" poses yet another constitutional infirmity when viewed in context with the statute as a whole, but most notably in context with the statutory phrase "child abuse or neglect."

First, the phrase "aid and abet" has been historically defined in the common law to mean "to assist or facilitate the commission of a crime, or to promote its accomplishment." Black's Law Dict. 7th ed. (1999). Although the terms "aid," and "abet" are frequently used interchangeably, they are not synonymous. To "aid" is to assist or help another. To "abet" means, literally, to bait or excite, as in

the case of an animal. In its legal sense, it means to encourage, advise, or even instigate the commission of a crime. 1 Charles E. Torcia, Wharton's Criminal Law § 29 at 181 (15th ed. 1993).

The statutory phrase "knowingly aids and abets another person to commit" poses a constitutional infirmity when viewed in context with the statutory phrase "child abuse or neglect" because, as a general rule, a principal in the second degree, or an aider or abetter as he is sometimes called, is one who is present, actually or constructively, during the commission of a felony, aiding and abetting in its commission. Normally, when a person "does an act in the presence of and with the assistance of another, the act is done by both." State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989); also State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987).

3. Accomplice Liability Theories

In the instant case, Solicitor White pursued applicant's conviction under an accomplice liability theory pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) [DSC - Tr.pg. 85, Lns. 22-25]. Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. See State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981). If two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1998).

Although applicant was not present when the fatal head injury was inflicted by co-defendant on October 14, 2000, section 16-3-85 clearly invites an inordinate amount of law enforcement discretion, and fails to protect applicant against arbitrary, erratic or discriminatory enforcement, because it grants unbridled discretion to

the prosecutor allowing them to employ accomplice liability theories in order to elevate culpability. Applicant claims this unbridled discretion clearly gave Solicitor White the discretion to prosecute applicant for either "causing the death of a child by committing child neglect," pursuant to section 16-3-85(A)(1), since applicant did not inflict the fatal blow, or simply prosecute applicant for "knowingly aiding and abetting [co-defendant] to commit child abuse," pursuant to section 16-3-85(A)(2). Clearly, the record reveals Solicitor White acknowledged that applicant is "guilty of the admission part of allowing the child to be neglected enough to stay with someone you know is abusing the child" [IMC - Tr.pg. 696, Lns. 17-20].

Such unbridled discretion is unconstitutional, because it clearly circumvents the legislator's purpose in section 16-3-85(C) to make one class of persons punishable more heavily than another. Since there is clearly no distinction between a person who "causes the death of a child while committing child neglect" from a person who "knowingly aids and abets another person to commit child abuse," section 16-3-85 fails to provide "ascertainable standards of guilt" in order to clearly define the culpability of a person under subsection (A)(1) from one under subsection (A)(2).

Section 16-3-85 arbitrarily, erratically and discriminatorily allows prosecutors to seek convictions punishable by "life but not less than a term of twenty years" under subsection (C)(1) for those persons who arguably only "knowingly aids and abets another person to commit child abuse." Since the term "neglect" is included in both subsection (A)(1) and (A)(2), the statute reasonably invites prosecutors to impose arbitrary, erratic or discriminatory enforcement; prosecutors can punish neglect by either subsection (A)(1) or (A)(2). Using accomplice liability theories only acts to exacerbate such arbitrary, erratic or discriminatory enforcement.

4. Ambiguities Resolved in Favor of Applicant

Statutes are to be strictly construed and any ambiguities in penal statutes

must be revealed in favor of applicant. U.S. v. Sheek, 990 F.2d 150 (4th Cir. 1993). Although being mindful of the salutary general principles requiring penal statutes to be strictly construed and prohibiting this Court from varying its language, the basic canons of construction certainly allows this Court to consider the statute as a whole and to interpret its terms in light of the context discussed above. Standard Oil Co. of New Jersey, 195 S.C. 267, 10 S.E.2d at 787-788. In resolving this statutory question, the cardinal principle of statutory construction is clearly appropriate because "an alternative interpretation is fairly possible." Swain v. Pressley, 430 U.S. 372, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977). Clearly, the fact that section 16-3-85(C) provides different penalties for identical conduct prohibited in subsection (A)(1) and (A)(2) raises serious doubts concerning the constitutionality of this penal statute. This Court must acknowledge this statute implicates a due process violation because it arbitrarily provides excessive prosecutorial discretion.

Several U.S. Supreme Court decisions have clearly established the doctrine that ambiguities in criminal statutes "must be resolved in favor of [applicant]." Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971); United States v. Bass, 404 U.S. at 347, 92 S.Ct. at 522; United States v. Naftalin, 441 U.S. 768, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979). And, in Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, the U.S. Supreme Court struck down a state criminal statute under the Due Process Clause where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." This Court should be compelled to strike down section 16-3-85 because it is not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

Statutory language is deemed ambiguous if reasonable persons could disagree as to its meaning. Applicant maintains section 16-3-85 is unconstitutionally susceptible to alternative interpretations because subsections (A)(1) and (A)(2) include the element of neglect. Clearly, the courts of this State, as well as prosecutors, can

reasonably interpret the language of subsection (A)(1) and (A)(2) to cover situations in which a parent knowingly exposes a child to abuse by placing the child in a situation where abuse has occurred and is likely to recur. However, there seems to be no reasonable doubt that a person who inflicts upon a child a physical injury that produces death will render them liable to the penalty of subsection (A)(1) only, not subsection (A)(2).

It is rather clear that any person of normal comprehension at first blush would have no problem in concluding that the direct actor whose conduct is to be sanctioned by the State is he or she who actually inflicts the harm upon a child that produces death. However, the State attempts to justify its illogical interpretation that a person who is "guilty of the admission part of allowing the child to be neglected enough to stay with someone you know is abusing the child" is somehow "just as guilty" [IMC - Tr.pg. 696, Ins. 18-20] as the person who actually inflicts the harm that produces death because the relationship between a parent and a child exemplifies a special relationship where the duty to protect is imposed. This argument is, of course, an understandable, if not justifiable, one for the prosecution to make, but the fact that the State would find it necessary to make such an argument exemplifies the statute's lack of clarity when applied to the facts of applicant's case.

That the legislators did not have such an interpretation in mind is shown by the legislative history of the statute itself. The effect of the 2000 amendment was, among other things, the deletion of the specific reference to the definition contained in section 20-7-490. So, in effect, this draft makes it rather clear that the 2000 amendment was apparently induced by the need to clarify the scope of the statute's forbidden conduct to "any person" [Section 16-3-85(B)(1)], thereby creating a special relationship for persons who otherwise had no affirmative duty to protect children. To conclude that the State's interpretation was the intent of the legislature is to attribute to it, and to its staff, a complete lack of drafting expertise and the ordinary usages of the English language.

The problem with the State's argument is that it begs the question. Of course, our legislature has the power to legislate within the scope of a constitutional source of power and expressly legislate the appropriate statutory language in section 16-3-85 to exercise that very purpose urged by the State. However, it is clear that such appropriate statutory language was expressly omitted from the statute by the 2000 amendment. The power to legislate is the power of the legislature. It is not an independent power conferred upon the courts, or to prosecutors. Courts may validate a legislature's conduct by recognizing the legislature's legislative power, but courts cannot supply that exercise of power where there is no evidence that the legislature so intended to act. Therefore, there is no evidence that the legislature intended to exercise its power to reasonably provide the interpretation of section 16-3-85 urged by the State. Again, if it desired to do so, the appropriate statutory language was not beyond the capabilities of the legislature.

5. Relevance of Other Child Abuse Statutes

Words defined elsewhere in statutory or case law retain their meanings, and as such, they provide guidance for this Court's analysis of applicant's case. Douglass, 115 Wash.2d at 180, 180 n.5, 795 P.2d 693. Therefore, applicant directs this Court's attention to the other S.C. child abuse statutes.

First, by the inclusion of the term "charge" in section 20-7-50(A), and in section 20-7-70, the conduct proscribed by these provisions are not limited to a child's parent, but instead creates a special relationship for persons who may otherwise have no affirmative duty to protect children.

There is no statutory definition of the term "charge" provided in sections 20-7-50 or 20-7-70. Therefore, this Court must turn to standard dictionary definitions for guidance. Oxford American Dictionary (1979) at pg. 140 defines "charge" when used as a noun to mean: "4. a task or duty, custody... 5. a person

or thing entrusted." The American Heritage College Dictionary (3rd. ed. 1993) at pg. 235 defines "charge" when used as a noun to mean: "4. An assigned duty or task; a responsibility... 5. One that is entrusted to another's care or management... 6.a. Supervision; management... b. Care; custody." And, interestingly enough, the Roget's College Thesaurus (1985) at pg. 69 cites synonyms for the term "charge" when used as a noun as: "...supervision, custody, ward, trust, care;..." Therefore, this Court must conclude that the ordinary and accepted meaning of the term "charge" does not limit the application of the child abuse statutes only to parents, but instead creates a special relationship for persons who may otherwise have no affirmative duty to protect children (i.e., a baby sitter, a daycare employee, or a person with whom the child's parent or guardian is cohabitating, such as a relative, friend or lover).

Second, by the inclusion of the terms "a person" in section 16-3-95(A), the statutory phrase "person with whom the child's parent or guardian is cohabitating," and by the inclusion of subsection (E), it is clear our legislators intended to create a special relationship for persons who may otherwise have no affirmative duty to protect children, just as they did in sections 20-7-50 and 20-7-70. However, it is also clear that by the inclusion of the statutory phrase "child's parent or guardian" in subsection (B) that our legislators intended to create a separate standard of guilt to cover situations in which a parent knowingly exposes a child to abuse by placing the child in a situation where abuse has occurred and is likely to recur. This standard of culpability is separate and distinct from a person, parent or otherwise, who actually inflicts the harm upon a child that produces great bodily injury, and actually imposes a separate sentence.

Based on the above analysis, it is clear by the appropriate statutory language of these relevant child abuse statutes enacted by our legislators that the conduct proscribed is not limited to the child's parent or guardian, but instead creates a special relationship for persons who may otherwise have no affirmative duty to protect children. Accordingly, there is absolutely no evidence to support the interpretation

that a parent who fails to take any action to stop instances of child abuse can be prosecuted equally as a principal [IMC- Tr.pg. 696, Lns. 18-20] for exposing the child to a foreseeable risk of harm. The provisions of section 16-3-85 and section 16-3-95 enacted by our legislators are absolutely devoid of any appropriate statutory language that implies such a legislative intent. Such a strained interpretation is a clear invasion of the legislative prerogative, and a violation of the separation of powers doctrine. See S.C. Const. art. I, § 8; also Cf. Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980) ("The granting of continuances is a judicial function which cannot be exercised by the legislative branch of the government.").

d. Other Jurisdictions

This case involves a novel issue of law. Therefore, this Court must look to other jurisdictions for edification, enlightenment, and guidance.

Other jurisdictions have stated specifically in their child abuse statutes that a person not the principal actor or abuser could be liable as the principal when a child was knowingly placed in a circumstance where abuse could occur. See, e.g., Colorado Statutes, sec. 18-6-401(1) ("A person commits child abuse if he causes an injury to a child's life or health or permits a child to be unreasonably placed in a situation which poses a threat of injury to the child's life or health."); Florida Statutes (1985), sec. 827.04(1) ("Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree ..."); Nevada Statutes (1983-84), sec. 200.508 ("1, Any adult person who willfully causes or permits a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse

or neglect or who willfully causes or permits a child to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect is guilty of ...; 2. ...; 3. As used in this section, 'permit' means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody and control of a minor child.").

In State v. Fabritz, 276 Md. 416, 348 A.2d 275 (1975), the Maryland Court of Appeals construed that state's child abuse statute to apply to a parent who allegedly caused a child to experience further injury because she failed to seek prompt medical attention for the child who had been severely beaten by a baby sitter. See Maryland Statutes, Md.Code Art. 27, sec. 35A ("Any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for the supervision of a minor child under the age of eighteen years who causes abuse to such minor child shall be guilty of a felony...").

In State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), the Wisconsin Supreme Court construed that state's child abuse statute to apply to a parent who knowingly exposed a child to abuse by placing the child in a situation where abuse had occurred and was likely to recur. See Wisconsin Statutes, sec. 940.201, Stats. ("Whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited, to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under s. 939.22(14) is guilty of a Class E felony. In this section, 'child' means a person under 16 years of age.").

It is important for this Court to acknowledge the fact that the statutes in the above jurisdictions do not attempt to distinguish separate ascertainable standards of guilt for persons who knowingly fail to protect a child from a foreseeable risk of harm. However, applicant would show this Court that by the legislator's specific inclusion of subsection (A)(2) in section 16-3-85, and subsection (B) in section 16-3-95, the S.C. legislature has at least **attempted** to distinguish ascertainable standards of guilt for persons whose conduct is the direct and immediate cause of

harm to a child from one whose conduct knowingly exposes a child to harm by allowing the child to come within a foreseeable risk of harm. Applicant maintains, however, that the legislator's attempt in section 16-3-85 fails to make that intent clear because section 16-3-85 is unconstitutionally susceptible to alternative interpretation by the inclusion of the element of child neglect in subsection (A)(1) and (A)(2). [IMC - Tr.pg. 681, Lns. 3-15].

The very fact established beyond a reasonable doubt in the record before this Court that the State finds it necessary to make the argument that a person who knowingly exposes a child to harm by allowing the child to come within a foreseeable risk of harm is "just as guilty" [IMC - Tr.pg. 696, Lns. 18-20] as a person whose conduct is the direct and immediate cause of harm to a child exemplifies the statute's lack of clarity when applied to the facts of applicant's case. Interestingly enough, a person who knowingly exposes a child to harm in section 16-3-95 cannot be convicted equally with the principal offender. Section 16-3-95(B) includes conduct of "a child's parent" who "knowingly...allow[s] another person to inflict great bodily injury..." This language is strikingly similar to the language of section 16-3-85(A)(2), which should provide guidance to this Court in this analysis of section 16-3-85.

This is a criminal case, not an occasion for an emotional cleansing nor for this Court's exercise of righteous indignation. The question for this Court is whether the legislature proscribed the language of section 16-3-85 with sufficient definiteness so common people can understand what conduct is prohibited without alternative interpretations, and whether the statute provides ascertainable standards of guilt, as applied to the facts of applicant's case, in order to protect applicant against arbitrary, erratic or discriminatory enforcement. The question is not whether this Court, were it sitting as a legislature, would have proscribed an ascertainable standard of guilt in section 16-3-85 more precisely.

Clearly, the fact that section 16-3-85 provides different penalties for identical conduct prohibited in subsection (A)(1) and (A)(2) raises serious doubts concerning

the constitutionality of this statute. This Court must acknowledge this statute implicates a due process violation because it arbitrarily provides excessive prosecutorial discretion while prosecuting child neglect. Therefore, section 16-3-85 violates the Fourteenth Amendment because it fails to provide ascertainable standards of guilt to protect applicant against arbitrary, erratic or discriminatory enforcement, and it reasonably "invites an inordinate amount of law enforcement discretion." Douglass, 115 Wash.2d at 181, 795 P.2d 693.

e. Extreme Indifference -vs- Knowingly

Criminal liability is normally based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense. United States v. Bailey, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980) (cited in McAninch & Fairey, The Criminal Law of South Carolina 1 (1996)). A person may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense. State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990) (required mental state for a particular crime may be purpose (intent), knowledge, recklessness, or criminal negligence).

As the U.S. Supreme Court pointed out in United States v. United States Gypsum Co., 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), a person who "causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct,'" while he is said to "act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'"

In the case of most crimes, "the limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the person desired or merely knew of the practical certainty of the result.'"

United States v. United States Gypsum Co., supra, at 445, 98 S.Ct. at 2877, quoting LaFave & Scott 197. In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention.

Although two levels of intent may be gleaned from the language of section 16-3-85, applicant argues section 16-3-85 does not provide adequate guidance to the person whose conduct is to be regulated, and it does not provide adequate guidance to the triers of fact.

First, section 16-3-85 does not provide adequate guidance to applicant because, although subsection (C) clearly provides separate penalties for subsections (A)(1) and (A)(2), both subsections prohibit child neglect. Since this element is proscribed in subsection (A)(1) as "child abuse or neglect," and in subsection (A)(2) as "aids or abets another person to commit child abuse," section 16-3-85 does not provide ascertainable standards of guilt. The proscribed conduct of child neglect violates both subsections, and therefore invites an inordinate amount of discretion. Although the sentencing provisions of subsection (C) state with sufficient clarity the penalties for violating subsection (A)(1) from (A)(2), the provisions themselves which attempt to prohibit the proscribed conduct do not.

Second, section 16-3-85 does not provide adequate guidance to the triers of fact because, based on the ambiguous language of section 16-3-85, a reasonable juror could be reasonably induced to understand, as mandating as a matter of law, that the element of child neglect is prohibited in both subsection (A)(1) and (A)(2), but without separate standards of proof. Such inadequate guidance to the triers of fact reasonably misleads the jury by suggesting a decision on an improper basis, commonly, though not necessarily, an emotional one. The use of accomplice liability theories enhances such inferences.

The Equal Protection Clause prohibits selective enforcement "based upon an unjustifiable standard." Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). When one statute provides two separate provisions which prohibit exactly the same conduct, the prosecutor's selection of which of two penalties to apply would

clearly constitute unbridled discretion. Because such prosecutorial discretion could reasonably produce unequal justice, this form of legislative redundancy is clearly unconstitutional.

This fact is clearly seen in Solicitor White's interpretation of section 16-3-85 where she explains to the jury that "[m]ore than one person can be guilty of the same death of a child. The person who allows it to happen, is neglectful, and the person who inflicts the blow. Both would be guilty under this statute of the top one, causing the death of a child under eleven while committing abuse or neglect." [IMC - Tr.pg. 681, Lns. 9-15]. Clearly, a reasonable juror could be reasonably induced, by the language of section 16-3-85, as mandating as a matter of law, that a person who "knowingly aids and abets another person to commit child abuse" is the same as the "person who allows it to happen" [IMC - Tr.pg. 681, Lns. 9-15], as referenced by Solicitor White.

In applicant's case, the record shows that "[t]he children gave statements that [co-defendant] would tell them to lie about how things were happening with Minor Child And what [applicant] was getting when he came home from work was what [co-defendant] was telling him and what the children were told by [co-defendant] to tell [applicant]." [DSC - Tr.pg. 197, Lns. 16-23]. Clearly, the record supports applicant's argument that applicant: (1) was not present when the head injuries occurred, (2) does not have knowledge of what happened while applicant was at work, and (3) did not share in the same criminal intent as co-defendant.

Applicant would show this Court that the case of State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct.App. 2002) provides guidance in this analysis regarding intent. Although Jarrell was not the direct and immediate cause of the child's death, the court specifically noted that Jarrell's affirmative act of leaving her home knowing her child would be killed while she was gone "evidence[d] her extreme indifference to his life." Jarrell didn't merely expose the child to harm by allowing the child to come within a foreseeable risk of harm. Unlike the facts of applicant's case, Jarrell and her husband "planned to kill the child." Jarrell, 350 S.C. 90, 564 S.E.2d at 366.

f. Relief Requested Pursuant to S.C. Code Ann. § 17-27-80

Applicant has specifically requested that this Court "[v]acate [the] conviction and sentence as unconstitutionally vague, or correct sentence to the terms of S.C. Code Ann. § 16-3-85(A)(2)". However, applicant now clarifies that correcting the sentence is not permissible under the due process clause. Therefore, applicant seeks to have this Court vacate the conviction and sentence for the offense of section 16-3-85 in the interest of justice.

As the U.S. Supreme Court recognized in Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 239, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot "be cured in a given case by a construction in that very case placing valid limits on the statute," because "the objection of vagueness is two-fold: (1) inadequate guidance to the individual whose conduct is regulated; and (2) inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court." Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); also Freund, The Supreme Court and Civil Liberties, 4 Vand. L.Rev. 533, 541 (1951); and Amsterdam, Note, 109 U. Pa.L.Rev. 67, 73-74, n. 34.

Indeed, any "clarifying gloss" to a vague statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10 of the Constitution forbids. An ex post facto law has been defined by the Supreme Court as one "that aggravates a crime, or makes it greater than it was, when committed." Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648. Therefore, if a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that this Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. Smith v. Cahoon, 283 U.S. 553, 565, 51 S.Ct. 582, 586, 75 L.Ed.

1264. The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.

Applicant contends this Court has the authority to grant the requested relief pursuant to section 17-27-80 (1985). In pertinent part, section 17-27-80 provides that "[i]f the court finds in favor of the applicant, it **shall** enter an **appropriate** order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper." (emphasis added). This Court has jurisdiction over this matter, so section 17-27-80 is applicable. Therefore, because the law of this case is that section 16-3-85 violates due process, controlling precedent mandates that this Court vacate applicant's conviction and sentence for the offense of section 16-3-85 in the interest of justice.

Conclusion

WHEREFORE, based on the foregoing reasons, Applicant respectfully prays this Court grants this application for post-conviction relief, and enters an appropriate order vacating applicant's conviction and sentence for the offense of section 16-3-85.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2009-CP-04-2033

Derek S. Carter, #275938

Applicant,

v.

State of South Carolina,

Respondent.

RETURN AND MOTION
TO DISMISS

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COMMON PLEAS AND
GENERAL SESSIONS

A TRUE COPY

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Richard X. Kitley
CLERK OF COURT

The Respondent, making its Return to the Application for Post-Conviction Relief filed May 15, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant was indicted at the March 2001 term of the Anderson County Grand Jury for one (1) count of Great Bodily Harm Upon a Child (2001-GS-04-0763), and later indicted at the May 2001 term of the Anderson County Grand Jury for one (1) count of Homicide by Child Abuse (2001-GS-04-1204). The Applicant was represented at trial by Robert E. Treacy, Jr. Esquire. On June 12, 2001, the Applicant pled guilty to both charges as indicted. The Honorable John W. Kittredge sentenced the Applicant to confinement for a period of thirty (30) years for Homicide by Child Abuse (2001-GS-04-1204), and twenty (20) years for Great Bodily Harm Upon a Child (2001-GS-04-0763), both to be served concurrently. The Applicant did not appeal his conviction or sentence.

The Applicant subsequently filed an Application for Post Conviction Relief on July 9, 2002. The Respondent made its Return and Motion to Dismiss for failure to comply with the Uniform Post Conviction Procedure Act, in that he filed after the one year statute of limitations had run, on or about September 17, 2004. In his first Application the Applicant alleged he was being held illegally because:

1. "Ineffective Assistance of Counsel";
2. "Unconstitutional Sentence"; and
3. "Brady Violation"

The Applicant then made a motion to withdraw his Application for Post Conviction Relief which the Court granted.

Attached herewith and incorporated herein by reference are the records of the Oconee County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and records of the Applicant's previous PCR. Any of the above not attached will be forwarded upon receipt.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reason(s):

1. "S.C. Code Ann. § 16-3-85 is unconstitutionally vague";

III.

The Court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications

for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id.

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

The Respondent also submits that this Application for Post-Conviction Relief

should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10, et. seq. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on June 12, 2001. This Application was filed on May 15, 2009, nearly seven (7) years after the one year statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the Application for Post-Conviction Relief for failure to file within the time mandated by statute.

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that this application be summarily dismissed.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

4/7, 2010.

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
Derek S. Carter, #275938)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Docket No. 2009-CP-04-2033 (PCR)

A TRUE COPY

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MOTION TO OPPOSE RESPONDENT'S
MOTION TO DISMISS
AND
APPLICANT'S MOTION FOR THE APPOINTMENT
OF LEGAL COUNSEL

CLERK OF COURT

The Applicant, making its Motion to Oppose Respondent's Motion to Dismiss and Applicant's Motion for the Appointment of Legal Counsel, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant was indicted at the March 2001 term of the Anderson County Grand Jury for one (1) count of Great Bodily Injury Upon a Child (2001-GS-04-0763), and later indicted at the May 2001 term of the Anderson County Grand Jury for one (1) count of Homicide by Child Abuse (2001-GS-04-1204). The Applicant was represented at trial by Robert E. Treacy, Jr., Esquire. On June 12, 2001, the Applicant pled guilty to both charges as indicted under the advice of counsel. The Honorable John W. Kittredge sentenced Applicant to confinement for a period of thirty (30) years for Homicide by Child Abuse (2001-GS-04-1204), and twenty (20) years for Great Bodily Injury Upon a Child (2001-GS-04-0763), both to be served concurrently. The Applicant did not appeal his conviction or sentence.

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GENERAL SESSIONS

Despite Respondent's erroneous claim that Applicant subsequently filed an Application for Post Conviction Relief "on July 9, 2002," the record accurately reflects the application was timely filed on June 3, 2002. In addition, the Respondent's claim that "the Respondent made its Return and Motion to Dismiss for failure to comply with the Uniform Post Conviction Procedure Act" is also in error. The Applicant did, however, make a motion to withdrawal his application, which the Court granted.

In this Application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. "S.C. Code Ann. § 16-3-85 is unconstitutionally vague"

II.

The Court should not summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Although successive applications for post-conviction relief are disfavored, Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980), the exception for successive applications under S.C. Code Ann. § 17-27-90 states that any new grounds for relief are forbidden unless the Applicant states a "sufficient reason" why new grounds for relief were not raised or were not properly raised in the previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Applicant contends the new ground for relief in this application is a legitimate claim in a successive application under S.C. Code Ann. § 17-27-90 because it is "so novel that its legal basis was not reasonably available to counsel," or applicant, at the time of the earlier proceedings. Reed v. Ross, 104 S.Ct. 2901 (1984). In fact, it is so novel that it was "not available at all." Smith v. Murray, 106 S.Ct. 2661 (1986).

Applicant claims § 16-3-85 is unconstitutionally vague because, as applied to the facts of this case, it does not provide ascertainable standards of guilt to protect against arbitrary, erratic or discriminatory enforcement, and therefore it violates the Fourteenth Amendment due process requirement of sufficient notice. A penal statute offends due process only when it fails to give fair notice of the conduct it proscribes. State v. Edwards, 302 S.C. 492, 397 S.E.2d 88 (1990). The statute must give sufficient notice to enable a reasonable person to comprehend what is prohibited. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61, cert. denied 499 U.S. 883, 101 S.Ct. 236, 66 L.Ed.2d 108 (1980).

No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it. Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed.2d 834 (1944). A waiver, on the other hand, is the "intentional relinquishment or abandonment of a known right." U.S. v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). The important distinction between forfeiture and waiver is that if an applicant waives a right (which is waivable), he cannot later raise an objection on the grounds that the failure to provide him with the waived right is error. *Id.*

Although "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice," Hormel v. Helvering, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941), the authority created by § 17-27-90 is clear. The involuntary nature of the

applicant's guilty plea "constitutes a 'fundamental defect' in his conviction which inherently results in a complete miscarriage of justice." Abreu v. U.S., 911 F.Supp. 203, 208 (quoting Hill v. U.S., 82 S.Ct. 468, 471 (1962)).

A guilty plea to accept a sentence cannot be knowingly, intelligently, and voluntarily entered if it is later discovered that the application of the statute itself is unconstitutional and must be vacated in the interest of justice. U.S. v. Bell, 917 F.Supp. 681, 684 (1996) ("A plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."). An unconstitutional law is void and is no law. A conviction under it is not merely erroneous, but it is illegal and void, and cannot be a legal cause for imprisonment. Ex Parte Holman, 79 S.C. 9, 60 S.E. 19 (1908).

Indeed, this Court's holding that such a claim could be raised in a successive PCR rests in part on the very same reasoning that underlies the decision that plain error review should be available in like circumstances, namely, that in such a circumstance there will "almost certainly" have been no reasonable basis upon which a litigant could have raised the novel issue in the earlier proceeding. Reed, 468 U.S. at 17, 104 S.Ct. at 2911.

Because the "nature of the error" is so "fundamental," United States v. David, 83 F.3d 638, 648 (4th Cir. 1996), that the "plain error was committed in a matter so absolutely vital to [applicant]," Wiborg v. United States, 163 U.S. 632, 16 S.Ct. 1127, 41 L.Ed. 289 (1896), and, most importantly, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(quoting United States v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936)), § 17-27-90 leaves the authority to correct the plain error within the sound discretion

of this Court, and as such, this Court should "feel themselves at liberty to correct it." Wiborg, 163 U.S. at 658, 16 S.Ct. at 1127.

The applicant maintains he could not have raised the new grounds for relief in his prior application. The applicant has presented a genuine, novel issue of law and material facts which entitles applicant to the relief requested. Based on the specific legal and factual reasons stated above, and within applicant's memorandum of law in support of applicant's application for post-conviction relief, filed September 25, 2009, the Respondent's motion to dismiss should be dismissed in its entirety.

III.

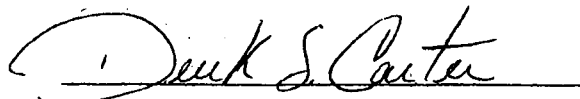
The applicant also hereby requests, pursuant to Rule 71.1 (d), SCRPC, that this Court promptly appoint counsel to assist applicant, and that counsel be given a reasonable time (at least 90 days) to confer with the applicant prior to any scheduled hearings.

IV.

WHEREFORE, based on the foregoing reasons, applicant respectfully prays that this Court denies the Respondent's motion to dismiss in its entirety, and grants applicant's motion for the appointment of legal counsel.

Respectfully submitted,

April 20, 2010



Derek S. Carter #275938
Kirkland C.I., Unit B2-5B
4344 Broad River Rd.
Columbia, S.C. 29210

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUITDerek S. Carter #275938,
Applicant,

2009-CP-04-2033

v.)

State of South Carolina,)

Respondent.)

CONDITIONAL ORDER
OF DISMISSAL

NOV 15 2012

Richard S. Kiley
CLERK OF COURTS

This matter comes before this Court by way of an application for post-conviction relief filed

May 15, 2009.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant was indicted at the March 2001 term of the Anderson County Grand Jury for one (1) count of Great Bodily Harm Upon a Child (2001-GS-04-0763), and later indicted at the May 2001 term of the Anderson County Grand Jury for one (1) count of Homicide by Child Abuse (2001-GS-04-1204). The Applicant was represented at trial by Robert E. Treacy, Jr. Esquire. On June 12, 2001, the Applicant pled guilty to both charges as indicted. The Honorable John W. Kittredge sentenced the Applicant to confinement for a period of thirty (30) years for Homicide by Child Abuse (2001-GS-04-1204), and twenty (20) years for Great Bodily Harm Upon a Child (2001-GS-04-0763), both to be served concurrently. The Applicant did not appeal his conviction or sentence.

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COMMON PLEAS AND
GENERAL SESSIONS

254

The Applicant subsequently filed an Application for Post Conviction Relief on July 9, 2002. The Respondent made its Return and Motion to Dismiss for failure to comply with the Uniform Post Conviction Procedure Act, in that he filed after the one year statute of limitations had run, on or about September 17, 2004. In his first Application the Applicant alleged he was being held illegally because:

1. "Ineffective Assistance of Counsel";
2. "Unconstitutional Sentence"; and
3. "Brady Violation"

The Applicant then made a motion to withdraw his Application for Post Conviction Relief which the Court granted.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject convictions and the Applicant's records from the Department of Corrections.

In this Application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reason(s):

1. "S.C. Code Ann. § 16-3-85 is unconstitutionally vague";

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

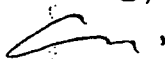
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Dr

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on June 12, 2001. This Application was filed on May 15, 2009, nearly seven (7) years after the one year statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

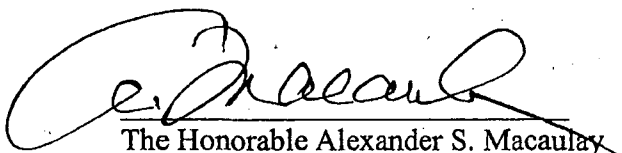
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Anderson County Clerk of Court and shall serve opposing counsel at the following address:

3-64


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Office of the Attorney General
Attn: A. West Lee, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 4th day of MAY, 2010.


The Honorable Alexander S. Macaulay
Administrative Judge
Tenth Judicial Circuit

Walmart, South Carolina.

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COMMUNICATIONS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
Derek S. Carter, #275938,)
Applicant)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

2009-CP-04-2033

ORDER GRANTING POST-
CONVICTION RELIEF HEARING

GENERAL SESSIONS
CLERK OF COURT

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CLERK OF COURT
OFFICE



This matter comes before the Court pursuant to an application for post-conviction relief (PCR). Respondent made its Amended Return and Motion to Dismiss on April 7, 2010, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated May 4, 2010, provisionally denying and dismissing this action while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final.

On April 21, 2010, Applicant filed a "Motion to Oppose Respondent's Motion to Dismiss and Applicant's Motion for the Appointment of Legal Counsel" stating his objections to the State's Motion to Dismiss. In addition, Applicant timely submitted correspondence objecting to the Conditional Order of Dismissal, dated May 25, 2010, and stating grounds as to why the dismissal should not become final.

This Court has reviewed the Applicant's responses to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that sufficient reason exists for the proceedings in this matter to continue. Pursuant to S.C. Code Ann. § 17-27-70(b), "disposition

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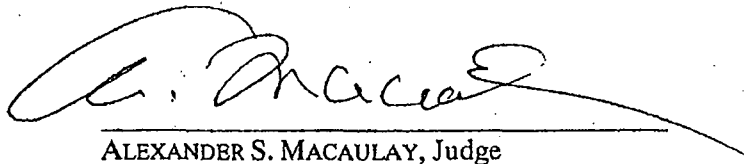


on the pleadings and record is not proper if there exists a material issue of fact." As a result, this application for Post-Conviction Relief shall be heard in accordance with S.C. Code Ann. § 17-27-80 and the Court shall make specific findings of fact, conclusions of law, and enter a final judgment on the matter.

IT IS THEREFORE ORDERED that genuine issues of material fact exist in the petitioner's PCR application and disposition on the pleadings and record is not proper.

IT IS FURTHER ORDERED that Applicant will be appointed an attorney, that Applicant's application for PCR will be scheduled for a hearing pursuant to the provisions of S.C. Code Ann. § 17-27-80.

AND IT IS SO ORDERED.



ALEXANDER S. MACAULAY, Judge

Walhalla, South Carolina
May 27, 2010

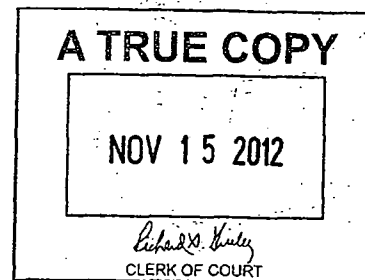
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COURT REPORTERS AND
GENERAL SESSIONS

rcb

November 15, 2010

Cathy M. Phillips, Clerk
Anderson County
P.O. Box 8002
Anderson, S.C. 29622

Re: Derek S. Carter v. State,
Docket No. 2009-CP-04-2033 (PCR)



Dear Mrs. Phillips:

ENCLOSED, please find an original copy of my Affidavit of Supporting Documents With Legal Arguments, which I am submitting to you today for filing. Please file this matter and return two (2) copies so that I may have a copy for my records, and also make service of the same to opposing counsel. SCDC policy prohibits the copying of documents produced by inmates (i.e., cover page, and pages 26-38 of this document).

In closing, I would greatly appreciate your assistance with this matter, and I look forward to your reply.

Thank you. Sincerely, I am,

Derek S. Carter, #275938
Kirkland C.I., Unit B2-5B
4344 Broad River Rd.
Columbia, S.C. 29210

/dsc

Enclosures as stated

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

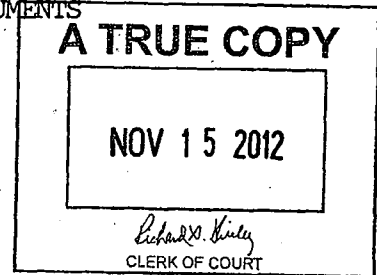
Derek S. Carter, #275938)
)
 Applicant,)
)
 vs.)

State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Docket No. 2009-CP-04-2033 (PCR)

AFFIDAVIT OF SUPPORTING DOCUMENTS
 WITH LEGAL ARGUMENTS



TO: THE HONORABLE COURT and the RESPONDENT:

PLEASE TAKE NOTICE AND BE ADVISED that the above-named Applicant, in support of his Application for Post-Conviction Relief (PCR), filed May 15, 2009, now provides an Affidavit of Supporting Documents with Legal Arguments pursuant to S.C. Code Ann. §17-27-50 ("records or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached").

Respectfully submitted,

Derek S. Carter, #275938
 Kirkland Correctional Inst., Unit B2-5B
 4344 Broad River Rd.
 Columbia, S.C. 29210

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IN THE HOUSE

H. 4432

2794 AC

Introduced by Rep. Wilkins, Jennings Harrison, Clyborne, Huff, Williams

A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 16-3-85 SO AS TO CREATE THE FELONY CRIMINAL OFFENSE OF HOMICIDE BY CHILD ABUSE, TO PROVIDE FOR THE CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, AND TO PROVIDE PENALTIES.

AMEND TITLE TO CONFORM

Robert F. Sheehan

APR 2 1992

The Senate ~~has~~ was agreed to and the Bill having received three readings in each House, it was ordered that the title be changed to that of an Act and that the Act be enrolled for ratification.

BY ORDER OF THE HOUSE

MAY 20 1992

Sandra H. McHenry
Clerk of the House

MAY 19 1992

MAY 7 1992

AMEND TITLE TO CONFORM

Frank Caplan
Frank Caplan, Clerk of the Senate
In the Senate

In the House of Representatives

Read First Time FEB 20 1992

Read Second Time APR 02 1992 (a)

Read Third Time APR 03 1992

Ordered to be Sent to the Senate

By Order of the House of Representatives

Sandra H. McHenry
Clerk of the House

Referred to Committee on *Jud* MAR 25 1992

Reported 0006 Fav. With Amc. m

Read First Time APR 6 1992

Read Second Time MAY 06 1992 With Notice

Read Third Time MAY 19 1992 Amended

Ordered to be ~~sent to the~~ House of Representatives with amendments

By Order of the Senate

John O. Winger
Clerk of the Senate
Judiciary

Referred to Committee on *Jud* APR 30 1992 25/1/92

Reported MAY 7 1992 Amended (Com Am. Adopted)

BILL SUMMARY

BILL NO: H. 4432
SPONSOR: Rep. Wilkins, et al.
CODE SECTION: Adds: § 16-3-85

SUMMARY: This bill would create a new felony known as "homicide by child abuse." A person would be guilty of this offense if he:

- (1) caused the death of a child under age 11 while committing child abuse or neglect and the death occurred under circumstances manifesting an extreme indifference to human life; or
- (2) knowingly allowed another to commit child abuse or neglect which resulted in the death of a child under age 11.

Child abuse or neglect would be defined as it is in Section 20-7-490 (harm or threat of harm to a child's physical or mental health or welfare by the acts or omissions of a parent, guardian, or person responsible for the child's welfare).

A person guilty of causing the child's death would be imprisoned for at least 20 years or for life. A person guilty of knowingly allowing another to cause the death of a child would be imprisoned for between 10 and 20 years.

In sentencing a person guilty of this offense, a judge would be required to consider aggravating circumstances, such as a history of abuse or neglect, and mitigating circumstances. A child's crying would not constitute provocation so as to be considered a mitigating circumstance.

This felony would be added to the list of felony crimes in Section 16-1-10.

The bill also would add a provision similar to S. 1354 which is currently in the House Judiciary Committee. This section, relating to testimony in a court proceeding, would add a new exception to the statutory provision that a husband or wife is not required to disclose any confidential communication (and in a criminal proceeding, any communication) made by one to the other during their marriage.

The exception which would be added by this bill would require the disclosure of the communication when the suit, actions, or proceeding concerns or is based on the abuse, neglect, or murder of a minor.

CHANGES IN EXISTING LAW:

Currently, cases involving child abuse by homicide often are prosecuted as involuntary manslaughters because the element of intent to kill is not present. This new felony would delete the requirement of premeditation which now must be proved in cases where a child's death is caused by abuse or neglect.

Also, under current law, the disclosure of a spousal communication is required when the suit, action, or proceeding concerns or is based on criminal sexual conduct involving a minor or the commission or attempt to commit a lewd act upon a minor. This bill would add another exception to the rule against disclosure.

S. 1308, introduced by Senator Nell Smith and others, is the companion bill to H. 4432 which provides for the creation of the offense of child abuse by homicide. S. 1308 has passed the Senate and is pending before the House Judiciary Committee. S. 1354, a bill similar to the section of H. 4432 which provides for the exception to the rule against disclosure of a spousal communication, introduced by Senators Rose and Courtney, has passed the Senate and is pending before the House Judiciary Committee.

AMENDMENT:

The technical amendment clarifies the sentencing guidelines for persons found guilty of homicide by child abuse.

ACTION:

Agenda -- April 14, 1992

CD:4432.AST

H. 4432 - Homicide by Child Abuse

Under Rep. Wilkins' bill, H. 4432, a person would be guilty of homicide by child abuse if the person caused the death of a child under eleven while committing child abuse or neglect and when the death occurred under circumstances manifesting an extreme indifference to human life. The penalty would be imprisonment for from 20 years to life. A lesser included offense is knowingly allowing a person to commit child abuse or neglect and the child abuse results in the death of a child under 11. The penalty for this offense is 10 to 20 years in prison.

Twelve states have amended their laws to include this kind of statute- "homicide by child abuse". The reason this legislation has been developed is because offenders often do not receive penalties matching the severity of their crimes

because of the difficulty of establishing the 'intent' or malice aforethought which is a necessary element to obtain a murder conviction.

COMMITTEE AMENDMENT: The amendment makes a grammatical change - the penalty section reads "must be imprisoned at least 20 years or for life". Since this does not make sense (20 years or life?), the amendment reads from at least 20 years to life.

COMMITTEE AMENDMENT ALSO ADDS A SECTION TO AMEND: the marital testimonial privilege (§19-11-30) to make an exception from the privilege is the proceedings involve child abuse or neglect or the death of a child. 15 states have an exception for the spousal testimonial privilege in cases involving a crime against a child of either party. (This is H. 4503, a bill by Rep. Wofford, cosponsored by over 20 reps including Huff, Kempe, Corning and Harrison.

CRIMINAL SUB.

3/24 Favorable with Amendment in Full Comm.



CHARLES F. REID
CLERK OF THE HOUSE

The House of Representatives

STATE OF SOUTH CAROLINA

P. O. BOX 11867

Columbia 29211

(803) 734-2010

SUITE 220
SOLOMON BLATT BUILDING
1105 PENDLETON STREET
COLUMBIA, SC 29201

January 15, 2010

Mr. Derek S. Carter, # 275938
Kirkland C.I., B2-5B
4344 Broad River Rd.
Columbia, S.C. 29210

Re: January 6, 2010, Freedom of Information Act Request

Dear Mr. Carter:

This letter is in response to your Freedom of Information Act (FOIA) requests, dated January 6, 2010 sent to myself and to Mr. Douglas Jennings, Jr. on January 6, 2009. The House policy is that all FOIA requests be handled through the House Clerk's Office. Due to the similarity of your requests, please accept this letter as the response to both requests. In your letter you stated and requested the following:

[A] usable copy of all Committee Reports and revisions filed in your office in connection with General Bill 3555 introduced by Representative Allison on February 17, 1999, to include any letters, certificates, reports, documents and/or other pertinent or required papers, which mention or discuss the opinions or amendments of Representatives Allison, Rodgers, Scott, Cobb-Hunter, Lloyd, Hosey, Bales, Moody-Lawrence, R. Smith, Sharpe, Mack, Perry, and Lanford in reference to said Bill 3555.

I have conferred with Mr. Jennings and we have reviewed our records. Please find enclosed all documents relevant to your request that are available on our systems of records. If you would like to access these documents electronically, they are available at www.scstatehouse.net.

Thank you for your interest. If you have questions please feel free to contact me.

Sincerely,

Charles F. Reid
Clerk of the House

/mpc
Enclosures

cc: The Honorable Douglas Jennings, Jr.
File

**South Carolina Code of Laws
(Unannotated)
Current through the end of the 2009 Session**

**Title 16 - Crimes and Offenses
CHAPTER 3.
OFFENSES AGAINST THE PERSON**

SECTION 16-3-85. Homicide by child abuse; definitions; penalty; sentencing.

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

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

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:

(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;

(2) "harm" to a child's health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;

(b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or

(c) abandons the child resulting in the child's death.

(C) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse:

(1) under subsection (A)(1) may be imprisoned for life but not less than a term of twenty years; or

(2) under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years.

(D) In sentencing a person under this section, the judge must consider any aggravating circumstances including, but not limited to, a defendant's past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child's crying does not constitute provocation so as to be considered a mitigating circumstance.

SECTION 16-3-95. Infliction or allowing infliction of great bodily injury upon a child; penalty; definition; corporal punishment and traffic accident exceptions.

(A) It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.

(B) It is unlawful for a child's parent or guardian, person with whom the child's parent or guardian is cohabitating, or any other person responsible for a child's welfare as defined in Section 63-7-20 knowingly to allow another person to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than five years.

(C) For purposes of this section, "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(D) This section may not be construed to prohibit corporal punishment or physical discipline which is administered by a parent or person in loco parentis in a manner which does not cause great bodily injury upon a child.

(E) This section does not apply to traffic accidents unless the accident was caused by the driver's reckless disregard for the safety of others.

2000 POST SESSION REPORT

South Carolina House of Representatives

David H. Wilkins
Speaker of the House

Prepared by
Staff of Standing Committees of the House of Representatives
and the Office of House Research

Act 261 Inflicting Great Bodily Injury Upon a Child / Definition of the
 Term "Child Abuse or Neglect"
H.3555 Representative Allison

Inflicting Great Bodily Injury Upon a Child

Under this act, it is a felony to inflict great bodily injury upon a child. It is also unlawful for a child's parent or guardian, person with whom the child's parent or guardian is cohabitating, or any other person who is responsible for a child's welfare to knowingly allow another person to inflict great bodily injury upon a child. The term "great bodily injury" means an injury that creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of any bodily member or organ.

Criminal penalties are established for failure to comply with the provisions of this legislation. Both inflicting great bodily injury upon a child and allowing another person to inflict great bodily injury upon a child are considered violent crimes under this act.

The act does not apply to corporal punishment or physical discipline that is administered by a parent or person in *loco parentis* in a manner that does not cause great bodily injury upon a child. Additionally, the act provides an exception for traffic accidents unless the accident was caused by the driver's reckless disregard for the safety of others.

Definition of the Term "Child Abuse or Neglect"

This act closes a loophole in current law pertaining to homicide by child abuse. The homicide by child abuse statute originally did not define the term "child abuse or neglect" and instead referred to the definition under §20-7-490. §20-7-490 provided that child abuse or neglect must be committed by a child's "parent, guardian, foster parent . . . child daycare facility operator or an adult who has assumed the role or responsibility of a parent or guardian for the child." The original statute excluded babysitters and other caregivers such as friends or paramours of the parent, other relatives, or neighbors. Under this act, all perpetrators are subject to prosecution for homicide by child abuse, regardless of their relationship to the victim.

STATUS: Signed by the Governor May 1, 2000.

The amendment proposed by the Committee on Judiciary (JUD4432.001) was adopted as follows:

Amend the bill, as and if amended, page 1, beginning on line 37, in Section 16-3-85(B)(1), as contained in SECTION 1, by striking /must be imprisoned for at least twenty years to life/ and inserting /may be imprisoned for life but not less than a term of twenty years/.

Amend the bill further, as and if amended, page 1, beginning on line 40, in Section 16-3-85(B)(2), as contained in SECTION 1, by striking /at least ten years and no more than twenty years/ and inserting /for a term not exceeding twenty years nor less than ten years/.

Amend the bill further, as and if amended, page 2, line 23, in Section 19-11-30, as contained in SECTION 3, by striking the word /attempting/ and inserting therein:

/attempting attempt/.

Amend title to conform.

Amendment No. 1

Senator POPE proposed the following Amendment No. 1 (JUD4432.002):

Amend the bill, as and if amended, by striking SECTION 1 in its entirety and inserting therein:

/SECTION 1. The 1976 Code is amended by adding:

"Section 16-3-85. (A) A person is guilty of homicide by child abuse who causes the death of a child under the age of eleven while committing child abuse or neglect as defined in Section 20-7-490 and the death occurs under circumstances manifesting an extreme indifference to human life.

(B) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse under this section may be imprisoned for life but not less than a term of twenty years.

(C) In sentencing a person under this section the judge shall consider any aggravating circumstances and any mitigating circumstances."/.

Amend title to conform.

Senator POPE explained the amendment.

On motion of Senator POPE, the Bill was carried over.

Merriam-Webster's Collegiate Dictionary, 11th ed. (Springfield: Merriam-Webster, Inc., 2006)

Adverb means "a word belonging to one of the major form classes in any of numerous languages, typically serving as *a modifier of a verb*, an adjective, another adverb, a preposition, a phrase, a clause, or a sentence, *expressing some relation* of manner or quality, *place, time, degree*, number, cause, opposition, affirmation, or denial, and in English also serving to connect and to express comment on clause content." (Page 19)

Aid means "to provide with what is useful or necessary in *achieving* an end: to give *assistance* —aid- er, n." (Page 26)

Abet means "1: to *actively* second and encourage (as an activity or plan): FORWARD 2: to assist or support in the achievement of a purpose." SYN see *incite* (Page 2)

-ance (suffix) means "1: instance of an action or process (*performance*) 2: quality or state :instance of a quality or state (*protuberance*) 3: amount or degree (*conductance*)." (Page 46)

Deliberate (adj.) means "1: characterized by or resulting from *careful and thorough* consideration (a *deliberate* decision) 2: characterized by *awareness of the consequences* (*deliberate* falsehood) 3: slow, unhurried, and steady as though *allowing time for decision on each individual action involved* (a *deliberate* pace). SYN see *voluntary* (Page 329)

-s (suffix) is "used to form adverbs denoting usual or *repeated action* or state (always at home Sundays) (mornings he stops by the newsstand)." (Page 1093)

-ing (suffix) means "1a" *action or process* (*running*) (*sleeping*) : instance of an *action or process* (a *meeting*) 2a: product or result of an *action or process* (an engraving) — often in plural (*earnings*) b: something used in an *action or process* (a bad covering) (the lining of a coat) 3: action or process connected with, consisting of, or used in making [a specified thing] (*scaffolding*) (*shirting*) 5: something related to [a specified concept] (*offing*)." (Page 642)

While (conj.) means "*during* the time that (take a nap *while* I'm out)." (Page 1426)

THU

THURSDAY, MAY 7, 1992

CREATE THE FELONY CRIMINAL OFFENSE OF HOMICIDE BY CHILD ABUSE, TO PROVIDE FOR THE CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, AND TO PROVIDE PENALTIES.

Senator WILLIAMS asked unanimous consent to make a motion to take the Bill up for immediate consideration.

There was no objection.

The Senate proceeded to a consideration of the Bill. The question being the adoption of the amendment proposed by the Committee on Judiciary.

The amendment proposed by the Committee on Judiciary (JUD4432.001) was adopted as follows:

Amend the bill, as and if amended, page 1, beginning on line 37, in Section 16-3-85(B)(1), as contained in SECTION 1, by striking /must be imprisoned for at least twenty years to life/ and inserting /may be imprisoned for life but not less than a term of twenty years/ .

Amend the bill further, as and if amended, page 1, beginning on line 40, in Section 16-3-85(B)(2), as contained in SECTION 1, by striking /at least ten years and no more than twenty years/ and inserting /for a term not exceeding twenty years nor less than ten years/ .

Amend the bill further, as and if amended, page 2, line 23, in Section 19-11-30, as contained in SECTION 3, by striking the word /attempting/ and inserting therein:

/attempting attempt/ .

Amend title to conform.

Amendment No. 1

Senator POPE proposed the following Amendment No. 1 (JUD4432.002):

Amend the bill, as and if amended, by striking SECTION 1 in its entirety and inserting therein:

/SECTION 1. The 1976 Code is amended by adding:

"Section 16-3-85. (A) A person is guilty of homicide by child abuse who causes the death of a child under the age of eleven while committing child abuse or neglect as defined in Section 20-7-490 and the death occurs under circumstances manifesting an extreme indifference to human life.

(B) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse under this section may be imprisoned for life but not less than a term of twenty years.

(C) In sentencing a person for homicide by child abuse, the court shall consider any aggravating circumstances. Amend title to conform

Senator POPE explained

On motion of Senator F

READ THE NOTICE OF

H. 4508 -- Reps. Carnahan, H. 4508 -- Reps. Carnahan, CODE OF LAWS OF SECTION 61-1-110 SO BEVERAGE CONTROL PAYMENT OF THE FEE ISSUES AND TO PROVIDE FOR ANY REASON, THE COMMISSION TO REVIEW AND TO REQUIRE AN APPLICANT TO BE IN C

Senator LOURIE asked for immediate consideration.

There was no objection.

The Bill was read the second time and passed on reading with notice of general

READ THE NOTICE OF

H. 4639 -- Reps. Ramo, Tucker and White: A BILL AMENDED, CODE OF LAWS RELATING TO THE PUBLIC AND HEALTH LICENSES REFERENCES FROM THE STATE HEALTH PLAN AMENDED, RELATING TO THE DEFINITION OF "AFACILITY", "HEALTH SERVICES OF "LIKE EQUIPMENT"

TUESDAY, MAY 19, 1992

The Senate proceeded to a consideration of the Bill. The question being the adoption of the amendment previously proposed by Senator POPE, and printed in the Journal of May 7, 1992.

Senator POPE asked unanimous consent to withdraw the amendment. There was no objection.

Senator POPE proposed the following amendment (JUD4432.004), which was adopted:

Amend the bill, as and if amended, page 1, line 30, in Section 16-3-85(A)(2), as contained in SECTION 1, by striking /allows/ and inserting therein /aids and abets/ .

Amend title to conform.

There being no further amendments, the Bill was read the third time, passed and ordered returned to the House of Representatives with amendments.

Amended, Read the Third Time, Returned to the House

H. 4639 -- Reps. Rama, Altman, Felder, P. Harris, Houck, Manly, Tucker and White: A BILL TO AMEND SECTION 44-7-120, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE PURPOSE OF THE CERTIFICATE OF NEED AND HEALTH LICENSURE ACT, SO AS TO CHANGE REFERENCES FROM THE STATE MEDICAL FACILITIES PLAN TO THE STATE HEALTH PLAN; TO AMEND SECTION 44-7-130, AS AMENDED, RELATING TO DEFINITIONS, SO AS TO REVISE THE DEFINITION OF "AFFECTED PERSON", "HEALTH CARE FACILITY", "HEALTH SERVICE", AND TO ADD THE DEFINITION OF "LIKE EQUIPMENT WITH SIMILAR CAPABILITIES"; TO AMEND SECTION 44-7-160, AS AMENDED, RELATING TO CIRCUMSTANCES REQUIRING CERTIFICATE OF NEED, SO AS TO DELETE PROVISIONS RELATING TO ACQUISITION OF MEDICAL EQUIPMENT OWNED BY OR LOCATED IN A HEALTH CARE FACILITY; TO AMEND SECTION 44-7-170, AS AMENDED, RELATING TO TRANSACTIONS AND INSTITUTIONS EXEMPT FROM THE ARTICLE, SO AS TO DELETE PROVISIONS RELATING TO THE INITIATION OF SERVICES THROUGH CONTRACTUAL ARRANGEMENTS FOR SHARED MOBILE DIAGNOSTIC AND THERAPEUTIC DEVICES; TO AMEND SECTION 44-7-180, AS AMENDED, RELATING TO THE STATE MEDICAL FACILITIES

4836

12

1

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APPOINTED TO THE

The Senate proceeded the third reading of the

Senator HINDS prop which was adopted:

Amend the bill, as a word /equipment./ and i /equipment, including accessibility to each su outweigh the adverse a facility, service, or equi

Amend the bill further after the word /accessibi

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1 BODY IS SET IN MOTION AND THEN SUDDENLY STOPPED AGAINST AN
2 OBJECT, LIKE A COUNTER TOP MUCH LIKE THAT RAILING IN FRONT
3 OF THE JURY BOX, WITH SUFFICIENT MOTION, THEN THAT BRAIN
4 COMES -- THE DURA STOPS WHEN THE HEAD STOPS AGAINST THE
5 OBJECT BUT THE BRAIN SLIDES UNDERNEATH IT. AND THAT
6 PRODUCES A TEARING OF THESE VESSELS. WE GET IT ON THE WRONG
7 SIDE OF THE BRAIN, IF YOU WILL, OR ON THE SIDE OTHER THAN
8 WHERE THE IMPACT IS IF THE MASS OF WHATEVER STOPS THEM IS
9 HUGE COMPARED TO THE INDIVIDUAL. IN THIS CASE, IF IT WAS A
10 COUNTER TOP OR A MANMADE OBJECT LIKE THAT RAILING, THEN
11 YOU'RE DEALING WITH THE MASS OF THE ENTIRE EARTH VERSUS, YOU
12 KNOW, EVEN MY MASS AS AN ADULT. SO IF I COULD BE SET IN
13 MOTION STRONGLY ENOUGH COMPARED TO MY PHYSICAL SIZE, THEN I
14 COULD PRODUCE THIS INJURY.

15 Q. SO IF I TAKE A CHILD AND I WHACK THEM ON ONE SIDE AND
16 THEY FLY THROUGH THE AIR AND HIT SOMEWHERE ELSE, OR IF I
17 SMACK THEM DOWN AND THEY HIT ON THE GROUND, ARE YOU GOING TO
18 -- IS THAT COMMON OR UNCOMMON TO FIND THE ACTUAL INJURY ON
19 THE OPPOSITE SIDE OF WHERE THE BRAIN IS?

20 A. COMMON WHEN THEY HIT A VERY LARGE OBJECT.

21 Q. DOCTOR, WERE YOU ABLE TO AGE THIS SUBDURAL HEMATOMA?

22 A. YES. BY LOOKING AT IT THROUGH THE MICROSCOPE, I WAS
23 ABLE TO TELL THAT THE SUBDURAL HEMATOMA OCCURRED AT THE
24 GENERAL TIME WHICH THE CHILD WAS ADMITTED TO THE HOSPITAL.
25 BY THAT I MEAN IT OCCURRED WITHIN HOURS OF THAT TIME THAT

1 THE CHILD WAS ADMITTED TO THE HOSPITAL OR WAS INVOLVED WITH
2 THAT HOSPITALIZING EVENT.

3 Q. AND DOCTOR, THE SUBDURAL HEMATOMA THAT YOU SAW, WHAT,
4 IF ANY, IMMEDIATE EFFECT ON THE CHILD WOULD YOU EXPECT TO
5 SEE IF THAT INJURY WERE INFLICTED ON HER? WHAT WOULD YOU
6 EXPECT THE CHILD'S BEHAVIOR TO DO ONCE THAT SUBDURAL IS
7 INFLICTED?

8 A. I WOULD EXPECT THE CHILD'S MENTAL CAPACITIES TO
9 DECREASE, AND VERY QUICKLY THE CHILD WOULD GO INTO A COMA
10 BECAUSE THAT WOULD PUT PRESSURE ON THE BRAIN AND CAUSE
11 SWELLING OF THE BRAIN. BUT IN Minor Child CASE, Minor Child
12 ALREADY HAD SWELLING OF HER BRAIN.

13 Q. ALL RIGHT. LET'S TALK ABOUT THAT A MINUTE. YOU SAID
14 THAT YOU ALSO REVIEWED MEDICAL RECORDS FROM APRIL OF 2000;
15 IS THAT CORRECT?

16 A. THAT'S CORRECT.

17 Q. AND WHAT DID THAT INVOLVE?

18 A. SHE WAS ADMITTED TO THE ANDERSON AREA MEDICAL CENTER
19 WITH A SUBDURAL HEMATOMA AROUND THE FRONT OF HER BRAIN.

20 Q. OKAY. WAIT A MINUTE. STOP THERE A MINUTE. NOW, IS
21 THAT THE SAME SUBDURAL HEMATOMA THAT YOU SAW IN OCTOBER?

22 A. NO.

23 Q. WHY NOT?

24 A. BY LOOKING AT MICROSCOPICALLY, YOU CAN TELL THE
25 CHANGES, THE TIME PERIOD CHANGES, THAT ARE INVOLVED. JUST

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1 NORMAL INTAKE OF FOOD OR THE NORMAL DIGESTION OR USE OF
2 FOOD.

3 Q. WHAT, IF ANY, FOOD DID YOU FIND IN HER STOMACH?

4 A. HER STOMACH WAS FILLED WITH PEAS, A LARGE NUMBER OF
5 CHEWED UP PEAS INTO A PASTY FORM AND PEAS THAT HELD THEIR
6 SHAPE LIKE YOU'D SEE THEM OUT OF A CAN OR IF YOU HAD COOKED
7 SOME PEAS FOR DINNER AND WERE SITTING ON YOUR PLATE AND WERE
8 MIXED WITH THAT CHEWED UP PEA MATERIAL.

9 Q. ALL RIGHT. AND I BELIEVE YOU TALKED A LITTLE BIT
10 EARLIER ABOUT HOW WITH THE SUBDURAL YOU CAN'T EXACTLY PIN
11 DOWN THE TIME. HOW ABOUT WITH THIS FOOD? CAN YOU TELL THIS
12 JURY APPROXIMATELY HOW LONG Minor Child ATE BEFORE THE HEAD
13 INJURY WAS INFLICTED AND DIGESTION -- WELL, FIRST OF ALL,
14 WOULD DIGESTION HAVE STOPPED AT THE TIME THE HEAD INJURY WAS
15 INFLICTED AND SHE WENT INTO A COMA?

16 A. YES, IT WOULD.

17 Q. ALL RIGHT. SO CAN YOU TELL THE JURY APPROXIMATELY HOW
18 LONG Minor Child ATE THESE THINGS YOU FOUND IN HER STOMACH
19 BEFORE THE HEAD INJURY WAS INFLICTED?

20 A. YEAH. WE CAN LOOK AT THE CONTENTS OF THE STOMACH. AND
21 WE'RE DEALING WITH, IF YOU WILL, A VERY SOFT MEAL, A VERY
22 BLAND MEAL, VERSUS LIKE THANKSGIVING DINNER WHICH IS, YOU
23 KNOW, FULL OF MEAT AND LOTS OF FATS. THERE'S ESSENTIALLY NO
24 FAT TO THIS TYPE OF MEAL. IT'S ALL CARBOHYDRATES. THAT'S
25 THE EASIEST TYPE OF MEAL TO DIGEST. SO I CAN TELL YOU

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1 WITHIN AN HOUR TO TWO HOURS OF THE TIME THAT SHE GOES INTO
2 COMA THAT SHE ATE THIS MEAL.

3 Q. AND I BELIEVE YOU SAID YOUR BODY STOPS DIGESTING ONCE
4 YOU ---

5 A. ONCE YOU GO INTO COMA, YOUR BODY STOPS DIGESTING. THE
6 -- AND THIS WOULD NOT BE MATERIAL THAT SOMEBODY WOULD HAVE
7 TRIED TO FORCE-FEED HER THROUGH A TUBE IN THE HOSPITAL. THE
8 COMPLETE PEAS WOULDN'T FIT THROUGH SUCH A TUBE.

9 Q. DOCTOR, ARE YOU AWARE OF THE TERM BATTERED CHILD
10 SYNDROME?

11 A. YES, I AM.

12 Q. I'M HANDING YOU AN ARTICLE ENTITLED "THE BATTERED CHILD
13 SYNDROME" BY KEMP AND OTHERS. DO YOU RECOGNIZE THAT
14 ARTICLE?

15 A. YES. THIS IS ONE OF THE INITIAL ARTICLES CONCERNING
16 BATTERED CHILD SYNDROME THAT WAS BROUGHT TO THE ATTENTION OF
17 THE MEDICAL COMMUNITY. AND IT IS ONE OF THE BASIC REFEREE
18 OR QUOTED ARTICLES WHEN THIS SUBJECT IS DISCUSSED.

19 Q. AND WAS THIS SORT OF THE ARTICLE THAT SET FORTH THE
20 DEFINITION OF BATTERED CHILD SYNDROME?

21 A. IT BEGAN THE DEFINITION, YES.

22 Q. DOCTOR, I'M GOING TO ASK YOU -- AND IS THIS RECOGNIZED
23 IN MEDICAL LITERATURE AS A RELIABLE PIECE OF LITERATURE?

24 A. YES, IT IS.

25 Q. IS IT STILL CITED TODAY IN LEGAL OPINIONS AS WELL AS IN

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- 1 A. NO, MA'AM.
- 2 Q. WHAT WOULD SHE DO WHEN THEY HIT HER IN THE HEAD?
- 3 A. SHE WOULD FALL OVER LIKE THAT.
- 4 Q. WHAT, IF ANY, CHOKING DID YOU EVER NOTICE?
- 5 A. THEY WOULD -- THEY WOULD PICK HER UP LIKE THAT AND JUST
- 6 HOLD HER UP AND SHAKE HER, OR THEY WOULD PICK HER UP AND
- 7 JUST THROW HER LIKE THAT. OR THEY WOULD PICK HER UP AND SIT
- 8 HER DOWN SOME PLACE.
- 9 Q. LET'S TALK ABOUT EXERCISE. SOMETIMES WHEN SHE WOULD BE
- 10 DISCIPLINED, WHAT, IF ANYTHING, WOULD THEY MAKE HER DO IN
- 11 REGARD TO EXERCISE?
- 12 A. THEY WOULD MAKE HER RUN AROUND THE KITCHEN. AND IF SHE
- 13 WASN'T RUNNING FAST ENOUGH, THEY WOULD PUSH HER. AND
- 14 SOMETIMES SHE'D HIT THE WALL AND FALL BACK. AND IF SHE
- 15 STILL WASN'T RUNNING FAST, THEY'D STILL PUSH HER AND MAKE
- 16 HER RUN.
- 17 Q. AND HOW LONG WOULD SHE HAVE TO RUN?
- 18 A. TWO OR THREE HOURS.
- 19 Q. AND WAS SHE ALWAYS MADE TO RUN INSIDE, OR WAS IT
- 20 SOMETIMES OUTSIDE?
- 21 A. I SAW HER ONE TIME RUNNING AROUND THE HOUSE IN JUST A
- 22 PULL-UP.
- 23 Q. DO YOU RECOGNIZE STATE'S EXHIBIT 15?
- 24 A. YES, MA'AM.
- 25 Q. HOW DO YOU RECOGNIZE THAT?

1 A. THAT WAS THE BUCKET SHE -- SHE HAD TO STAND ON THE BACK
2 PORCH WITH ICE IN.

3 Q. DO YOU RECOGNIZE STATE'S EXHIBIT 6?

4 A. YES, MA'AM.

5 Q. HOW WAS THAT USED?

6 A. THAT WAS USED IN THE BATHROOM TO -- IT WAS ATTACHED TO
7 THE HARNESS. AND THEN THERE WAS A SCREW OUTSIDE THE DOOR.
8 THEY RAN IT THROUGH THE DOOR AND PUT IT ON THERE SO IF SHE
9 DID GET OUT OF THE HARNESS, WHICH SHE DID ABOUT THREE OR
10 FOUR TIMES, THEN THEY'D HAVE THAT AND SHE'D STAY IN THERE.

11 Q. DO YOU RECOGNIZE STATE'S EXHIBIT 4 AND STATE'S EXHIBIT
12 5?

13 A. YES, MA'AM.

14 Q. WHAT ARE THOSE?

15 A. THEY ARE BELTS AND BELT BUCKLES USED ON Minor Child

16 Q. WERE THESE THE ONLY BELTS THAT WERE USED AGAINST
17 Minor Child

18 A. NO, MA'AM. THERE WAS ONE BELT THAT MICHELE AND DEREK
19 USED THAT, I THINK, MICHELE BROKE WHIPPING HER. AND THEY
20 THREW THAT ONE AWAY, I THINK, BECAUSE IT WAS BROKE.

21 Q. DREW, DO YOU REMEMBER WHEN Minor Child WENT INTO THE
22 ANDERSON HOSPITAL THE FIRST TIME SHE WAS IN THE HOSPITAL?

23 A. YES, MA'AM.

24 Q. NOW, THE DAY THAT SHE WENT INTO THE HOSPITAL, WERE YOU
25 AND YOUR BROTHER AND Minor Child JUMPING OFF THE BUNK BEDS?

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- 1 A. NO, MA'AM.
- 2 Q. DID YOU TELL THE DOCTOR THAT YOU WERE?
- 3 A. YES, MA'AM.
- 4 Q. PLEASE TELL THESE PEOPLE WHY YOU TOLD THE DOCTOR THAT
- 5 YOU WERE JUMPING OFF THE BED.
- 6 A. BECAUSE MICHELE CARTER TOLD ME TO SAY THAT.
- 7 Q. AND HAD THAT REALLY HAPPENED?
- 8 A. NO, MA'AM.
- 9 Q. DO YOU KNOW WHAT REALLY HAPPENED?
- 10 A. NO, MA'AM.
- 11 Q. ON OCTOBER 14TH, THE DAY THAT Minor Child WENT INTO
- 12 GREENVILLE HOSPITAL -- ON THAT DAY, WERE YOU AND Minor Child
- 13 JUMPING ON THE TRAMPOLINE?
- 14 A. NO, MA'AM.
- 15 Q. WAS Minor Child ALLOWED TO JUMP ON THE TRAMPOLINE?
- 16 A. NO, MA'AM.
- 17 Q. WAS SHE ALLOWED TO EVEN LEAVE THE YARD?
- 18 A. NO, MA'AM.
- 19 Q. WHEN MICHELE WOULD TELL Minor Child TO STAND IN THE
- 20 CORNER, WHAT WOULD STEPHANIE DO?
- 21 A. SHE WOULD JUST GO TO THE CORNER WITHOUT SAYING ANYTHING
- 22 AND WOULD STAND THERE.
- 23 Q. AND WAS SHE ALLOWED TO LEAVE THE YARD?
- 24 A. NO, MA'AM.
- 25 Q. WAS SHE ALLOWED TO PLAY FOOTBALL WITH THE BOYS IN THE

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- 1 NEIGHBORHOOD?
- 2 A. NO, MA'AM.
- 3 Q. WAS SHE ALLOWED TO PLAY BASEBALL WITH THE BOYS IN THE
- 4 NEIGHBORHOOD?
- 5 A. NO, MA'AM.
- 6 Q. HOW OFTEN WAS Minor Child PUNISHED?
- 7 A. VERY OFTEN.
- 8 Q. WELL, HOW MANY TIMES A WEEK?
- 9 A. A LOT.
- 10 Q. LET ME PUT IT THIS WAY. HOW MANY DAYS OUT OF THE MONTH
- 11 WOULD SHE NOT BE PUNISHED?
- 12 A. MAYBE ONE.
- 13 Q. DREW, DID YOUR MOTHER EVER TALK TO YOU ABOUT WHAT YOU
- 14 SHOULD TELL PEOPLE ABOUT A HEATER?
- 15 A. YES, MA'AM. YES, MA'AM.
- 16 Q. TELL THE JURY WHAT SHE TOLD YOU.
- 17 A. SHE TOLD ME TO SAY THAT SHE WAS JUST SITTING THERE AND
- 18 SHE JUST LEANED OVER AND BURNED HER CHEST.
- 19 Q. DID YOU REALLY SEE HER BURN HER CHEST ON THE HEATER OR
- 20 NOT?
- 21 A. NO, MA'AM.
- 22 Q. DID YOUR MOM ASK YOU TO SAY ANYTHING ABOUT HOW HER FEET
- 23 WERE INJURED?
- 24 A. YES, MA'AM.
- 25 Q. WHAT DID SHE TELL YOU TO SAY?

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- 1 Q. DID Minor Child AND DREW GO ANYWHERE TOGETHER THAT
2 MORNING?
3 A. YES.
4 Q. WHERE DID THEY GO?
5 A. THEY WENT TWO DOORS DOWN.
6 Q. WHAT DID THEY DO?
7 A. I BELIEVE THEY WERE JUMPING ON THE TRAMPOLINE.
8 Q. DID YOU ALLOW THEM TO JUMP ON IT?
9 A. NO.
10 Q. MA'AM?
11 A. NO, SIR.
12 Q. DID YOU ALLOW Minor Child TO JUMP ON THE TRAMPOLINE?
13 A. NO, SIR.
14 Q. DID YOU ALLOW YOUR CHILDREN TO JUMP ON THE TRAMPOLINE?
15 A. NO, SIR.
16 Q. YOU DIDN'T LIKE THAT?
17 A. WELL, THEY COULD. BUT THERE WAS NO ONE AT THAT HOUSE
18 THAT DAY.
19 Q. OH. YOU DIDN'T WANT THEM JUMPING WITH NO SUPERVISION?
20 A. YES, SIR.
21 Q. WHEN THEY CAME BACK IN, DID YOU ASK THEM WHERE THEY HAD
22 BEEN?
23 A. I WENT OUTSIDE AND SAW THEM.
24 Q. YOU SAW THEM?
25 A. UH-HUH.

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- 1 Q. DID YOU CALL FOR THEM?
- 2 A. I TOLD THEM TO COME HOME.
- 3 Q. ALL RIGHT. AND THEY CAME HOME. WHO WAS THERE JUMPING
- 4 ON THE TRAMPOLINE?
- 5 A. JUST DREW, Minor Child AND ANOTHER CHILD. I DON'T KNOW
- 6 WHO THE CHILD WAS.
- 7 Q. AND DID DREW AND Minor Child COME BACK TO YOUR HOUSE?
- 8 A. YES, SIR.
- 9 Q. WHAT WERE YOU DOING THEN?
- 10 A. I WAS MAKING MEATLOAF.
- 11 Q. ALL RIGHT. DID YOU FEED Minor Child BREAKFAST OR LUNCH
- 12 THAT DAY?
- 13 A. SHE ATE KIND OF LIKE A BRUNCH.
- 14 Q. WHAT DID SHE HAVE?
- 15 A. SALMON PATTIES, MASHED POTATOES AND PEAS.
- 16 Q. ENGLISH PEAS?
- 17 A. UH-HUH.
- 18 Q. WHERE DID THAT COME FROM?
- 19 A. THE REFRIGERATOR.
- 20 Q. WAS THAT LEFTOVERS?
- 21 A. YES, SIR.
- 22 Q. DID ANYTHING HAPPEN TO Minor Child THAT DAY?
- 23 A. YES, SIR.
- 24 Q. WHAT?
- 25 A. SHE WAS HAVING THE SPELLS.

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ILA MICHELE CARTER - DIRECT EXAMINATION BY MR. GAMBLE

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- 1 Q. WHAT HAPPENED WHEN SHE HAD THE SPELLS?
- 2 A. SHE WOULD LOSE HER BALANCE AND GO TO THE FLOOR. AND
- 3 SHE WOULD TENSE UP. SHE WOULD BE STIFF AS A BOARD.
- 4 Q. DID YOU SEE HER FALL BEFORE?
- 5 A. YES, SIR.
- 6 Q. WHERE WERE YOU?
- 7 A. I WAS IN THE KITCHEN.
- 8 Q. WHERE WAS DREW?
- 9 A. I DON'T KNOW AT THAT TIME BECAUSE THEY WERE ALL IN AND
- 10 OUT. I CAN'T SAY FOR SURE.
- 11 Q. WHAT DID YOU DO WHEN SHE HAD THIS SPELL?
- 12 A. I WENT -- I ALWAYS WENT OVER TO HER.
- 13 Q. AND WHAT DID YOU DO?
- 14 A. WHEN SHE WAS HAVING THEM, THERE'S REALLY NOT MUCH YOU
- 15 CAN DO EXCEPT BE SURE SHE'S NOT ON THE COUCH TO FALL OFF OR
- 16 THE BED. BE SURE SHE CAN'T HURT HERSELF ANY FURTHER.
- 17 Q. DID YOU CALL DEREK?
- 18 A. YES, SIR.
- 19 Q. HOW MANY TIMES?
- 20 A. TWO OR THREE TIMES.
- 21 Q. DID HE EVER CALL YOU BACK?
- 22 A. YES, SIR.
- 23 Q. WHAT DID YOU DO AS A RESULT OF THAT CALL?
- 24 A. I CALLED THE PLANT TO GET HIM OFF WORK.
- 25 Q. HUH?

- 1 A. I CALLED THE PLANT TO GET HIM OFF WORK.
- 2 Q. DID YOU GET HIM OFF WORK?
- 3 A. UH-HUH.
- 4 Q. WHAT DID YOU DO THEN?
- 5 A. I WENT AND PICKED HIM UP. WELL, I FINISHED UP AT THE
- 6 HOUSE. AND I WENT AND PICKED HIM UP.
- 7 Q. HOW WAS Minor Child AT THAT TIME?
- 8 A. SHE WAS STILL HAVING SPELLS.
- 9 Q. WHAT DO YOU MEAN, STILL HAVING SPELLS?
- 10 A. SHE WAS -- SHE WOULD TENSE UP AND JUST BE VERY RIGID.
- 11 Q. WHO WENT WITH YOU TO PICK UP DEREK?
- 12 A. ME, Minor Child AND JARED.
- 13 Q. ALL RIGHT. YOU PICKED HIM UP AND BROUGHT HIM BACK TO
- 14 [REDACTED]
- 15 A. YES, SIR.
- 16 Q. AND HOW WAS Minor Child THEN?
- 17 A. THEN SHE WAS OVER HER SPELL.
- 18 Q. DID YOU HAVE HER IN A CAR SEAT?
- 19 A. NO. SHE WAS SITTING IN THE SEAT.
- 20 Q. ALL RIGHT. DID SHE SAY ANYTHING?
- 21 A. YEAH.
- 22 Q. WHAT DID SHE SAY?
- 23 A. SHE WAS THIRSTY.
- 24 Q. DID YOU GET HER ANYTHING TO DRINK?
- 25 A. YES, SIR.

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ILA MICHELE CARTER - CROSS EXAMINATION BY MS. WHITE

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1 A. NO, MA'AM. I DID NOT KNOW SHE HAD FELL OFF.

2 Q. DO YOU WANT TO JUST GO AHEAD AND ADMIT TO THE JURY
3 WHATEVER HAPPENED THAT MORNING, OR DO I NEED TO KEEP ON
4 DOING THIS?

5 A. I'VE ALREADY SAID WHAT HAPPENED.

6 Q. AND YOU'RE THE ONLY ONE THAT DOES KNOW WHAT HAPPENED
7 THAT MORNING, DON'T YOU?

8 A. NO, MA'AM.

9 Q. NOW, WHEN SHE STARTED HAVING THIS CONTINUOUS SEIZURE
10 THAT YOU TALKED ABOUT, YOU, OF COURSE, IMMEDIATELY PICKED UP
11 THE PHONE AND CALLED 9-1-1 BECAUSE YOU HAD NOTHING TO HIDE?

12 A. WE HAD TALKED TO DR. LEGARDA ABOUT THAT ON WEDNESDAY.

13 Q. NO, MA'AM. I'M TALKING ABOUT THE DAY THAT SHE DIED
14 WHEN SHE STARTED CONVULSING, AS YOU DESCRIBE IT, IN A
15 CONTINUOUS CONVULSION, AT THAT POINT, WHEN DID YOU PICK UP
16 THE PHONE AND CALL 9-1-1?

17 A. I DIDN'T.

18 Q. BECAUSE YOU HAD TO HAVE TIME TO THINK ABOUT THE STORY;
19 ISN'T THAT RIGHT?

20 A. NO, MA'AM.

21 Q. AND YOU'RE STILL NOT WILLING TO TELL THE TRUTH ABOUT
22 WHAT HAPPENED THAT DAY IN YOUR HOUSE, ARE YOU?

23 A. I TOLD IT.

24 Q. WELL, WHILE THE CHILD WAS CONVULSING, YOU CALLED
25 DEREK'S WORK HOW MANY TIMES?

- 1 A. SEVERAL TIMES.
- 2 Q. THIS WAS KIND OF DEJA VU FOR HIM, WASN'T IT, BECAUSE
- 3 BACK ON APRIL 14TH WITH THE ANDERSON ONE, HE WAS WORKING ALL
- 4 DAY THAT DAY, TOO, WHEN THIS HAPPENED, WASN'T HE, MA'AM?
- 5 A. NO, MA'AM.
- 6 Q. DID YOU NOT HEAR THE PERSON COME IN ---
- 7 A. YES, MA'AM.
- 8 Q. --- WHO TESTIFIED FROM THE WORK RECORDS?
- 9 A. YES, MA'AM.
- 10 Q. THAT'S AN ERROR IN HIS WORK RECORDS?
- 11 A. DEREK WOULD LEAVE WORK QUITE OFTEN WITHOUT CLOCKING
- 12 OUT.
- 13 Q. WELL, WHY DID YOU BOTHER CALLING? THE CHILD IS
- 14 CONVULSING. WHY DIDN'T YOU JUST RACE DOWN THERE AND SAY,
- 15 MEET ME AT THE BACK? HE DOESN'T HAVE TO CHECK OUT. HE DOES
- 16 THAT ALL THE TIME.
- 17 A. WE HAD ALREADY SPOKE TO DR. LEGARDA ABOUT IT. AND SHE
- 18 DIDN'T SEEM TO BE CONCERNED WITH IT.
- 19 Q. MA'AM, I'M SORRY. BUT YOU SAID THE CHILD THAT DAY WAS
- 20 CONVULSING AND HAVING A CONTINUOUS -- HOW COULD YOU TALK TO
- 21 DR. LEGARDA? DID YOU CALL HER THAT DAY?
- 22 A. WE TOOK HER WEDNESDAY AND TOLD HER ABOUT IT. THAT'S
- 23 THE REASON WHY SHE WENT ON WEDNESDAY.
- 24 Q. DID YOU MENTION ANYTHING ABOUT CONTINUOUS CONVULSIONS
- 25 TO DR. LEGARDA, MA'AM?

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ILA MICHELE CARTER - CROSS EXAMINATION BY MS. WHITE

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1 STATEMENT.

2 I'D ALSO ASK THE ATTORNEYS TO BE CONSIDERING THE BEST
3 WAY TO CHARGE THE JURY ON THEIR CONSIDERATION OF THE TWO
4 SEPARATE INDICTMENTS. FOR EXAMPLE, THE INDICTMENT THAT
5 CHARGES HOMICIDE BY CHILD ABUSE, IT'S MY INITIAL THOUGHT
6 THAT I WOULD SPECIFICALLY INSTRUCT THE JURY THAT THEY MAY
7 NOT, FOR PURPOSES OF THE HOMICIDE BY CHILD ABUSE, CONSIDER
8 ANY INJURY, IF THEY FIND SUCH, WHICH WOULD NOT CAUSE OR LEAD
9 TO THE CAUSE OF DEATH. I WANT TO BE VERY CLEAR TO THE JURY
10 THAT THE CHARGES ARE SEPARATE AND THE VARIETY OF INJURIES
11 ALLEGED BY THE STATE CANNOT BE LUMPED TOGETHER. AND THOSE
12 WHICH CANNOT LEAD TO DEATH CANNOT BE GIVEN THE JURY'S
13 CONSIDERATION IN THE HOMICIDE INDICTMENT. THOSE ARE JUST
14 SOME THOUGHTS I'VE BEEN PONDERING. AND I'D LIKE THE BENEFIT
15 OF COUNSEL'S SUGGESTIONS IN THAT REGARD.

16 MS. WHITE: YOUR HONOR, I THINK THE OTHER THING
17 WE'RE GOING TO HAVE TO DO -- THERE ARE DIFFERENT SENTENCES.
18 I'VE GOT THE CHARGE. UNDER BOTH STATUTES THERE ARE
19 DIFFERENT SENTENCES DEPENDING ON WHICH STATUTE. SO I
20 BELIEVE WE'RE GOING TO HAVE TO BREAK THE SENTENCING SHEET
21 DOWN SO THAT WE KNOW WHETHER THEY GO WITH THE FIRST PART OR
22 THE SECOND PART IN BOTH STATUTES.

23 THE COURT: I'VE PREPARED A VERDICT FORM. CHARGE
24 ONE, INFLECTING OR ALLOWING INFLECTION OF GREAT BODILY
25 INJURY. WE, THE JURY, FIND THE DEFENDANT GUILTY OF

1 INFLECTING GREAT BODILY INJURY UPON A CHILD. NUMBER TWO,
2 GUILTY OF ALLOWING ANOTHER PERSON TO INFLECT GREAT BODILY
3 INJURY UPON A CHILD. AND NOT GUILTY. THAT DOVETAILS THE
4 STATUTORY LANGUAGE WHICH TRIGGERS THE VARIOUS SENTENCING
5 SCHEMES. I DID THE SAME THING IN THE HOMICIDE BY CHILD
6 ABUSE. DIRECTLY CAUSING THE DEATH OF A CHILD UNDER THE AGE
7 OF ELEVEN, ET CETERA, OR GUILTY OF KNOWINGLY AIDING OR
8 ABETTING ANOTHER PERSON. AND I'LL BE GLAD FOR COUNSEL TO
9 REVIEW THAT. BUT I'M -- THOSE ARE ISSUES I THINK WE NEED TO
10 DISCUSS. AND I'D RATHER ERR ON THE SIDE OF CAUTION AND MEET
11 AND NOT HAVE A LOT OF CONTESTED ISSUES. BUT JUST IN CASE
12 THERE IS, GIVE US TIME TO DO SO. I'LL SEE COUNSEL AT ONE
13 THIRTY. THANK YOU VERY MUCH. WE'RE IN RECESS.

14 (WHEREUPON COURT STOOD AT RECESS)

15 THE COURT: IS THE STATE READY TO PROCEED?

16 MS. WHITE: THE STATE'S READY.

17 THE COURT: IS THE DEFENDANT READY TO PROCEED?

18 MR. GAMBLE: THE DEFENDANT IS READY, YOUR HONOR.

19 THE COURT: I WANT THE RECORD TO REFLECT WE HAD A
20 CHARGE CONFERENCE. WE HAVE REVIEWED AND AGREED UPON THE
21 FORM OF THE VERDICT. WE HAVE REVIEWED THE CHARGE. AND I
22 BELIEVE WE'RE IN AGREEMENT AS TO THE CHARGE. BUT OF COURSE,
23 I'LL GIVE AN OPPORTUNITY AT THE CONCLUSION BEFORE
24 COMMENCEMENT OF DELIBERATION FOR EACH SIDE TO NOTE ANY
25 OBJECTIONS OR EXCEPTIONS.

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CLOSING ARGUMENTS - MS. WHITE

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1 COMMITTED THESE CRIMES?

2 THE DEFENDANT IS CHARGED WITH TWO COUNTS. NOW, LET'S
3 START WITH THE HOMICIDE BY CHILD ABUSE. EVERY CRIME IN
4 SOUTH CAROLINA IS -- CONSISTS OF SEVERAL DIFFERENT ELEMENTS.
5 THE STATE MUST PROVE EACH ELEMENT BEYOND A REASONABLE DOUBT.
6 SO LET'S START WITH THE ELEMENTS OF HOMICIDE BY CHILD ABUSE.
7 THE STATE HAS GOT TO PROVE THAT THE DEFENDANT CAUSED THE
8 DEATH OF A CHILD UNDER ELEVEN WHILE COMMITTING -- I'M JUST
9 GOING TO PUT -- CHILD ABUSE -- AND THIS IS IMPORTANT -- OR
10 NEGLECT, AND THE DEATH OCCURS UNDER CIRCUMSTANCES
11 MANIFESTING EXTREME INDIFFERENCE, EXTREME INDIFFERENCE, TO
12 HUMAN LIFE. THOSE ARE THE ELEMENTS THAT THE STATE MUST
13 PROVE. SO IF YOU FIND THAT IT IS REASONABLE TO BELIEVE THAT
14 THE DEFENDANT CAUSED THE DEATH OF A CHILD UNDER THE AGE OF
15 ELEVEN WHILE COMMITTING CHILD ABUSE OR NEGLECT UNDER
16 CIRCUMSTANCES MANIFESTING EXTREME INDIFFERENCE TO HUMAN
17 LIFE, THEN THE DEFENDANT WOULD BE GUILTY OF HOMICIDE BY
18 CHILD ABUSE.

19 NOW, LET'S DEFINE A FEW OF THESE THINGS. AND THIS IS
20 SIMPLY THE STATUTE THAT I'M READING. THE JUDGE IS GOING TO
21 READ YOU THE SAME STATUTE. "CHILD ABUSE OR NEGLECT," -- AND
22 THIS IS VERY IMPORTANT -- "MEANS AN ACT OR OMISSION," AN ACT
23 OR OMISSION, "BY ANY PERSON WHICH CAUSES HARM TO THE CHILD'S
24 PHYSICAL HEALTH OR WELFARE." IN OTHER WORDS, IF SOMEONE
25 LIVES WITH ANOTHER PERSON AND THEY SEE THIS OTHER PERSON

1 COMMITTING ABUSE ON A CHILD REPEATEDLY AND THEY DO NOTHING
2 ABOUT IT, THEN THAT WOULD BE CONSIDERED AN OMISSION BY A
3 PERSON WHICH CAUSES HARM TO THE CHILD'S PHYSICAL HEALTH OR
4 WELFARE. SO JUST REMEMBER, THE IMPORTANT THING HERE, ACT OR
5 OMISSION.

6 HARM. "HARM TO A CHILD'S HEALTH OR WELFARE OCCURS WHEN
7 A PERSON INFLECTS OR ALLOWS TO BE INFLECTED UP ON THE CHILD
8 PHYSICAL INJURY INCLUDING INJURIES SUSTAINED AS A RESULT OF
9 ACCEPTED CORPORAL PUNISHMENT." SO AGAIN, THAT'S WHAT WE'RE
10 LOOKING AT ON THE HOMICIDE BY CHILD ABUSE.

11 NOW, YOU'RE GOING TO HAVE A CHOICE. I'M GOING TO SHOW
12 YOU THE CHOICE. YOU'LL HAVE -- THIS WILL BE YOUR SENTENCING
13 SHEET. THE FOREMAN WILL SIGN THE FIRST CHARGE. IT SAYS,
14 "INFLECTION OR ALLOWING INFLECTION OF GREAT BODILY HARM."
15 THE SECOND ONE IS HOMICIDE BY CHILD ABUSE. WE'RE TALKING
16 ABOUT THE SECOND ONE HERE. "WE, THE JURY, FIND THE
17 DEFENDANT GUILTY OF DIRECTLY CAUSING THE DEATH OF A CHILD
18 UNDER THE AGE OF ELEVEN WHILE COMMITTING ABUSE OR NEGLIGENCE,
19 AND THE DEATH OCCURRED UNDER CIRCUMSTANCES MANIFESTING
20 EXTREME INDIFFERENCE TO HUMAN LIFE." IF YOU FIND EITHER SHE
21 STRUCK THE FATAL BLOW OR HER NEGLIGENCE ALLOWED THAT BLOW TO BE
22 STRUCK, THEN SHE WOULD BE GUILTY OF THIS PORTION.

23 NOW, THERE IS A SECOND CHOICE UNDER THE HOMICIDE BY
24 CHILD ABUSE. AND CERTAINLY, THE STATE STRONGLY MAINTAINS
25 THE FIRST ONE APPLIES TO HER BECAUSE SHE STRUCK THE FATAL

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CLOSING ARGUMENTS - MS. WHITE

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1 BLOW. AND CERTAINLY, IF SHE DIDN'T, HER NEGLECT CAUSED THE
2 FATAL BLOW BECAUSE SHE WAS NEGLECTFUL.

3 BUT THE SECOND PART IS YOU'RE, "GUILTY OF KNOWINGLY
4 AIDING OR ABETTING ANOTHER PERSON TO COMMIT CHILD ABUSE OR
5 NEGLECT, AND THE CHILD ABUSE OR NEGLECT RESULTED IN THE
6 DEATH OF A CHILD UNDER THE AGE OF ELEVEN." IT'S CALLED A
7 LESSER PORTION OF THE STATUTE. BUT AGAIN, SHE IS CERTAINLY
8 GUILTY OF COMMITTING THE ABUSE OR NEGLECT THAT CAUSED THE
9 INJURY. MORE THAN ONE PERSON CAN BE GUILTY OF THE SAME
10 DEATH OF A CHILD. THE PERSON WHO ALLOWS IT TO HAPPEN, IS
11 NEGLECTFUL, AND THE PERSON WHO INFLECTS THE BLOW. BOTH
12 WOULD BE GUILTY UNDER THIS STATUTE OF THE TOP ONE, CAUSING
13 THE DEATH OF A CHILD UNDER ELEVEN WHILE COMMITTING ABUSE OR
14 NEGLECT. MORE THAN ONE PERSON ON THE SAME CHILD CAN BE
15 GUILTY OF THIS TOP ONE RIGHT HERE.

16 ALL RIGHT. NOW, LET'S GO TO THE SECOND ONE. THE
17 SECOND ONE -- AND AGAIN, THIS IS THE STATUTE OR LAW. CHILD
18 ABUSE FELONY. AND AGAIN, WE HAVE ELEMENTS. WE'VE GOT TO
19 PROVE THAT THE DEFENDANT, AGAIN, INFLECTED GREAT BODILY
20 INJURY UPON A CHILD. THOSE ARE THE ELEMENTS. THE DEFENDANT
21 INFLECTED GREAT BODILY INJURY UPON A CHILD. FOR THE
22 PURPOSES OF THIS SECTION, GREAT BODILY INJURY MEANS, "BODILY
23 INJURY WHICH CREATES A SUBSTANTIAL RISK OF DEATH OR WHICH
24 CAUSES SERIOUS OR PERMANENT DISFIGUREMENT OR PROTRACTED LOSS
25 OR IMPAIRMENT OF THE FUNCTION OF ANY BODILY MEMBER OR

1 THINK TO TAKE A BALL -- THAT'S ALMOST THE SICKEST THING OUT
2 OF THIS WHOLE THING. HOW COULD YOU EVEN THINK TO TAKE A
3 BALL AND MAKE A CHILD FETCH IT? AND REMEMBER WHEN I ASKED
4 HIM, WELL, HOW WAS SHE ACTING. SHE WAS CRYING. SHE BROUGHT
5 IT BACK, AND THEY MADE HER FETCH AGAIN. WHICH, WHEN YOU
6 THINK ABOUT WHAT SHE TOLD THE DENARDOS, I'VE GOT TO GO HOSE
7 THE DOG OFF NOW. MAYBE THEY SAW NOTHING WRONG WITH PLAYING
8 FETCH. SHE WAS NOT JUST A HUMAN ASHTRAY, SHE WAS ALSO THEIR
9 DOG.

10 NOW, AS DREW SAID, SHE WAS HIT ON THE HEAD VERY HARD.
11 HOW DO WE KNOW THAT THAT'S TRUE? THIS CHILD WAS FOUR. AND
12 IN SIX MONTHS, SHE HAD HAD TWO MAJOR HEAD INJURIES THAT
13 REQUIRED TREMENDOUS FORCE. DOES ANYBODY KNOW WHAT HAPPENED
14 EITHER TIME? JUST NOT SURE. DON'T KNOW. REMEMBER WHAT
15 DREW TOLD YOU. IT WAS NOT DEREK THAT MADE HIM LIE. HIS
16 MOTHER MADE HIM LIE ON BOTH OF THEM. AND DON'T GET ME
17 WRONG, DEREK IS GUILTY OF HOMICIDE BY CHILD ABUSE. BUT HE'S
18 GUILTY OF THE ADMISSION PART OF ALLOWING THE CHILD TO BE
19 NEGLECTED ENOUGH TO STAY WITH SOMEONE YOU KNOW IS ABUSING
20 THE CHILD. BUT HE'S JUST AS GUILTY. THIS ISN'T HIS DAY IN
21 COURT. THIS IS HERS.

22 THINK ABOUT HER INJURIES, WHEN DREW TOLD YOU THERE WERE
23 MULTIPLE HEAD INJURIES. SHE HAD A BRUISE TO THE EAR.
24 THAT'S CERTAINLY NOT A TRAMPOLINE. BESIDES WHICH -- YOU MAY
25 HAVE ALREADY THOUGHT ABOUT THIS -- HOW DID SHE GET HOME? IF

ACTNPCB1

South Carolina Department of Social Services
 REPORT FOR CASE ID: 00129064-00 FLDR: 1
 ACTION LOG REPORT

11/06/2000
 PAGE: 1

CASE ID:00129064-00 STAT:O FILE:CARTER,DEREK

204-03AD01(CPI/OP)

FV Field Visit

Action Date: 10/24/00 TIME: 12:30

Created By --> JENKINS, CHARIE

864-260-4454 FAX:

864-260-4735

TCM Billable Activity: (Y/N)
 Primary or Concurrent: (P/C)
 Billable Placement : (Y/N - APS Only)
 TCM Billing Date : (MM/DD/YYYY)

supervisor and investigator carpenter talked with dr.
 woodard. he did the autopsy. he said that Minor Child died from
 a lack of oxygen to the brain. he said when he cut into the
 brain he expected to see a case of encephalopathy. but he
 saw hypoxia. he said that this could be caused from putting
 your hand over her nose and mouth or from putting something
 over her head. he said that whatever happened was around
 the time of her father the boys charlie jenkins (CJ)

END OF SERVICE EPISODE REPORT

LEGAL ARGUMENTS

Before dissecting S.C. Code Ann. §16-3-85 and assigning culpability to each element, one very important observation must first be made: In performing such an analysis, the "courts obviously must follow the legislature's intent. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to mandates of the legislature." United States v. Bailey, 444 US 394, 62 LEd2d 575, 100 Sct 624, 632 (1980).

Applicant's claim is supported by persuasive authority. David H. Wilkins, formerly the Speaker of the S.C. House of Representatives and principal draftsman of the original homicide by child abuse statute, construed §16-3-85 in his "2000 Post Session Report" (see AFFIDAVIT, pg. 8), which was published contemporaneously with the code on May 1, 2000. Such reports by legislative constituents of a statutory enactment are clear signals of legislative intent and are considered controlling authority when construing a particular statute. Cf. State v. Alles, 106 Wis2d 368, 386-87, 316 NW2d 378 (1982); also Bailey, supra.

In Wilkins' 2000 Post Session Report, he clearly states that one of the purposes of Act 261 of 2000 (H.3555) was to provide a "definition of the term 'Child Abuse or Neglect.'" In addition, Wilkins stated that, "this act closes a loophole in current law pertaining to homicide by child abuse. The homicide by child abuse statute originally did not define the term 'child abuse or neglect' and instead referred to the definition under S.C. Code Ann. §20-7-490." In other words, §16-3-85(A)(1) and §16-3-85(A)(2) were originally created to apply only to a child's "parent, guardian, foster parent . . . or an adult who has assumed the role or responsibility of a parent or guardian for the child" (see §20-7-490). Wilkins further stated that, "the original statute excluded babysitters and other

caregivers such as friends or paramours of the parent, other relatives or neighbors. Under this act, all perpetrators are subject to prosecution for homicide by child abuse, regardless of their relationship to the victim" (emphasis added). Therefore, it is clear the legislature intended to broaden the scope of §16-3-85.

In addition to the controlling authority expressed above by Wilkins, the documents filed in 1992 with regard to the original bill (H.4432) offer this court additional controlling authority concerning the expressed intent of §16-3-85 (see AFFIDAVIT, pg. 2). The original documents filed in 1992 reveal the following:

This bill would create a new felony known as "homicide by child abuse." A person would be guilty of this offense if he:

- (1) caused the death of a child under age 11 while committing child abuse or neglect and the death occurred under circumstances manifesting an extreme indifference to human life; or
- (2) knowingly allowed another to commit child abuse or neglect which resulted in the death of a child under age 11.

There are two specific facts about the legislature's intent which can be gleaned from the original language of the statute. First, although not originally included in the language, Wilkins deleted the specific reference to §20-7-490 by his May 1, 2000 amendment (H.3555), thereby expanding the scope of the current statute to encompass "all perpetrators . . . regardless of their relationship to the victim." Second, and the most revealing fact, is the absence of the element of "aids and abets" in the original language. The importance of this latter fact is that, by replacing the term "allowed" with the term "aids and abets" at a later date (see AFFIDAVIT, pgs. 9, 12), the May 19, 1992 amendment by Senator Thomas H. Pope, III actually enhanced the culpability of §16-3-85(A)(2) in the current statute.

Applicant now asserts a common sense rationale to explain the current version of §16-3-85 based on Wilkins' construction of the language. In the second paragraph of the original "Bill Summary" for H.4432 (see AFFIDAVIT, pg. 2), Wilkins clearly explains that, "A person guilty of causing the child's death would be imprisoned for at least 20 years or for life. A person guilty of knowingly allowing another to cause the death of a child would be imprisoned for between 10 and 20 years." Therefore, before Senator Pope's May 19, 1992 amendment, the legislature's intent already existed: The principal offender (whoever directly causes the death) would be culpable under §16-3-85(A)(1), while any other offender who may be involved (whoever indirectly causes the death) is culpable under §16-3-85(A)(2). The specific implication of the use of the term "aids and abets," rather than "allowed," will be discussed at length below.

Although §16-3-85(B) distinguishes an act from an omission by the disjunctive term "or" ("act or omission"), the statute gives both elements equal weight. In other words, an act can cause death just as easily as an omission. But this very fact of equal weight begs the question: How does the court differentiate between §16-3-85(A)(1) and §16-3-85(A)(2) if a parent, or anyone else for that matter, can be prosecuted by either provision? To answer this apparent conundrum, this court's attention must be directed to the provisions of §16-3-85(B)(2)(a), §16-3-85(B)(2)(b), and §16-3-85(B)(2)(c) for guidance.

It must first be noted that the term "or" is used four times in the above provisions. These provisions provide several means by which "harm" may be accomplished, which is key to the correct interpretation intended by Wilkins. If one simply exchanges the term "child abuse or neglect" with its definition ("an act or omission"), the intent of these provisions become obvious.

(1) causes the death of a child under the age of eleven while committing "an act (i.e., a physical injury [§16-3-85(B)(2)(a)]) or omission" (i.e., fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes [proximate cause] a physical injury or condition resulting in death [§16-3-85(B)(2)(b)] or abandons the child resulting in the child's death [§16-3-85(B)(2)(c)]), and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person (i.e., the person who directly causes the death) to commit "an act (i.e., a physical injury [§16-3-85(B)(2)(a) ("allows to be inflicted")]) or omission (i.e., allowing another person to fail to supply the child with adequate food, clothing, shelter, or health care, and that person's failure to do so causes a physical injury or condition resulting in the child's death [§16-3-85(B)(2)(b)] or allows another person to abandon the child resulting in the child's death [§16-3-85(B)(2)(c)]), and the act or omission (perpetrated by the principal offender) results in the death of a child under the age of eleven.

(S.C. Code Ann. §16-3-85, as amended on May 1, 2000)(emphasis added)

In addition to the above annotated version of the statute, other documents included within the original filing of H.4432 by Wilkins offer further controlling authority with regard to the legislature's intended interpretation of §16-3-85. As such, this court should consider the following:

Under Rep. Wilkins' bill, H.4432, a person would be guilty of homicide by child abuse if the person caused the death of a child under eleven while committing child abuse or neglect and when the death occurred under circumstances manifesting extreme indifference to human life. The penalty would be imprisonment for from 20 years to life. A lesser included offense is knowingly allowing a person to commit child abuse or neglect and the child abuse results in the death of a child under 11. The penalty for this offense is 10 to 20 years in prison.

(see AFFIDAVIT, pg. 4)

In the case of State v. Elliott, 346 SC 603, 552 SE2d 727, 728 (2001), the S.C. Supreme Court held that the true test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses "includes all the elements of the lesser offense." However, because Wilkins specifically stated that §16-3-85(A)(2) is a lesser included offense of §16-3-85(A)(1), suffice it to say that this component of the analysis is unnecessary.

Viewing §16-3-85 as a whole and with a practical eye, the term "child abuse or neglect" becomes inherently subjective in the context in which it is applied by the State. The statute itself contemplates that both provisions are "proven by evidence of multiple acts or omissions which show a systematic pattern of abuse." State v. Pierce, 326 SC 176, 485 SE2d 913 (1997). However, it must be observed that the term "child abuse or neglect" has been defined by the statute itself, but the terms "knowingly," and "aids and abets" have not. Because the latter term was amended into the language of the statute, a careful examination of their implications is in order.

Our S.C. Supreme Court has held that courts are not justified in their departure from the plain meanings of words, especially in a criminal statute, in search of intention which words themselves do not suggest, and to determine that a case is within the intention of the statute; its language must authorize the court to say so. Bouie v. City of Columbia, 378 US 347, 12 LEd2d 894, 84 SCT 1697 (USSC 1964); see also City of Myrtle Beach v. Juel P. Corp., 344 SC 43, 543 SE2d 538 (2001) ("In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.")

The term "knowingly" is an adverb that "qualifies a verb, adjective, or other adverb and indicates how, when, or where" (see AFFIDAVIT, pg. 10). It has also been

defined as "having or showing awareness or understanding; well-informed (a knowing waiver of the right to counsel); deliberate; conscious (a knowing attempt to commit fraud)" (see Black's Law Dict., 7th ed. (1999)). A person is said to "act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" United States v. United States Gypsum Co., 438 US 422, 57 LEd2d 854, 98 Sct 2864 (1978). In the context of §16-3-85(A)(2), the adverb "knowingly" acts to qualify the verbs "aids and abets," which indicates "how, when, or where" the person achieved knowledge or awareness of the principal's conduct. Therefore, the plain and ordinary meaning of these words in this specific context requires that "knowingly" and "aids and abets" are to be read together as a conjunctive phrase.

The term "aid and abet" has been historically defined in the common law to mean "to assist or facilitate the commission of a crime, or to promote its accomplishment" (see Black's Law Dict., 7th ed. (1999), pg. 69). Although the terms "aid," and "abet" are frequently used interchangeably, they are not synonymous. To "aid" is to assist or help another, to provide with what is useful or necessary in achieving an end. To "abet" means, literally, to bait or excite, as in the case of an animal, to actively second or encourage (as an activity or plan), to assist or support in the achievement of a purpose (abetted the thief in his getaway) (see 1 Charles E. Torcia, Wharton's Criminal Law §29 at 181 (15th ed. 1993); see also AFFIDAVIT, pg. 10).

If the court grammatically construes the conjunctive phrase "knowingly aids and abets" correctly, and without any subtle or forced constructive meanings, the plain and ordinary meaning of this phrase demonstrates that any person who "knowingly aids and abets" in the context of §16-3-85(A)(2) is a person who is knowledgeable or aware that a child's death is practically certain to follow from his conduct

because he has assisted or facilitated the commission of the child's death, or promoted its accomplishment, by providing what is useful or necessary in achieving the death and by actively assisting or supporting the achievement of the death. The legislature's further use of the suffix "-s" demonstrates the term "aids and abets" denotes "usual or repeated action (a pattern)" (see AFFIDAVIT, pg. 10).

Based on a grammatically correct interpretation of the conjunctive phrase "knowingly aids and abets," a person who is guilty of §16-3-85(A)(2) is not one who "merely knew of the practical certainty of the result." United States Gypsum Co., 438 US at 445, 98 S.Ct at 2877 (quoting LaFave & Scott 197). Rather, a person who "knowingly aids and abets" is one who "engages in deliberate conduct which culminates in the death of some person," Davis v. State, 325 Ark 96, 925 SW2d 768, 773 (1996), and reasonably demonstrates evidence of "a mental state akin to intent characterized by a deliberate act culminating in death." State v. Jarrell, 350 SC 90, 564 SE2d 362 (CtApp 2002).

In reference to the element of "extreme indifference," it is clear Wilkins included this term in the language of §16-3-85(A)(1). However, the May 1, 2000 amendment omits this term from §16-3-85(A)(2). Ordinarily, such an omission would generally lead one to assume this degree of a culpable mental state does not exist in §16-3-85(A)(2), but the provision's mere omission of the term does not eliminate that mental state from the offense. Morissette v. United States, 72 S.Ct 250 (1952).

In State v. Vowell, 634 SW2d 118 (1982), the evidence indicated Vowell had been drinking most of the day and was driving in an intoxicated condition when his automobile crossed the center line of a highway and collided with the victim's vehicle. Vowell took the stand and testified on direct examination that the wreck was an accident caused by a mechanical failure of his automobile. The trial court allowed the State to cross-examine him about three convictions within the past

twenty-six months for driving while under the influence of intoxicants in violation of Ark.Stat.Ann. §75-1027 (Repl 1977) and allowed the State to cross-examine him about driving while his license to drive was revoked. The Court of Appeals held the questions were proper.

Pursuant to Rule 404(b) the evidence of the three convictions for driving under the influence of intoxicants and the fact Vowell was driving while his license was revoked were admissible on cross-examination to prove the warning quality of the other convictions and to infer that Vowell must have arrived at a mental state inconsistent with mistake and consistent with the culpable mental state of causing serious bodily injury [albeit without death] under circumstances manifesting extreme indifference to the value of human life (emphasis added).

In comparison, the legislation in H.3555 by Wilkins also introduced the new felony offense of §16-3-95, "Inflicting Great Bodily Injury Upon a Child" (see AFFIDAVIT, pg. 8). The 2000 Post Session Report filed by Wilkins states that, "the term 'great bodily injury' means an injury that creates a substantial risk of death [albeit without death] or which causes serious or permanent disfigurement, or protracted loss or impairment of any bodily member or organ." According to John R. Ferguson in the Criminal Offenses in South Carolina, 3rd ed. (2007), the offense of inflicting great bodily injury upon a child "can apply to traffic accidents in which the injuries were caused by the driver's reckless disregard for the safety of others" (West, pg. 339); see also §16-3-95(E). The culpable mental state of "reckless disregard" has been compared to the "conscious indifference to the consequences (of an act)" (Black's Law Dict., 7th ed. (1999), pg. 1276).

The culpable mental state of recklessness means a heedlessness or wilfulness. State v. Jenkins, 249 SC 570, 155 SE2d 624 (1967). This state of recklessness is more than a failure to exercise ordinary care. State v. Phillips, 226 SC 297, 84 SE2d 855

(1954). Recklessness implies the doing of a negligent act knowingly. When a man actually acts negligently and he realizes that he is acting negligently, the law says he is reckless or wilful and wanton. These terms all mean the conscious failure to exercise ordinary and due care. State v. Rachels, 218 SC 1, 8, 61 SE2d 249 (1950).

Since the circumstances of inflicting great bodily injury upon a child naturally create a substantial risk of death, and because such circumstances also involve a reckless disregard for the safety of others, then, as in the case of Vowell, supra, one who inflicts great bodily injury upon a child has arrived at a mental state "akin to intent characterized by a deliberate act culminating in [serious physical injury]." Jarrell, supra. Even in the absence of death, a culpable mental state of extreme indifference can logically be inferred by the infliction of great bodily injury upon a child. In addition, it may also be logically implied within the conjunctive phrase "knowingly aids and abets" in §16-3-85(A)(2) where death does exist (emphasis added).

The above analysis, however, presents another conundrum: The defendant in Jarrell was not present at the scene when the fatal injury was inflicted. However, the evidence presented by the State indicated that Jarrell "acted with malice aforethought in planning the murder of her child." Jarrell, 564 SE2d at 367. Moreover, Jarrell "left home knowing her child would be killed while she was gone." Jarrell, 564 SE2d at 367. Jarrell's conduct was far more than knowingly exposing her child to harm by allowing her child to come within a foreseeable risk of harm [reckless disregard]; Jarrell acted with premeditation in actually planning the murder. State v. Crowsbreath, 629 NW2d 433, 440 (Minn.2001) ("It is possible for premeditation and extreme indifference to coexist.")

In light of the Jarrell analysis, one must carefully observe that Jarrell's husband was charged with murder, not §16-3-85. Jarrell, 564 SE2d at 366. Jarrell was also charged with accessory before and after the fact of murder, which was proven

by evidence of premeditation in planning the death. Both offenses required Jarrell to be absent, that Jarrell's husband commit the act [murder], but more importantly, that Jarrell in some way aid her husband.

Interestingly, however, under these circumstances, and based upon the analysis of the conjunctive phrase "knowingly aids and abets," the legislative intent of §16-3-85(A)(2) makes it rather clear that Jarrell would be culpable, at least with respect to the homicide by child abuse statute, as an aider or abetter under §16-3-85(A)(2), not as a principal offender under §16-3-85(A)(1). To elevate Jarrell as a principal offender, in light of the fact her husband was not charged under §16-3-85, clearly circumvents the purpose of the legislature in making one class of persons [i.e., the person who directly causes the death] punishable more heavily than another [i.e., the person who indirectly causes the death by allowing another person to commit an act or omission that is the proximate cause of the death] (see §16-3-85(C)).

A careful examination of the terms used in §16-3-85(A)(1) reveal that Wilkins used the term "while," which ordinarily means "during the time that (take a nap while I am out)" (see AFFIDAVIT, pg. 10). And unlike the term "commit" used in §16-3-85(A)(2) this term is expressed with the suffix "-ing" in §16-3-85(A)(1). Therefore, the phrase "while committing" denotes an action during a specified time.

The language used by Wilkins makes it rather clear that the "act or omission" [proximate cause] is in present tense in §16-3-85(A)(1), and is intended to refer to the person who directly causes the death. Moreover, the specific phrase "another person" in §16-3-85(A)(2) also refers to the person who directly causes the death. And, as noted above, it is clear Wilkins intended that the person who directly causes the death be culpable under §16-3-85(A)(1), while the person who indirectly causes the death be culpable under §16-3-85(A)(2). The court cannot circumvent legislative

intent where such intent is clearly expressed. Cf. U.S. v. Ambrose, 472 US 1017, 105 Sct 3479, 87 LEd2d 614.

Applicant's case is distinguishable from Jarrell in two very important ways: (1) Applicant's co-defendant was also charged with homicide by child abuse; and (2) neither Applicant nor his co-defendant were charged either as accessories or as conspirators to this or any other offense (i.e., murder). In addition to these facts, Applicant was not present when the fatal injury occurred [Tr.Pg. 199, Lns. 7-12], and the State's own evidence shows that Applicant's co-defendant directly caused the death [Tr.Pg. 202, Lns. 3-4; see also AFFIDAVIT, pg. 22-23]. The fact Applicant is the victim's biological parent does not automatically elevate culpability in this case. By no stretch of interpretation does the language of §16-3-85 authorize the State, or this court, to render such an interpretation within the intention of the statute, and merely resorts to subtle or forced construction to expand the statute's operation. Bowie, supra.

The essence of criminal conduct is the requirement of a wrongful "act" (LaFave & Scott, Criminal Law, § 25 at 177 (West 1972)). This element, however, is satisfied by overt acts, as well as omissions to act where there is a legal duty to act (see LaFave & Scott, Criminal Law, § 26 at 182). Accordingly, the following states the general rule applicable to omissions:

Some statutory crimes are specifically defined in terms of omission to act. With other common law and statutory crimes which are defined in terms of producing a specified result, a person may be criminally liable when his omission to act produces that result, but only if (1) he has, under the circumstances, a legal duty to act; and (2) he can physically perform the act. The trend of the law has been toward enlarging the scope of duty to act.

The common law imposes affirmative duties upon persons standing in certain personal relationships to other persons, such as a parent's specific and undelegable duty to serve the best interest of the child. Cf. Nash v. Byrd, 298 SC 530, 381 SE2d 913 (CtApp 1989). The requirement of a legal duty to act is a policy limitation which prevents most omissions from being considered the proximate cause of a prohibited consequence. In a technical sense, a person's omission, i.e., whether the person fails to protect, may be a substantial factor in exposing another person to harm. The concept of causation, however, is not solely a question of mechanical connection between events, but also a question of policy.

Applicant asserts that a parent's affirmative duty to act does not exclude a parent from prosecution under §16-3-85(A)(2). The real intent of the amended version of §16-3-85, bill H.3555 of May 1, 2000 revealed by the drafting file, states that, "all perpetrators are subject to prosecution . . . regardless of their relationship to the victim." Therefore, if one is to accept the position of the State, that a person, parent or otherwise, who is "guilty of the admission part . . ." (see AFFIDAVIT, pg. 24) is equally guilty as the principal offender, to conclude that such was the intent of the legislature is to attribute to it (and its staff) a complete lack of drafting expertise and the ordinary usages of the English language. The record before this court is completely devoid of any material that expresses the legislative intent that any person was to be held liable as a principal offender under §16-3-85(A)(1) who is "guilty of the admission part . . ." (see AFFIDAVIT, pg. 24). If one is to accept the position of the State, then §16-3-85(A)(2) is essentially useless, and the likelihood for genuine convictions [not guilty pleas] under the lesser included offense of §16-3-85(A)(2) would be virtually non-existent (see AFFIDAVIT, pg. 21 [Lns. 21-25 "This is very important - - means act or omission, an act or omission"]; pg. 22 [Lns. 4-5 "So just remember, the important thing here, act or omission"]); see also AFFIDAVIT, pg. 23 [Lns. 9-15 "More than one person can be guilty ..."]).

Because no "ascertainable standard of guilt" is clear from the ambiguous and vague language of the statute on its face, Applicant asserts the ambiguity must be resolved by the expressed intent of the legislature by Wilkins in the drafting file. Applicant further asserts that this case is essentially similar to Thomas v. Davis, 192 F3d 445 (4th Cir 1999) because his sentence was imposed in violation of the Due Process Clause of the Fourteenth Amendment since he was not afforded fair notice of the penalty he would face upon conviction. Based on the above analysis, the State has incorrectly construed the language of §16-3-85 with respect to the facts of Applicant's case. The record before this court establishes by a preponderance of the evidence that Applicant is entitled to be re-sentenced pursuant to §16-3-85(A)(2), and concurrently as originally ordered with respect to §16-3-95(A). Thomas v. Davis, 192 F3d at 449, fn. 1; also State v. Fletcher, 322 SC 256, 471 SE2d 702 (CtApp 1996) ("vindictiveness during retrial and sentencing is barred as contrary to the defendant's due process rights.")

CONCLUSION

WHEREFORE, based on the foregoing reasons, Applicant respectfully prays this court grants this application for post-conviction relief, and enters an appropriate order vacating Applicant's conviction and sentence for §16-3-85(A)(1), and thereby correct Applicant's conviction and sentence to §16-3-85(A)(2), and concurrently with the terms of Applicant's conviction and sentence for §16-3-95(A). Simmons v. State, 322 SC 49, 471 SE2d 455 (1993); also §17-27-80.

Respectfully submitted,



Derek S. Carter #275938
Kirkland Correctional Inst., Unit B2-5B
4344 Broad River Rd.
Columbia, S.C. 29210

STATE OF SOUTH CAROLINA	)	IN THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	THE COURT OF GENERAL SESSIONS
	)	2009-CP-04-02033
DEREK SHANE CARTER,	)	
	)	
PLAINTIFF,	)	
	)	
VERSUS	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	DATE: MARCH 8, 2012
DEFENDANT.	)	ANDERSON, SOUTH CAROLINA

POST-CONVICTION RELIEF HEARING

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

A P P E A R A N C E S:

TOMMY THOMAS, ESQUIRE
ATTORNEY FOR THE APPLICANT

KAELON MAY, ATTORNEY AT LAW
ATTORNEY FOR THE STATE

ROBERT TREACY, ESQUIRE
WITNESS

PROVIDED FOR: LORIE NE FRENCH, SCCID

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SOUTH CAROLINA JUDICIAL DEPARTMENT

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1 THE COURT: This is Derek Shane Carter, #275938,
2 versus The State of South Carolina. For the record, I had
3 an in chambers meeting with the State and the Applicant's
4 attorney and heard a gist of the nature of the issues
5 involved in this case. This is somewhat unique. There are
6 some constitutional issues that will be raised, I believe.
7 Isn't that right, counsel?

8 MR. THOMAS: That is correct, Your Honor.

9 THE COURT: Okay. If you would, for the record, stand
10 up and tell me what you contend the issues are in this
11 matter.

12 MR. THOMAS: I will be glad to, Your Honor. Your
13 Honor, if it please the Court, I'm here for Mr. Derek
14 Carter today. This is a Post-Conviction Relief action and
15 he has brought this action pursuant to the statute alleging
16 that there are some unconstitutional issues with regard to
17 the statute under which he pled and was sentenced. Your
18 Honor, that statute is 16-3-85, Homicide by Child Abuse.
19 There are two sections to that statute, (A)(1) section and
20 an (A)(2) and his challenge is that (A)(1) and (A)(2) are
21 unconstitutionally vague and, as such, are unconstitutional
22 with regard to due process.

23 Your Honor, if it please the Court, what he intends to
24 go forward with today is that the vagueness of the statute
25 created prejudice for him in that a sentence under (A)(1)

1 carries twenty to life and a sentence under A(2) carries
2 ten to twenty, that he did plea under (A) (1) and as a
3 result, received thirty years in which he would allege is
4 in violation of the statute because he actually would have
5 been guilty of (A) (2) and therefore, his sentence is longer
6 than what he should have received, which is twenty years.

7 THE COURT: Have you framed that issue for the
8 purposes of this hearing under what would have been
9 ineffective assistance of counsel?

10 MR. THOMAS: Yes, Your Honor. I think there are two
11 prongs to this. I've looked at his situation. He did not
12 have an appeal. He has asked for another Post-Conviction
13 Relief application, if I'm correct, for a delayed appeal,
14 as well. I think it is either 1) an appellate issue or 2)
15 it is an ineffective issue in which counsel should have
16 understood and taken the time to realize the difference
17 between (A) (1) and (A) (2) and was ineffective in not doing
18 so and allowing him to plea under (A) (1).

19 THE COURT: All right.

20 MR. THOMAS: Yes, sir.

21 THE COURT: Thank you very much. Are you ready to
22 call your first witness?

23 MR. THOMAS: Yes, Your Honor. And to complete the
24 record, what we would present to the Court in the sense he
25 is serving time under the constitutionally vague statute,

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1 that if the Court should rule in his favor, the remedy in
2 this case would be re-sentencing under the proper section
3 of (A) (2) rather than (A) (1).

4 THE COURT: Okay, sir. And my understanding is that
5 you intend to submit a memorandum in support?

6 MR. THOMAS: We do, Your Honor. We talked about that
7 in chambers and I think the State is in agreement with me
8 that there is ---

9 THE COURT: How long do you need to get that to me?

10 MR. THOMAS: Thirty days, Your Honor, if that please
11 the Court.

12 THE COURT: Sure. Make sure you copy Ms. May.

13 MR. THOMAS: Yes, sir. Thank you, Your Honor.

14 THE COURT: Would you call your first witness to the
15 stand?

16 MR. THOMAS: Your Honor, if it please the Court, we
17 would call Mr. Derek Carter to the stand.

18 MS. MAY: If I may ask, I would like to have time to
19 respond with a brief.

20 THE COURT: I assume that's what you will do.

21 MR. THOMAS: And I will provide a copy to counsel
22 before I send it to the Court, Your Honor.

23 THE COURT: How long will you need, do you think?

24 MS. MAY: Ten days, Your Honor.

25 THE COURT: So, all said and done, all briefing in

DEREK SHANE CARTER VERSUS THE STATE OF SOUTH CAROLINA

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

6

1 this case should be done within forty days. Is that
2 correct?

3 MR. THOMAS: That's correct, Your Honor.

4 THE COURT: Okay.

5 (After being duly sworn by the Clerk of Court, Derek
6 Carter testified as follows:)

7 CLERK OF COURT: If you would, take the witness stand
8 and state your name for the record, please.

9 MR. CARTER: My name is Derek Shane Carter.

10 MR. THOMAS: If it please the Court.

11 THE COURT: Yes, sir.

12 DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

13 Q Mr. Carter, you are currently serving time within the
14 South Carolina Department of Corrections?

15 A Yes, sir.

16 Q And you are serving time for what?

17 A Homicide by child abuse and great bodily injury upon a
18 child.

19 Q All right, sir. And in what year were you convicted
20 of that?

21 A 2001.

22 Q And you have filed, you filed a previous Post-
23 Conviction Relief application?

24 A Yes, sir. I did.

25 Q Okay. Was this issue raised in that action?

DEREK SHANE CARTER VERSUS THE STATE OF SOUTH CAROLINA

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

7

1 A No, sir.

2 Q And an order has been issued allowing you to go
3 forward on the merits of this hearing?

4 A Yes, sir.

5 Q Okay. Mr. Carter, now, you are challenging the
6 constitutionality of this statute?

7 A Yes, sir.

8 Q And you heard the summary that I presented to the
9 Court?

10 A Yes, sir.

11 Q And is that the gist of your argument?

12 A Yes, it is.

13 Q All right. And why do you say this statute is
14 unconstitutional?

15 A Well, I put it on the basis that I had been guilty of
16 child neglect. I wasn't present at the time the
17 injury was, in fact, committed. I had prior knowledge
18 that abuse had been taking place in the past, but
19 under the impression that Mr. Treacy advised me that I
20 was guilty of homicide by child neglect and because of
21 that term "neglect" was used in (A)(1), I was guilty
22 under (A)(1), that's what he advised me.

23 Q Okay. Now, what do you mean by (A)(1) and (A)(2)?

24 A Well, the statute is separated into two separate
25 provisions. One, it states that a person that causes

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

8

1 the death of a child while committing child abuse or
2 neglect and the death occurs under circumstances that
3 manifest an extreme indifference to human life. The
4 second statute states that you knowingly aid and abet
5 another to commit child abuse or neglect and death
6 results or the the child abuse and neglect results in
7 the death of a child. So, now, the problem is that
8 both include the element of neglect. If you are
9 guilty, like me, of child neglect, you could be
10 sentenced under the either provision. It seems
11 subjective because it's based on someone's opinion and
12 how they feel that day, whatever. There's no clear
13 standard to separate between the two.

14 Q All right. And you pled to two separate crimes. Is
15 that correct?

16 A Right.

17 Q And what other crime did you plead to?

18 A 16-3-95, which is great bodily injury upon a child.

19 Q All right. And what kind of sentence did you receive
20 for that?

21 A Twenty years.

22 Q All right. And then you also pled to the homicide?

23 A Yes, sir.

24 Q All right. And what sentence did you receive for
25 that?

DEREK SHANE CARTER VERSUS THE STATE OF SOUTH CAROLINA

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

9

1 A Thirty.

2 Q And that under that statute you could receive thirty
3 to life?

4 A Twenty to life.

5 Q Twenty to life.

6 A Right.

7 Q And you received a thirty year sentence?

8 A Yes, sir.

9 Q Okay. And you are asking the Court today to grant
10 your Post-Conviction Relief?

11 A Yes, sir.

12 Q And you are asking for re-sentencing. Is that
13 correct?

14 A Yes, I am.

15 Q And why are you asking for re-sentencing?

16 A Well, because the statute (A) (2) says, knowingly aids
17 and abets. Aiding and abetting requires
18 participation. It doesn't require presence, but it
19 requires some participation. Knowingly implies that
20 you have prior knowledge or some knowledge of someone
21 committing an act and in this case, child abuse or
22 neglect. My argument is that (A) (1), child abuse and
23 neglect, has two separate elements but they are
24 treated the same. The way the definition in the
25 statute explains it, in a limited fashion, is that if

1 you commit child abuse under (A)(1), that's the
2 proximate cause of the death. In other words, there
3 was an inflicted injury or some type of injury that
4 caused the death. If it was neglect, then in that
5 instance, it would be the case of someone leaving a
6 child in the car during the heat of the day or they
7 created a condition or injury that resulted in death
8 of a child. In my situation, I've been informed that
9 my co-defendant, who was my wife at the time, she
10 confessed that she did inflict an injury. That's how
11 the death was caused, by inflicted injury, not
12 neglect. It wasn't my failing to do something that
13 caused that injury. Her hand or whatever she used
14 that day, caused the injury.

15 Q Okay. And is it your contention that you are guilty
16 of the great bodily harm?

17 A Yes, sir.

18 Q And that you are guilty of (A)(2)?

19 A Yes, sir.

20 Q All right. And your wife was taken to trial?

21 A Yes, she did.

22 Q And she was found guilty of what?

23 A (A)(1). Well, of both charges, really. Death by
24 child abuse (A)(1) and great bodily injury upon a
25 child.

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

11

1 Q And what is her sentence?

2 A Life and twenty years.

3 Q All right. And now, I know that it took me quite some
4 time to understand this argument.

5 MR. THOMAS: Your Honor, beg the Court's indulgence?

6 THE COURT: Yes, sir.

7 MR. THOMAS: Your Honor, may I approach, please?

8 THE COURT: Yes, sir.

9 Q Now, you've spent a lot of time working on this case.
10 Haven't you?

11 A Yes, sir.

12 Q And you prepared a flow chart of the difference
13 between (A) (1) and (A) (2)?

14 A Yes, sir. I did.

15 Q Do you think this more easily summarizes your
16 contention as far as the differences between those two
17 sections?

18 A I do. Yes, sir.

19 Q Let me show you this and ask if you can identify that.

20 A That's it. That's the one I did when I was at
21 Kirkland.

22 Q And that is the flow chart that you prepared with the
23 differences between (A) (1) and (A) (2)?

24 A It is.

25 Q All right.

DEREK SHANE CARTER VERSUS THE STATE OF SOUTH CAROLINA

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

12

1 MR. THOMAS: Your Honor, if we can, we'd like to move
2 this in as Applicant's #1.

3 THE COURT: Any objection?

4 MS. MAY: I have no objection. I just ask that it be
5 admitted just as to the Applicant's understanding of the
6 statute or his assertion of what the statute means.

7 MR. THOMAS: And that's what it would be admitted for,
8 Your Honor.

9 THE COURT: All right.

10 MR. THOMAS: It may be helpful to the Court.

11 THE COURT: Admitted, without objection.

12 (Whereupon, a flow chart is entered into evidence as
13 Applicant's #1, without objection)

14 MR. THOMAS: Your Honor, if it please the Court. May
15 we hand this up?

16 THE COURT: Yes, sir. (Mr. Thomas hands document to
17 the Judge)

18 MR. THOMAS: Your Honor, may I approach? I've got a
19 larger version that I'm going to let him go through with
20 me.

21 THE COURT: Yes, sir.

22 A I have a smaller one.

23 Q You have a smaller one. All right. Now, you spent
24 quite some time trying to distinguish between (A) (1)
25 and (A) (2). Is that correct?

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DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

13

1 A Yes, sir.

2 Q And would you kind of very briefly take us through
3 your chart and show us the difference between (A) (1)
4 and (A) (2)?

5 A Okay. I'll do my best.

6 Q All right.

7 A At the top of this page, there is a box and it says,
8 "Child abuse or neglect means an act or omission by
9 any person which causes harm to the child's physical
10 health and welfare." The box below that states, "Harm
11 to a child's health or welfare occurs when a person."
12 Now, those two boxes indicate section (B) (1) and the
13 definition for it in the statute.

14 Q All right. And these pieces that you are using are
15 coming out of the statute with regards to the
16 definitions in (A) (1) and (A) (2). Is that correct?

17 A Yes. As they are applied to the statute.

18 Q All right. As they are applied to the statute.

19 A Right. Now, the three text boxes that are listed
20 below those are titled (B) (2) (a), (B) (2) (b) and
21 (B) (2) (c). Those come from the language in the
22 statute and stuff as well and those three sections
23 describe what harm is defined as.

24 Q Right.

25 A The different ways that harm can be accomplished, if

1 you will.

2 Q Right.

3 A The text boxes to the left and to the right are
4 questions that I surmise come from looking at and
5 addressing those particular text boxes, those
6 particular sections of the statute. So, for example,
7 under (B) (2) (a), it says, "Inflicts or allows to be
8 inflicted upon the child physical injury, including
9 physical injuries sustained as a result of excessive
10 corporal punishment."

11 Q Right.

12 A In my view is, if you look at the statute, the first
13 question you have to ask is, well, it says child abuse
14 or neglect and the statute treats both with the same
15 equal weight so you have to ask yourself was it child
16 abuse or was it neglect. Was it the nexus for the
17 proximate cause of her death.

18 Q Right.

19 A So, under (B) (2) (a) you have to ask yourself two
20 simple questions. Did the person being charged allow
21 another person to inflict the injury or did the person
22 inflict upon a child a physical injury. So, after you
23 ask either of those questions, you move to the next
24 one, which would be (B) (2) (b) and you would follow
25 that process until you get to the end. If you answer

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1 no to all six questions, then the person is not going
2 to be under that statute. But if there is any point
3 in this phase that you address the question and you
4 say yes, in my instance, you would get to the
5 (B) (2) (a) and say yes to the first question, did the
6 person allow another person to inflict upon a child
7 physical injury, including injuries sustained as a
8 result of excessive corporal punishment. I would say
9 yes in my case.

10 Q Were you -- let me stop you just a second.

11 A Okay.

12 Q Were you there when the actual blow that caused the
13 death to the child -- I know there was testimony at
14 your trial or forensic evidence, but were you there
15 when that blow was caused?

16 A No. In fact, I mean, it wasn't until December of 2001
17 after I had already pled guilty and was sentenced and
18 sent to Lieber, it wasn't until then that I found out
19 that an injury even took place.

20 Q Okay. All right. So, you were saying that as you go
21 through this chart ---

22 A Right.

23 Q --- that if you look at your circumstances, that you
24 would be under (A) (1) or (A) (2)?

25 A (A) (2).

1 Q And where, and I guess it's your contention that under
2 (A)(1), the whole problem in this comes about by the
3 use of the word "neglect".

4 A Right.

5 Q And then the definition of child abuse and neglect,
6 which is (B)(1) that says an act or omission.

7 A Right.

8 Q So, we could boil those down to saying that the
9 vagueness of the statute is in (A)(1), the use of the
10 word "neglect".

11 A Right.

12 Q And then the definition of neglect in (B)(1) is an act
13 or omission.

14 A Right.

15 Q Is it your contention that either knowingly aids or
16 abets or an omission are all the same?

17 A Say that again?

18 Q In other words, the problem is that if you knowingly
19 abet by, say in your circumstances, by not stopping
20 the abuse.

21 A Right.

22 Q Then it is an omission.

23 A Right.

24 Q And an omission is defined as an act or omission
25 under (B)(1), which is the definition of child abuse

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

17

1 or neglect.

2 A Right. Which could be treated either way.

3 Q Which brings you to the section of (A) (1).

4 A Right.

5 Q So, it is your contention that actually (A) (2), would
6 never come into play, that you would always be guilty
7 of (A) (1)?

8 A Of (A) (1). There would be very few instances where
9 (A) (2) would even come in unless the person pled
10 guilty.

11 Q Right. So, there could be a distinction in a guilty
12 plea.

13 A Right.

14 Q Between (A) (1) and (A) (2).

15 A Right.

16 Q But at trial there would be no distinction. It would
17 be difficult for a jury to distinguish between (A) (1)
18 and (A) (2).

19 A True. Especially considering my co-defendant's
20 transcript, if you read it, Solicitor White numerous
21 times said "or neglect". She emphasized "or neglect"
22 numerous times in her closing argument, so it would be
23 difficult for any reasonable jury sitting there in the
24 box and hear testimony of child abuse and think, well,
25 ok, or neglect is there, too. No, their first

1 impression and only impression would be (A) (1) every
2 single time.

3 Q Now, how does that apply to you? I mean, I understand
4 that you are saying that the statute is
5 unconstitutionally vague.

6 A Right.

7 Q And it is a violation of due process.

8 A Right.

9 Q How does that apply to you in your circumstances?

10 A Well, I'm serving an additional ten years. If I had
11 been convicted and sentenced correctly under (A) (2),
12 the maximum penalty would be twenty years, rather than
13 the thirty I'm now serving.

14 Q But you pled guilty to (A) (1).

15 A Right.

16 Q And you understand that when you pled guilty, the
17 judge asked you certain questions with regards to what
18 we would call, qualifying your plea.

19 A Right.

20 Q And you understand what that means, qualifying your
21 plea?

22 A Yes.

23 Q Okay. So, the judge in your case qualified your plea
24 and you pled guilty to (A) (1), then how does this
25 apply, why should you be granted relief today?

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1 A Because I was pleading under advice given to me by Mr.
2 Treacy and as qualified by the judge.

3 Q And what advice were you given by Mr. Treacy?

4 A Since the statute (A)(1) said "or neglect", that I
5 fell under (A)(1) and that I was just as guilty as my
6 wife.

7 Q Was it explained to you the circumstance of being the
8 hand of one, hand of all type situation?

9 A Yes.

10 Q And is it hand of one, hand of all?

11 Q Well, not in the traditional sense and I say that
12 because in most of the cases that I've read of the
13 hand of one, hand of all, it usually refers to like a
14 murder charge where there is not numerous subsections
15 in the statute. Murder has one statute, one
16 provision, so it differs from this statute because
17 this statute clearly defines two separate classes of
18 persons; those who commit the act and those who allow
19 it to happen.

20 Q Right.

21 A So, if you use hand of one, hand of all in the
22 traditional sense, what it does is, it takes someone
23 like me that's guilty of neglect and it elevates them
24 to (A)(1), but not under a clear standard, it's just
25 clearly subjective.

1 Q So, you are saying, in essence, that counsel was
2 ineffective in not properly advising you of the
3 differences between (A) (1) and (A) (2)?

4 A Correct.

5 Q And as a result of that ineffective advice, you ended
6 up pleading to (A) (1), which created, which put you in
7 a higher sentencing category.

8 A Right.

9 Q Now, you had an opportunity to appeal your plea?

10 A My plea?

11 Q Uh-huh.

12 A No.

13 Q Did you understand that you could appeal?

14 A No.

15 Q And did you, in fact, do a direct appeal?

16 A No, I didn't.

17 Q Okay. Now, you understand that the constitutionality,
18 your constitutionality of the statute would be an
19 appellate issue?

20 A Uh-huh.

21 Q Now, in your pleadings for post-conviction, you have
22 asked for a belated appeal.

23 A Yes, sir.

24 Q All right. And so you are also asking the Court to
25 consider, in the alternative, that if this is an

DIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

21

1 appellate issue, that you be allowed to raise that?

2 A Right.

3 Q And why are you asking to be allowed to raise that
4 issue?

5 A Well, if I had known that the issue was there, of
6 course, I would have raised it. So, here now, it
7 being a issue I never could have raised it before. I
8 mean, I couldn't have raised it then, so if the Court
9 is saying I should have raised it then, I should be
10 given the opportunity to raise it.

11 Q Okay. Now, you feel like you were prejudiced?

12 A Yes.

13 Q And how do you feel like you were prejudiced?

14 A That I'm serving an additional ten years.

15 MR. THOMAS: Your Honor, beg the Court's indulgence
16 just a second.

17 THE COURT: All right. Sure.

18 Q Mr. Carter, this is your day in court and in some
19 ways, as we have discussed, this is a simple issue but
20 in some ways this is a very complicated issue, as
21 well.

22 A It is.

23 Q I'm not suggesting that I have forgotten anything, but
24 since you have been a long time waiting for this day
25 in court, is there anything else that you feel is of

1 importance that you want to bring to the attention of
2 the Court?

3 A Well, I believe I've covered the statute and the
4 charge as best I could. I know on several occasions
5 since my guilty plea, I contacted Mr. Treacy through
6 letters from Lieber and I've always had some sense or
7 impression there was something wrong with the way this
8 statute is worded, how the sentences are handed down
9 and all that, and so several times I've communicated
10 through letters and asked him could he explain to me
11 what the difference was between the two. At no time,
12 he did. He would just remind me that there was the
13 hand of one, hand of all and so forth and he would
14 outline the admissions that I did make as far as the
15 physical abuse or the other statute, but at no time
16 did he explain the difference between the two and so
17 for the last twelve years that's what I've been doing,
18 trying to discern what's the difference between the
19 two and can someone give me a clear answer.

20 Q All right. Now, you mentioned admissions. You did
21 make certain admissions in this case.

22 A I did.

23 Q Your admissions were truthful in regards to your
24 involvement in this case?

25 A They were.

CROSS EXAMINATION OF DEREK CARTER BY MS. MAY

23

1 Q And those admissions would have placed you in (A) (1)
2 or (A) (2)?

3 A (A) (2).

4 Q Were you the direct cause of death of this child?

5 A No. I was not.

6 Q Was there any evidence that you are aware of that
7 placed you in the situation of you being the direct
8 cause of this?

9 A No.

10 MR. THOMAS: Your Honor, I have no further questions.

11 THE COURT: Cross examination?

12 MS. MAY: Thank you, Your Honor. May it please the
13 Court.

14 CROSS EXAMINATION OF DEREK CARTER BY MS. MAY

15 Q Mr. Carter, do you recall at your guilty plea the
16 judge asked you if you had discussed the charges and
17 the elements of each charge with your attorney?

18 A I did.

19 Q Okay. You did?

20 A Uh-huh.

21 Q So, y'all discussed the elements of the homicide by
22 child abuse char ---

23 A We were in the ---

24 THE COURT: Hold on. Let her finish her question.

25 MR. CARTER: Okay. I'm sorry.

1 THE COURT: Okay, sir. That's all right.

2 Q So, y'all discussed the elements of the homicide by
3 child abuse charge?

4 A Very vaguely, we did.

5 Q And do you recall the judge advising you that the
6 homicide by child abuse charge carried twenty years to
7 life?

8 A Yes, ma'am.

9 Q And was it your decision to plead guilty?

10 A It was.

11 Q It was. Okay. And you admit you are guilty under
12 (A) (2)?

13 A Yes.

14 Q But not under (A) (1).

15 A That's correct.

16 Q And is it your testimony that you were unaware of the
17 differences between (A) (1) and (A) (2) at the time of
18 your plea?

19 A Right.

20 Q Do you believe the facts that were cited by the
21 solicitor at your plea were correct?

22 A I believe they were correct as they were described for
23 both cases, for me and my wife.

24 Q So, you don't contest the ---

25 A I don't contest the facts, but we did contest my

REDIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS 25

1 involvement in them as far as mine were limited.

2 MS. MAY: Your Honor, I have no further questions.

3 THE COURT: Redirect?

4 MR. THOMAS: Your Honor, if I may just ask one or two
5 questions.

6 REDIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS

7 Q Counsel asked you about contesting the facts.

8 A Right.

9 Q Were -- did you have all the facts at the time of your
10 plea?

11 A That's kind of hard to say. What I knew, I mean, I
12 didn't have what I didn't know.

13 Q Right. Did you have knowledge after the fact of your
14 wife's culpability ---

15 A Right.

16 Q --- is what I was asking you about.

17 A Right.

18 Q And you learned this after the fact?

19 A Right. I didn't know that her son lied to me until
20 later on that year in December after I was sentenced.

21 Q Very briefly, what were the differences in the facts
22 that you found out later?

23 A Well, I was under the impression that she had fell
24 that day on October 14th, which we described as, you
25 know, a seizure. That's what she called it, a spell.

REDIRECT EXAMINATION OF DEREK CARTER BY MR. THOMAS 26

1 Q You're talking about the child?

2 A Right. So, that's the impression I had. I was never
3 under the impression that there was an inflicted
4 injury that day. Now, I knew there was an inflicted
5 injury on April 14th as a result of them jumping off
6 the beds and jumping on the bean bag and stuff like
7 that and so I knew there was an injury there, a
8 physical injury, but not on October 14th.

9 Q And your wife went to trial. Is that correct?

10 A Right.

11 Q Okay. And some of this information came out at her
12 trial?

13 A Right.

14 Q Okay.

15 MR. THOMAS: No further questions, Your Honor.

16 THE COURT: You may step down. Do you have any
17 further questions?

18 MR. THOMAS: Your Honor, if it please the Court, we
19 call Mr. Treacy to the stand.

20 THE COURT: Mr. Treacy, come around.

21 (After being duly sworn by the Clerk of Court, Robert
22 Treacy testified as follows:)

23 CLERK OF COURT: If you will take the witness stand
24 and state your name for the record, please.

25 MR. TREACY: My name is Robert Treacy. T-R-E-A-C-Y.

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DIRECT EXAMINATION OF ROBERT TREACY BY MR. THOMAS

27

1 MR. THOMAS: If it please the Court.

2 THE COURT: Yes, sir.

3 DIRECT EXAMINATION OF ROBERT TREACY BY MR. THOMAS

4 Q Mr. Treacy, you had an opportunity to represent Mr.
5 Derek Carter?

6 A I did.

7 Q All right, sir. And that representation ended up in a
8 plea?

9 A Yes, sir.

10 Q Okay. To the homicide by child abuse?

11 A Yes.

12 Q All right, sir. And, I guess you've heard the
13 testimony of Mr. Carter this afternoon. What
14 distinction, if any, were you able to make between the
15 statute that he pled to between the two sections that
16 we are talking about with regards to (A)(1) or (A)(2)?

17 A At the time or now?

18 Q At the time. Do you need a copy of that? I'm sorry.

19 A I have a copy of what the Attorney General presented,
20 which is a copy of the statute as it was then.

21 Q Okay.

22 A I think that maybe, perhaps, you and I were reading
23 one that's a newer version outside. I don't know if
24 it's the same.

25 Q I think they are the same.

1 A Okay. It may be the same. At the time, we had very
2 painfully dissected all of the available options for
3 him under the statutes that were being presented at
4 trial and our strategy was to try our best in pre-
5 trial motions to allow the Court to let us go to the
6 jury with the ability to argue child abuse and my
7 strategy was to -- because you couldn't get away from
8 it because there were admissions, to admit the child
9 abuse. There really wasn't a defense to it. He was
10 admitting it and my fear was that the jury was not
11 going to hear the distinction or difference, if there
12 is any, between child abuse and neglect. We had that
13 conversation and I think that a part of, not
14 necessarily a problem, but a part of the communication
15 with Mr. Carter and I has always suffered from the
16 fact that he seems to fail to accept that anyone might
17 see the facts differently from the way he sees the
18 facts. He admits to a lot of the facts. He doesn't
19 dispute them, but was not willing to see how the
20 solicitor clearly perceived there to be facts in it
21 that were going to be in evidence that supported the
22 (A) (1) and I think that, if my memory, this was eleven
23 years ago, but if my memory serves, there were facts
24 supporting that presented at the plea when it was
25 accepted that, you know, most of the facts supported

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1 his abuse, he's correct, don't connect him to any
2 physical trauma that led to the child's death
3 directly. He's absolutely right. That's why I felt
4 like we had a chance if we could get to the jury with
5 all of the options and fall on the lowest sword, the
6 smallest sword in the room, and hope that the jury
7 would overlook the other. For example, the day of him
8 learning of the child having something wrong with her,
9 be it a spell or -- assuming the jury would believe
10 that he believed it was a spell. That's the kind of
11 thing that I don't know if he's willing to accept that
12 a jury could, because of all the history, find that
13 his version of what he knew, that he's saying he knew
14 and understood isn't believable. But if you accept it
15 as believable, he still has a difficult time
16 explaining how he drove past the Anderson Hospital,
17 which was the nearest hospital, and took the child all
18 the way to Greenville if there wasn't some kind of
19 conspiracy with his wife at the time. He has an
20 explanation for that. His wife has a history of
21 problems with Anderson Hospital. There was always an
22 answer to it, and again, we could have had a chance in
23 front of a jury hoping that they believed all that,
24 but ultimately, I saw then and really even now, when
25 I'm being asked to focus on it after eleven years

1 having my mind completely clear, I'm not sure that the
2 difference, that it's a distinction without a
3 difference really. I see his point that (A)(1) and
4 (A)(2) aren't clearly different from each other. I
5 get that. But when we went to, when we lost our pre-
6 trial motions, the, the...

7 Q Let me ask you. I want to stop you a minute.

8 A Sure.

9 Q Let me ask you about that just to kind of keep it
10 flowing. There were actually two charges, which was
11 homicide by child abuse and then also the great bodily
12 injury.

13 A Right.

14 Q And you had brought a pre-trial motion to sever those?

15 A Right. And then also to allow a lesser included
16 offense of child abuse, the ten year, which is
17 essentially like ABHAN.

18 Q All right. And what did the Court do with both of
19 those motions?

20 A Denied both of those motions.

21 Q And then what happened as a result of that? Because
22 you were concerned about the factual, there were
23 certain facts with regards to great bodily injury that
24 you were afraid would taint the jury with regards to
25 the homicide by child abuse. Is that correct?

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1 A Right. And, you know, we were trying the whole time,
2 we never expected that we were going to get out of the
3 courtroom with him being found not guilty. It was
4 always trying to allow a path that would get to ten
5 years or twenty years and when the path escaped us and
6 it was clear that it was going to be between twenty
7 and life, given the facts of this case, I presented to
8 him that he was going to have a very difficult time, I
9 think I used pretty strong language about that, and
10 that I did not think that the jury was going to see
11 the distinctions that he was asking them to draw.
12 That it was going to get lost in how upset they were
13 going to be at the situation and I asked him, I
14 thought it was in his best interests for me to try to
15 go back and talk to the judge and see if I could get
16 an agreement to a plea that would hopefully spare him
17 his life, that he would be allowed to have some years
18 of his life. He was still young and I was able to do
19 that, but the solicitor was insistent that he plead to
20 (A) (1). It had to be a straight up plea to all the
21 charges and she could not recommend anything given the
22 publicity of the trial, obviously. That's
23 understandable. And I felt like I had enough of a gut
24 feel for what the judge would do after that
25 conversation, that my recommendation was for him to

1 plead and I didn't, we didn't have a constitutional
2 discussion at the time, certainly. I will concede
3 that. It was not, but, you know, I am confident that
4 my conversations with him were that it was more
5 important that he approach whatever issues he had with
6 this case from a time frame of thirty years rather
7 than having the book thrown at him which was almost
8 inevitable and I don't recall anything about the
9 guilty plea that caused me to think that I needed to
10 object that there weren't facts sufficient to support
11 it.

12 Q Let me ask you this: Under the, in looking at his
13 culpability under the statute, do you think that --
14 would it be fair to say that his actions were more of
15 an admission, I mean, an omission rather than an act
16 in the homicide cause of the death?

17 A It would -- Again, if you accept all of the facts the
18 way he says the facts are, which I have a feeling that
19 if Druanne White was in the room right now she would
20 disagree with him, but if you assume the facts the way
21 they are, it would depend on how you characterize
22 driving past the hospital, whether that is an act or
23 an omission. I think in fairness, probably the act of
24 driving past the hospital was the only thing that
25 could be attributed to him. I don't remember there to

DIRECT EXAMINATION OF ROBERT TREACY BY MR. THOMAS 33

1 be any facts after he was known to have left for work
2 that day, there wasn't any evidence that he did
3 anything to the child. The only evidence was going to
4 be the driving to Greenville rather than Anderson
5 given the fact that the child was not in good shape.

6 Q So, there was no evidence that he was the one that
7 struck the blow?

8 A Correct. You would have to believe that the blow that
9 caused her death came from a time frame where he had
10 already worked his shift and was back prior to the
11 time and I don't remember the State's evidence
12 supporting that.

13 Q How would somebody be -- I know that all of us were
14 looking at the statute, that we were looking at it
15 prior to this hearing. Do you know how somebody would
16 be guilty under (A)(2)? What would be the factual
17 situation of somebody being guilty under (A)(2)?

18 MS. MAY: I'm going to object. Calls for speculation.

19 A Well, I mean ---

20 THE COURT: Don't answer that. State the question
21 again, please?

22 MR. THOMAS: Your Honor, I was going to ask him how
23 someone would be guilty, factually would be guilty, under
24 (A)(2). We've been talking about the differences and the
25 vagueness between (A)(1) and (A)(2). I think it's relevant

1 to his interpretation of the statute with regards to how he
2 would have advised his client.

3 THE COURT: I sustain the objection.

4 MR. THOMAS: All right. Thank you, Your Honor.

5 THE COURT: Yes, sir.

6 MR. THOMAS: Your Honor, I beg the Court's indulgence.

7 THE COURT: Yes, sir.

8 Q Just a couple of questions about driving by the
9 hospital. Your concern was, I guess, how you would
10 categorize him not going to Anderson Hospital -- was
11 it Anderson or Pickens?

12 A Anderson.

13 Q Anderson Hospital and going to the Greenville
14 Hospital, how that -- Well, let me re-phrase it. In
15 looking at the statute, you would be concerned from
16 your testimony that going to the other hospital could
17 potentially place him under (A) (1)?

18 A Correct.

19 Q Okay. And how would you have come to that conclusion?

20 A That was the argument that Solicitor White made to me
21 when I tried my best in pre-trial discussions with her
22 trying to convince her that he had nothing to do with
23 it, that he was at work. Her retort to that was his
24 drive to the hospital and that's what she was clinging
25 to as being an act on his part rather than just aiding

DIRECT EXAMINATION OF ROBERT TREACY BY MR. THOMAS

35

1 someone else's act.

2 Q Was it your understanding that he went to the
3 Greenville Hospital based on the information given to
4 him by his co-defendant, problems with the Anderson
5 Hospital or something?

6 A Correct. My memory, and again I don't recall whether
7 those facts were coming from him. I think those were
8 in his, those were either in statements made to the
9 police explaining why he did it or his statements to
10 me, but Druanne had them and so I assume those were
11 statements he had given to the police.

12 Q And I guess what we are talking about, it really all
13 boils down to what you said, whether or not it is an
14 act or an omission in regards to the statute and I
15 guess whether or not it is neglect because it would
16 have to be an omission that would be categorized as
17 neglect under (A) (1) for him to be guilty of this. Is
18 that correct?

19 A In hindsight, yes. I mean, I guess I would have to,
20 not that my opinion of it would necessarily resolve
21 the matter.

22 Q Would you agree that, obviously, the definition, I
23 mean, the distinction between (A) (1) and (A) (2) is
24 somewhat blurred?

25 A Sure.

1 Q Do you think it's vague?

2 A I think it is. It -- but I'm not sure the vagueness
3 is necessarily what, if it was the only problem that
4 was presented for him and why he entered the plea that
5 he did.

6 Q Right.

7 A I mean, I think he, that an example is, you are also
8 having to assume -- he's wanting everyone just to
9 accept that he would have gotten twenty years except
10 for (A)(1), but in reality he could very easily have
11 gotten twenty plus twenty consecutive. There were a
12 lot of different variables that I was having to cope
13 with as his legal counsel at that time that I don't
14 believe that he was actually considering. He was not
15 allowing himself or wasn't able, understandable as a
16 lay person, to predict how bad things could really be
17 and, you know, I was trying to explain to him that how
18 the jury is not even going to hear your very reason,
19 meticulous logical argument and even though nine times
20 out of ten a judge might do x, y and z with a certain
21 scenario, his case was not a standard case by any
22 means. It was a very volatile, highly publicized case
23 and I tried my best to negotiate that treachery in
24 good faith with him.

25 Q If you had tried this case do you think the jury would

CROSS EXAMINATION OF ROBERT TREACY BY MS. MAY

37

1 also have been, had problems distinguishing between
2 (A) (1) and (A) (2) as to where his culpability would
3 lie?

4 A I don't think they would had -- my personal feeling is
5 I don't think they would have had a problem. They
6 would have just convicted him of the highest thing and
7 moved on. It's difficult to me to say the jury would
8 have even given it a thought, because ---

9 THE COURT: Let's just move on. You can't guess what
10 a jury is going to do and I wouldn't pay that any
11 attention.

12 MR. THOMAS: Yes, sir, Your Honor. Thank You.

13 THE COURT: Yes, sir.

14 MR. THOMAS: Your Honor, may it please the Court. We
15 have no further questions, Your Honor. Thank You.

16 THE COURT: Yes, sir. Cross examination?

17 MS. MAY: May it please the Court.

18 CROSS EXAMINATION OF ROBERT TREACY BY MS. MAY

19 Q Mr. Treacy, I believe you stated the main crux putting
20 Mr. Carter under (A) (1) was the fact of driving past
21 the Anderson hospital and going to Greenville, that
22 that is what the solicitor said to you?

23 A Right. That was the clearest one to me. I think you
24 could stretch some of the prior acts that he admitted
25 to as evidence of a relationship with his wife that a

CROSS EXAMINATION OF ROBERT TREACY BY MS. MAY

38

1 jury would probably have just seen them as two people
2 doing the same, acting the same way with that child.

3 Q And you felt the jury was not going to go along with
4 Mr. Carter's explanation as to why he drove past the
5 hospital?

6 A No.

7 Q And did you discuss the solicitor's argument about the
8 hospital with Mr. Carter?

9 A Yes. My memory is, yes. I mean, it's been eleven
10 years, but I would assume we discussed that. Yes.

11 Q And you discussed your feelings about the jury, that
12 it was not likely that ---

13 THE COURT: I'm going to -- juries, you don't know
14 what they are going to do, that's all speculation.

15 MS. MAY: Yes, sir.

16 Q Mr. Treacy, did You review the elements of both
17 charges with Mr. Carter?

18 A I did. I will concede that I did not have a
19 constitutional argument that's been presented here. I
20 was dealing with it on a practical level, not a
21 constitutional level.

22 Q And you looked at both subsections, both (A) (1) and
23 (A) (2)?

24 A Yes. I had to, because they had different sentences.

25 Q And you believe that the facts presented at the plea

CROSS EXAMINATION OF ROBERT TREACY BY MS. MAY

39

1 put Mr. Carter under (A) (1)?

2 A I do, because -- and that is why I didn't have any
3 objection to it that day.

4 Q And did you discuss with Mr. Carter that he would be,
5 that in pleading guilty he would be giving up his
6 right to challenge those pre-trial rulings that You
7 discussed earlier?

8 A Yes.

9 Q And Mr. Carter did not ask you to file for an appeal.
10 Is that correct?

11 A Correct. We didn't have -- we didn't talk about that
12 afterwards.

13 MS. MAY: I have no further questions. Thank You.

14 MR. THOMAS: Nothing further, Your Honor.

15 THE COURT: All right. Thank You. May he be excused?

16 MR. THOMAS: Certainly, Your Honor.

17 MS. MAY: Yes, sir.

18 THE COURT: Thank You.

19 MR. THOMAS: Your Honor, that's the Applicant's case.

20 THE COURT: Are you going to call anyone?

21 MS. MAY: No, sir, Your Honor.

22 THE COURT: I have read, but obviously, not all of the
23 transcript, I've listened to the testimony and I'm going to
24 allow the attorneys to brief the issues. Obviously, I will
25 take this under advisement and give you my opinion. I am

1 going to note for the record that I read through the plea
2 colloquy between Judge Kittredge and Mr. Carter and Justice
3 now, but Judge Kittredge very thoroughly and adequately
4 questioned Mr. Carter as to his rights and his waiver of
5 those rights and I see nothing wrong with the plea,
6 whatsoever. Further, Judge Kittredge advised Mr. Carter of
7 the range he was subject to being incarcerated and he knew
8 this was a straight up plea and so with that being said,
9 I'm more concerned about the constitutional issue. Quite
10 frankly, those are very tough arguments, but I'm not going
11 to rule at this point. I'm going to let you give me your
12 information and then I'll make my decision.

13 MR. THOMAS: Thank you, Your Honor.

14 THE COURT: Thank you for your preparation, thank you
15 for being here and thank you.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, SO GIVEN ON MARCH 8, 2012 TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 2ND DAY OF JANUARY, 2013.



 JO RICE
 OFFICIAL COURT REPORTER

DEREK SHANE CARTER VERSUS THE STATE OF SOUTH CAROLINA

RECEIPT FOR EXHIBITS

CASE NUMBER 09-CP-04-2033
 PLAINTIFF: DEREK SHANE CARTER
 DEFENDANT: STATE OF SC
 DATE(S): 3.8.12

JUDGE R. LAWTON MCINTOSH
 ATTORNEY: TOMMY TAYLOR
 ATTORNEY: CAELAN MAY

APPLICANT
 STATE/PLAINTIFF EXHIBITS

1 FLOW CHART
 2 _____
 3 _____
 4 _____
 5 _____
 6 _____
 7 _____
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____

COURT EXHIBITS

1 _____
 2 _____
 3 _____

DEFENSE EXHIBITS

1 _____
 2 _____
 3 _____
 4 _____
 5 _____
 6 _____
 7 _____
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____

A TRUE COPY

NOV 15 2012

Richard X. Wiley
 CLERK OF COURT

FILED-CLERK'S OFFICE
 ANDERSON SC
 2012 MAR 12 A 8:03
 COMMON PLEAS AND
 GENERAL SESSIONS

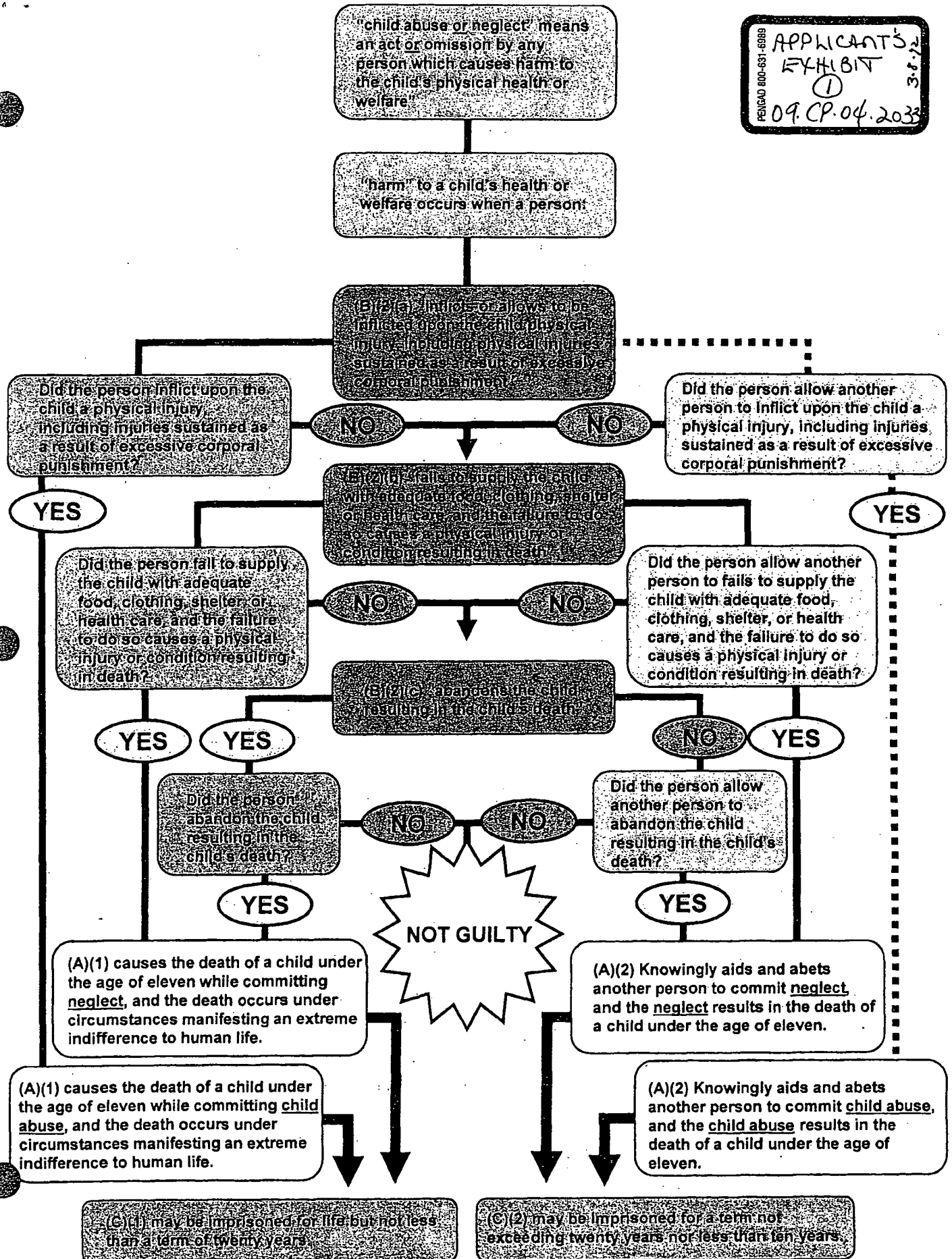
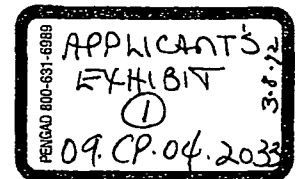
*ALL EXHIBITS CIRCLED HAVE BEEN ENTERED AS EVIDENCE

Court Reporter

Blue

Clerk of Court

Richard X. Wiley



adjudication. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). All the due process clause requires is that the language of a statute convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. Id. The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. Main v. Thomason, 342 S.C. 79, 535 S.E.2d 918 (2000). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. Id. Due process does not require that every word in a statute be expressly defined. Id.

Respondent submits that Applicant by his own admissions and actions clearly demonstrates that he is able to discern a difference between the two subsections. Applicant complains that section 16-3-85 is unconstitutionally vague in violation of due process, but then admits that he is certainly guilty of subsection (A)(2) and requests resentencing under that subsection. Respondent submits that Applicant is asking this Court to grant PCR so that he may be resentenced under a different subsection of an unconstitutionally vague statute.

In support of his claim, the Applicant argues that if someone knowingly aids and abets another person under (A)(2) to commit child abuse or neglect, that person's act or omission, which is part of the definition of child abuse or neglect creates a situation where they would always be guilty of (A)(1) causing the death of a child under the age of eleven while committing child abuse or neglect. Respondent submits that Applicant misconstrues the language of subsection (A)(2). To "knowingly aid and abet" an individual helps, assists, or facilitates the commission of a crime, or promotes the accomplishment thereof. There is no 'act or omission' requirement to "knowingly aid and abet" another person to commit child abuse or neglect.

In State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011), the defendant was indicted under (A)(1) and the trial judge also allowed the state to proceed under (A)(2). The jury found Smith guilty of aiding and abetting homicide by child abuse under (A)(2). Id. The court of appeals found that the state presented sufficient evidence to support various theories of Smith's guilty under the aiding and abetting section. Id. The court explained that "[e]ven if the jury found the State failed to prove beyond a reasonable doubt that Smith inflicted the fatal chest injuries, or personally administered the pseudoephedrine, they could nevertheless find him guilty of aiding and abetting if they found the State proved beyond a reasonable doubt that Smith knew about the injuries or about the pseudoephedrine but failed to seek medical care for the victim." Id. Applicant's argument that a person's actions under subsection (A)(2) creates a situation where that person would always be guilty under (A)(1) must fail based on a reading of Smith.

The Applicant asserts that his argument can be further carried to say that any individual who "knowingly aids or abets" another person to commit child abuse or neglect would in almost any case exhibit a manifestation of extreme indifference to human life, placing the individual's fault under (A)(1). Extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death. State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). In South Carolina, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care. Id. Respondent submits that Applicant's argument is speculative at best and wholly unsupported.

Plea counsel testified at the PCR hearing that the state was going to focus on the Applicant's actions when he took the victim to Greenville Hospital. Applicant claims that the transcript and record demonstrate that the Applicant was not the individual who created the

situation causing the death of the minor child. Counsel testified that he and Applicant discussed the differences between subsection (A)(1) and subsection (A)(2) of the homicide by child abuse statute. Counsel testified that the facts presented at the plea supported the charge under section 16-3-85(A)(1). Counsel testified that it was his opinion that the distinction between subsections (A)(1) and (A)(2) was somewhat blurred and vague, but that counsel was not sure vagueness was the only problem that Applicant faced in deciding whether to enter a guilty plea or go to trial.

Respondent submits that Applicant failed to show that counsel was ineffective for failing to object to the statute under which Applicant pled guilty and for allowing Applicant to plead guilty under the statute. The record reflects that there was a factual basis for Applicant's plea with respect to each indictment. (Tr. p.187, lines18-25). The record further reflects that Applicant entered his guilty plea freely, voluntarily, and knowingly, with the advice of plea counsel with whom Applicant was satisfied with. (Tr. p. 187, lines13-17).

The State, therefore requests that the requested relief by Applicant be denied and the Application for PCR be dismissed with prejudice.

Respectfully submitted,

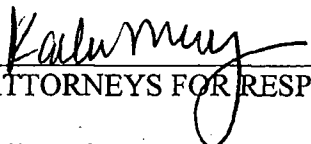
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAELOE E. MAY
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Columbia, South Carolina
May 14, 2012

STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON

Derek S. Carter, #275938

FILED - CLERK'S OFFICE
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2009-CP-04-2033

COMMON PLEAS AND
 GENERAL SESSIONS

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

TRUE COPY

AUG 13 2012

Richard A. Huddy
 CLERK OF COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 15, 2009. Respondent made its Return and Motion to Dismiss on April 7, 2010. An evidentiary hearing into the matter was convened on March 8, 2012 at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by Tommy A. Thomas, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing the Applicant testified on his own behalf. The State offered the testimony of Robert E. Traecy, Esquire (Mr. Traecy) Applicant's plea counsel. This Court also had before it the records of the Anderson County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant was indicted at the March 2001 term of the Anderson County Grand Jury for one (1) count of Great Bodily Harm Upon a Child (2001-GS-04-0763), and later indicted at the May 2001 term of the Anderson County Grand Jury for one (1) count of Homicide by Child Abuse (2001-GS-04-

1204. The Applicant was represented at trial by Robert E. Treacy, Jr. Esquire. On June 12, 2001, the Applicant pled guilty as charged. The Honorable John W. Kittredge sentenced the Applicant to confinement for a period of thirty (30) years for Homicide by Child Abuse (2001-GS-04-1204), and twenty (20) years for Great Bodily Harm Upon a Child (2001-GS-04-0763), both to be served concurrently. The Applicant did not appeal his conviction or sentence.

The Applicant subsequently filed an Application for Post Conviction Relief on July 9, 2002. The Respondent made its Return and Motion to Dismiss on or about September 17, 2004, for failure to comply with the Uniform Post Conviction Procedure Act. In his first Application the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
2. Unconstitutional Sentence
3. Brady Violation

The Applicant then made a motion to withdraw his Application for Post Conviction Relief which the Court granted.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reason(s):

1. S.C. Code Ann. § 16-3-85 is unconstitutionally vague
 - a. "statute does not provide ascertainable standards of guilty to protect against arbitrary, erratic and discriminatory enforcement, and it violates the Fourteenth Amendment due process requirement of notice."

On May 4, 2010, the Honorable Alexander S. Macaulay issued a Conditional Order of Dismissal provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said order in which to show why the conditional order of dismissal should not become final. On April 21, 2010, Applicant filed a document captioned "Motion to

Oppose Respondent's Motion to Dismiss and Applicant's Motion for the Appointment of Legal Counsel" in which he stated his objections to Respondent's motion to dismiss. In addition, Applicant timely submitted correspondence objecting to the conditional order of dismissal, dated May 25, 2010, and stating grounds as to why the dismissal should not become final. Subsequently, Judge Macaulay issued an Order Granting Post-Conviction Relief Hearing on May 27, 2010.

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

The Applicant contends that plea counsel was ineffective for failing to object to the vagueness of S.C. Code Ann. §16-3-85(A)(1) (2003) and for allowing Applicant to plead under Section 16-3-85(A)(1). The Applicant argues that there is a circular analysis between subsections (A)(1) and (A)(2) which leads a court and/or jury to always find an individual guilty under (A)(1). In support of his claim, the Applicant argues that if someone knowingly aids and abets another person under (A)(2) to commit child abuse or neglect, that person's act or omission, which is part of the definition of child abuse or neglect creates a situation where they would always be guilty of (A)(1) causing the death of a child under the age of eleven while committing child abuse or neglect. The Applicant asserts that his argument can be further carried to say that

any individual who "knowingly aids or abets" another person to commit child abuse or neglect would in almost any case exhibit a manifestation of extreme indifference to human life, placing the individual's fault under (A)(1).

Plea counsel testified at the PCR hearing that the state was going to focus on the Applicant's actions when he took the victim to Greenville Hospital. Applicant claims that the transcript and record demonstrate that the Applicant was not the individual who created the situation causing the death of the minor child. Counsel testified that he and Applicant discussed the differences between subsection (A)(1) and subsection (A)(2) of the homicide by child abuse statute. Counsel testified that the facts presented at the plea supported the charge under section 16-3-85(A)(1). Counsel testified that it was his opinion that the distinction between subsections (A)(1) and (A)(2) was somewhat blurred and vague, but that counsel was not sure vagueness was the only problem that Applicant faced in deciding whether to enter a guilty plea or go to trial.

Counsel further testified that there were a lot of other variables that counsel had to consider in preparing Applicant's case. Counsel testified that he tried to explain to Applicant what a jury would hear in if Applicant went to trial and that Applicant's case was a very volatile, public case. Counsel testified that one of the hurdles Applicant faced at a trial was the fact that the jury was going to hear about prior incidents of abuse therefore the jury was likely not going to accept Applicant's version of what he knew. Counsel testified that Applicant was going to have a difficult time explaining to the jury why he drove past the Anderson Hospital to take the victim to the Greenville Hospital, which was farther away. Counsel testified that a jury would not have had a problem finding Applicant guilty at trial.

Counsel testified that he did not object to the statute at Applicant's plea hearing because the facts of the case met the requirements of Section 16-3-85(A)(1). This Court notes that

Applicant was facing a possible life sentence and received a thirty (30) year sentence. Counsel testified that after losing the pre-trial motions it was his goal to try to find a way to spare Applicant a life sentence. Counsel testified that that solicitor was adamant that the plea offer to Applicant would be under subsection (A)(1) of the statute and straight up with no recommendations. This Court finds that counsel provided a rational explanation as to why he did not object to the statute under which Applicant was pleading on the grounds that the statute was unconstitutionally vague. This Court accepts counsel's reasoning as to why he did not object. Furthermore, there has been no showing by the Applicant that had counsel objected that the result of Applicant's proceeding would have been different. This Court finds that Applicant failed to show that counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

To the extent Applicant claims his guilty plea was involuntary; this Court finds Applicant cannot meet his burden of proof. The record reflects that there was a factual basis for Applicant's plea with respect to each indictment. (Tr. p.187, lines18-25). The record further reflects that Applicant entered his guilty plea freely, voluntarily, and knowingly, with the advice of plea counsel with whom Applicant was satisfied with. (Tr. p. 187, lines13-17).

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable."

Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

IV. CONCLUSION

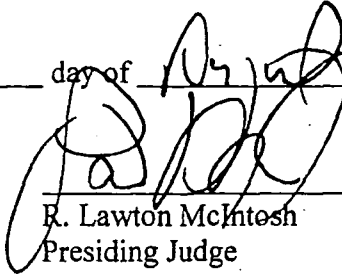
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

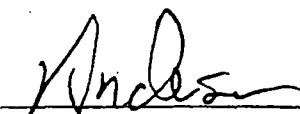
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 7 day of August, 2012.


R. Lawton McIntosh
Presiding Judge


Anderson, South Carolina

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COMMON PLEAS AND
GENERAL SESSIONS

ARREST WARRANT

G-096227

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

THE STATE

against

Derek Shane Carter

[Redacted Name]

[Redacted Name]

Sex: M Race: [Redacted] Height: 5'04" Weight: 135

DL State: SC DL #: 007636279

DOB: [Redacted] Agency ORI #: 04000

Prosecuting Agency: ACSI

Prosecuting Officer: J. Carpenter

Offense: Great Bodily Injury Upon

A Child

Code/Ordinance Sec. 16-3-95

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

dealt with according to law.

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant Derek Shane Carter

on 05-22-2009

Signature of Constable/Law Enforcement Officer

Signature of Constable/Law Enforcement Officer

Signature of Constable/Law Enforcement Officer

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

MAY 15 2009

CLERK OF COURT

CLERK OF COURT

CLERK OF COURT

CLERK OF COURT

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Anderson

Personally appeared before me the

affiant

being duly sworn deposes and says

that defendant

between 10/01/99 and 10/14/2000

did within this county and state on

State of South Carolina (or ordinance of

in the following particulars:

DESCRIPTION OF OFFENSE: Great Bodily Injury Upon A Child

I further state that there is probable cause to believe that the defendant named above did commit

the crime set forth and that probable cause is based on the following facts:

the Defendant did on multiple occasions betwe

11/01/99 And 10/14/2000 repeatedly strike, grab,

AND Assault his 4 year old daughter, Stephanie

Carter, this resulted in great bodily injury to

the child's body and extremities. These incidents occur

at [Redacted Address] in Anderson County. [Redacted Signature]

Sworn to and subscribed to before me

on 10/14/2000

Signature of Affiant

Affiant's Address

Signature of Issuing Judge

Affiant's Telephone

260-4400

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Anderson

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on between 11/01/99 and 10/14/2000

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ ☐ Municipality of

Anderson

DESCRIPTION OF OFFENSE: Great Bodily Injury Upon A Child

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before

me, forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the

defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge

Judge's Address

PO Box 8002

Anderson SC 29622

Signature of Issuing Judge

Judge's Telephone

260-4350

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

AFFIDAVIT

who

between 10/01/99 and 10/14/2000

did within this county and state on

State of South Carolina (or ordinance of

in the following particulars:

DESCRIPTION OF OFFENSE: Great Bodily Injury Upon A Child

I further state that there is probable cause to believe that the defendant named above did commit

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Carter, this resulted in great bodily injury to

the child's body and extremities. These incidents occur

at [Redacted Address] in Anderson County. [Redacted Signature]

Sworn to and subscribed to before me

on 10/14/2000

Signature of Affiant

Affiant's Address

Signature of Issuing Judge

Affiant's Telephone

260-4400

Signature of Issuing Judge

Affiant's Telephone

260-4400

Signature of Issuing Judge

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Affiant's Telephone

260-4400

Signature of Issuing Judge

Affiant's Telephone

260-4400

WITNESSES

INV-J CARPENTER, ACSO

ARREST WARRANT NO.

F-966184

Ref.

ACTION OF GRAND JURY

Foreman of Grand Jury

[Signature]
DATE 5/1/04

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 2001-GS-04 1804

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

MAY TERM 2001

DDW THE STATE

vs.

DEREK SHANE CARTER

Indictment for

HOMICIDE BY CHILD ABUSE
16-03-0085(A)(1) [2356]

DRU/ANNE D. WHITE, SOLICITOR

Common
6-12-01
Camp

A TRUE COPY

MAY 15 2009

County of Anderson

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT FOR
HOMICIDE BY CHILD ABUSE
16-03-0085(A)(1) [2356]

At a Court of General Sessions, convened on MAY 1, 2001,
the Grand Jurors of ANDERSON County present upon their oath:

HOMICIDE BY CHILD ABUSE

That Derek Shane Carter did in Anderson County on or between April 14, 2000, and October 14, 2000, cause the death of his four year old biological daughter, Minor Child while committing child abuse or neglect and the death occurred under circumstances manifesting an extreme indifference to human life and/or that Derek Shane Carter knowingly aided and abetted another person to commit child abuse or neglect, and the child abuse or neglect resulted in the death of Minor Child

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Dwaine D. White

SOLICITOR

WITNESSES

INV. J. CARPENTER AGSO

WARRANT NO. 2001-GS-04-763
The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

MARCH TERM 2001

DDW THE STATE

vs.

DEREK SHANE CARTER

ARREST WARRANT NO. G-096227

ACTION OF GRAND JURY

[Signature]
Foreman of Grand Jury 5/27/01

VERDICT

Indictment for

GREAT BODILY INJURY UPON A CHILD
16-03-0095(A)(P) [2766]

Foreman of Petit Jury

Date:

DRUANNE D. WHITE, SOLICITOR

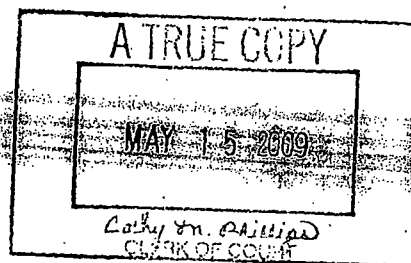
A TRUE COPY
MAY 15 2009
Cathy M. Phillips
CLERK OF COURT

*Comm.
6-12-01
cmk*

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)INDICTMENT FOR
GREAT BODILY INJURY UPON A CHILD
16-03-0095(A)(B) [2766]At a Court of General Sessions, convened on MARCH 27, 2001,
the Grand Jurors of ANDERSON County present upon their oath:GREAT BODILY INJURY UPON A CHILD

That Derek Shane Carter did in Anderson County on or between November 1, 1999, and October 14, 2000, inflict great bodily injury upon his biological daughter, Minor Child DOB: [REDACTED] and/or that Derek Shane Carter, the parent or guardian of Minor Child did knowingly allow another person to inflict great bodily injury upon Minor Child



Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Dwaine D. White
SOLICITOR

EM-31 YH

COUNTY OF ANDERSON

STATE v DEREK SHANE CARTER

AKA:

Race/Sex: W M

Age: 30

DOB: [REDACTED]

SSN: [REDACTED]

SCDL# 7636279

SID: SC01299124

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO:

Homicide By Child Abuse OR NEGLECT

in violation of 16-3-85 (A) (1) of the S.C. Code of Laws, bearing CDR Code# 2/3/5/6

☐ NON-VIOLENT

☒ VIOLENT

☐ SERIOUS

☒ MOST SERIOUS

☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

Plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Druanne D. White
Solicitor

[Signature]
Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and assessments as applicable*, the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation. Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for since 10-25-00 days/months/jail time.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 6-12-01

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine..... \$ _____
14-1-206 - Assessments 100%..... \$ _____
14-1-211 (A)(1) Surcharge \$ 100
14-1-211 (A)(2) Surcharge \$ _____
56-5-2995 (DUI) \$ _____
3% County (if Paid in Installments) \$ _____
TOTAL \$ 100

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Reporter M. Watts Code# / / / /

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

JUDGE [Signature] Code# 1104

Sentence Date 6-12-01

SCCA/217 (1/01)

INDICTMENT/CASE#

2001-GS-J4- 1204

381

A/W#: F966184

Date of Offense: 10/14/00

S.C Code: 16-03-0085

CDR #: 2356

CASE RESTORED ☐

SENTENCE: ☒ PLEA ☐ TRIAL

TRUE COPY
JUN 12 2001
Cathy M. Phillips
CLERK OF COURT

382 STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

STATE v DEREK SHANE CARTER

AKA:

Race/Sex: W M

Age: 30

DOB: [REDACTED]

SSN: [REDACTED]

) IN THE COURT OF GENERAL SESSIONS

) INDICTMENT/CASE#

) 2001-GS-04-763

) A/W#: G096227

) Date of Offense: 10/14/00

) S.C Code: 16-03-0620

CDR #: 0014

) CASE RESTORED ☐

) SENTENCE: ☒ PLEA ☐ TRIAL



SCDL# 7636279

SID: SC01299124

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO:

Great Bodily Injury Upon A Child

in violation of 16-3-95(A)(5) of the S.C. Code of Laws, being CDR Code# 21764

☐ NON-VIOLENT

☒ VIOLENT

☐ SERIOUS

☐ MOST SERIOUS

☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

Plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Druanne D. White

Solicitor

[Signature]
Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and assessments as applicable*, the balance is suspended with probation for _____ months/years and subject of South Carolina Department of Probation. Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for Since 10-25-00 days/months jail time.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 6-12-01

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee \$ _____

Payment Terms:

☐ set by SCDPPPS _____

Recipient: _____

*Fine..... \$ _____

14-1-206 - Assessments 100%..... \$ _____

14-1-211 (A)(1) Surcharge \$ 100

14-1-211 (A)(2) Surcharge \$ _____

56-5-2995 (DUI) \$ _____

3% County(if Paid in Installments) \$ _____

TOTAL \$ 100

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

A TRUE COPY

MAY 15 2009

Cathy M. Phillips
CLERK OF COURT

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Reporter M. Watts Code# 1/1/1/1

JUDGE [Signature]

Code# 194

Sentence Date 6-12-01

SCCA/217 (1/01)

November 30, 2009

Cathy M. Phillips
Clerk, Anderson County
P.O. Box 8002
Anderson, S.C. 29622



RE: Carter, Derek S. v. State,
Docket No. 2009-CP-04-2033 (PCR)

Dear Mrs. Phillips:

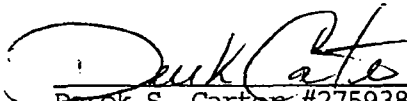
The original complaint for the above-referenced matter was filed in your office on May 15, 2009. A Memorandum of Law in Support of Applicant's Application for Post-Conviction Relief (PCR) was subsequently filed on September 25, 2009.

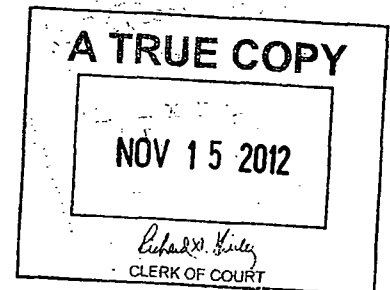
As of this date, there have been no other filings by the Applicant in this case, nor has the Applicant received any notices and/or responses from the Attorney General in regards to the claims made by Applicant. Moreover, Applicant would respectfully show that, as of this date, a total of 199 days have elapsed since the filing of this matter. Accordingly, the Respondent is now in Default, pursuant to Rule 12, SCRPC, and Rule 55(e), SCRPC. The law presented within the Memorandum establishes a claim to relief by evidence satisfactory to this Court.

Please enter a default in your calendar, pursuant to Rule 55(e), SCRPC, and provide copies of any additional document which may have been filed in this case after September 25, 2009. Also, please provide an index listing of all documents filed in this case, as of the date you receive this request.

In closing, I thank you in advance for your attention to this matter, and I look forward to your response.

Thank you. Sincerely, I am,


Derek S. Carter #275938
Kirkland C.I., B2-5B
4344 Broad River Rd.
Columbia, S.C. 29210



/dsc

cc: file

FILED-CLERK'S OFFICE
ANDERSON SC
2009 DEC - 1 P 1:28
CORRECTIONS AND
GENERAL SESSIONS