Exhibit 1

(Order of Dismissal)

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Stephanie Irene Greene, S.C.D.C. No. 359489,	)	Case No.: 2019-CP-42-01605
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter is before this Court by way of an application for post-conviction relief (PCR) filed May 2, 2019. Attorney Susannah Ross was appointed to represent Applicant Greene on May 13, 2019. The State filed its return on August 5, 2019. The State was served notice that attorneys Daniel J. Westbrook, Blake T. Williams, John Kuppens and Caroline A. Warner, all of Nelson, Mullins, Riley, & Scarborough Law Firm, were additionally representing Applicant. A consent order for discovery was issued on December 16, 2020. Subsequently, the PCR application was amended twice before the evidentiary hearing.

An evidentiary hearing was held at the Spartanburg County Courthouse on September 19-20, 2022. Applicant was present and represented by all the attorneys listed above. The State was represented by Senior Assistant Attorney General David Spencer. At the conclusion of the hearing, this Court requested post-hearing briefs. Both parties submitted their briefs.

PROCEDURAL HISTORY

A jury found Applicant guilty as charged for homicide by child abuse, involuntary manslaughter, and unlawful conduct towards a child following trial on August 30 to September 2, 2014. C. Rauch Wise, Esquire, represented Applicant. Seventh Circuit Solicitor Barry J. Barnette

and Assistant Solicitor Timi Poulos, prosecuted the case. Judge Cole sentenced Applicant to concurrent sentences of twenty years' imprisonment for homicide by child abuse, five years' imprisonment for involuntary manslaughter, and five years' imprisonment for unlawful conduct towards a child.

Mr. Wise continued to represent Applicant on appeal, and raised four appellate issues. By order filed May 5, 2016, the Supreme Court of South Carolina certified the appeal pursuant to Rule 204(b), SCACR. By opinion issued on May 23, 2018, the Supreme Court affirmed Applicant's convictions for homicide by child abuse and unlawful conduct towards a child, but vacated the conviction for involuntary manslaughter. State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). The Remittitur was issued on June 26, 2018. Mr. Wise petitioned the Supreme Court of the United States for a writ of certiorari on November 19, 2018, which was denied by summary disposition published January 7, 2019.

Even though the present PCR requires an analysis under Strickland v. Washington, 466 U.S. 668 (1984) – an analysis of whether a deficiency of counsel and resulting prejudice, if any, that denied Applicant of her fair right to a trial under the Sixth Amendment – the substance of this PCR, from an evidentiary standpoint, is medically intense.

Evidence at trial

Applicant's infant child, Alexis (Victim), died at forty-six days old. Toxicology results showed lethal levels of morphine and the presence of other drugs in Victim's blood, liver, and brain. Applicant received prescriptions for numerous drugs including MS Contin, a form of slow release morphine, without the prescribing doctor aware that Applicant was pregnant with Victim and later, breastfeeding Victim. The prosecution's theory of the case was morphine and other

drugs passed through Applicant's breastmilk and caused Victim to die from respiratory depression.

The Supreme Court succinctly summarized evidence at trial below:

> The State's causation theory was Appellant consumed excessive amounts of central nervous system depressants, principally morphine, while breastfeeding Alexis and these drugs passed through Appellant's breast milk, resulting in Alexis's death. The evidence at trial revealed that Appellant took more morphine than her doctors prescribed. In addition, Appellant exclusively breastfed Alexis until approximately one week before her death. Appellant told investigators that she began supplementing with formula due to her new blood pressure medication; however, Appellant also told investigators that she breastfed Alexis extensively during the two nights immediately preceding Alexis's death. Thus, sufficient evidence was shown that Appellant took many drugs, including morphine, and breastfed Alexis.

Greene, 423 S.C. at 267, 814 S.E.2d at 498.

The Supreme Court, in denying the allegation that the trial court should have granted a directed verdict on causation, noted:

> In sum, the State presented evidence that Appellant continuously ingested substantial doses of morphine and other drugs while pregnant and breastfeeding; that morphine and other drugs can and do pass from a nursing mother to a breastfeeding child through breast milk; that infants cannot metabolize morphine and other drugs effectively; that Alexis exhibited symptoms consistent with morphine toxicity; and that Alexis's death was caused by respiratory failure secondary to synergistic drug intoxication.

Id. at 275, 814 S.E.2d at 503. The Supreme Court also rejected the claim that insufficient evidence of the intent element of homicide by child abuse – extreme indifference – was presented to the jury. The Court explained:

> In this case, sufficient evidence was presented to show that Appellant was addicted to prescription drugs – including morphine – and Appellant knew she should use caution in taking morphine while pregnant or breastfeeding but elected to take it in excessive amounts without a doctor's supervision ensuring Alexis's safety.

Id. at 277, 814 S.E.2d at 503. The Supreme Court found:

> Throughout her pregnancy, Appellant failed to disclose that she was pregnant to the doctors prescribing morphine to her and failed to disclose that she was taking morphine to her prenatal doctors. In addition, she routinely omitted the fact that she was taking morphine from the paperwork that she submitted to her doctors. The testimony at trial was that at the very least, the drug should only be taken under a doctor's supervision so the baby's health could be monitored. Nevertheless, Appellant failed to disclose this important information to any of her doctors.
>
> The morphine addiction and concealment continued after Alexis's birth. . . . One of the State's experts, Dr. Eagerton, testified that the use of morphine during lactation is not recommended. . . . Dr. Kovacs testified that she would not have given Appellant the medication had she known about the pregnancy and Dr. Bridges testified that no mention of morphine was made during Appellant's postpartum visit. Due to her nondisclosure, the record reveals that Appellant received an additional prescription for MS Contin and continued to breastfeed Alexis.

Id. at 278, 814 S.E.2d at 504. The Supreme Court also noted the morning of Victim's death, Applicant omitted morphine from the list of her prescriptions, even when confronted with the pill bottle found in her bedroom. She later admitted she hid her pregnancy because she was afraid they would take her off the morphine. Id. at 278-79, 814 S.E.2d at 504.

Certainly, the above evidence was significant to the Supreme Court when it affirmed the trial court's denial of Applicant's direct verdict motion.

Evidence at PCR hearing

At the PCR hearing, only three witnesses, all called by Applicant, were presented: (1) Applicant's trial and appellate counsel, Rauch Wise; (2) Dr. Scialli, an expert in Reproductive and Developmental Toxicology, Obstetrics and Gynecology, and (3) Dr. Katherine Twombley, an expert in Pediatric Nephrology. The qualifications for the two expert witnesses were substantial and material to their believability. They both appeared very knowledgeable, their subject matter

expertise was relevant to the issues presented to the Court, and they were also highly credible while testifying.

Dr. Scialli opined that the morphine concentration measure that was in the child could not have derived from breastfeeding alone (to a certain extent, his testimony called in to question the pre-trial investigation by law enforcement). His opinion was that the morphine concentration measured in the child mostly explained by the inhibition of the excretion of morphine and its metabolites, almost certainly due to renal failure (renal failure was not related to morphine or its transmission through breast milk). Dr. Scialli also testified that reliance on the Canadian case report by the State's trial witnesses was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as a subsequent 2020 research paper established in material detail. He further explained that the testimony of the State's expert witnesses regarding "synergy" was not appropriate because there is no literature for support for synergy in this case.

More broadly, Dr. Scialli's testimony, including the State's cross-examination, indicates at the very least, that the medical science underpinning infant morphine toxicity such as in the present case is complex and is outside the purviews of the common knowledge of the fact finder. One of the most glaring examples of the complexity of the topic was revealed by Dr. Scialli when he explained that the Canadian study relied upon by the State's trial toxicologist had been retracted in 2020 by two medical journals and he explained the new research that refuted the prior study.

Dr. Twombley opined to a reasonable degree of certainty that the child suffered from acute renal failure and renal failure was the cause of her death. She explained the information she had showed the child had a normal two-week well doctor's visit (on October 11, 2010), and there was absolutely no concern for the baby's health. On November 10th, a few days before the child's

death, the medical records indicate the child was "congested, not eating well and somewhat lethargic." Dr. Twombley explained that when babies are congested, they cannot take in the amount of formula or breast milk they typically need. As a result, dehydration occurs. Dehydration is the most common cause of renal failure. Renal failure, she stated, was the cause of the victim's death and, to a reasonable degree of medical certainty, the victim would not have died absent renal failure. Dr. Twombley explained that the morphine in the child's system was not the cause of renal failure. Even if the child had no morphine in her system, other toxins like potassium could build up and cause her death. Her opinion included that even if morphine toxicity was a factor, death would not have occurred absent the renal failure. She also opined that renal failure would not have been reasonably foreseeable to the Applicant.

As stated above, these two witnesses appeared credible while on the stand. Their credentials are impeccable. Moreover, the terminology used by these experts clearly placed their opinions within the certainty of reasonable medical standards. No experts were presented by the State to counter these experts. While the State asserts neither of these witnesses could eliminate morphine as the cause of death, their testimony, at least, assuming arguendo agreement with the State's position, constitutes evidence that the child would not have died but for renal failure, and that the victim's renal failure was not caused by morphine. More broadly, Dr. Twombley's testimony underscores, again, the medical complexity of the issues in this case, including causation of the child's death.

Rauch Wise (Counsel), Applicant's trial and appellate counsel, testified at the PCR hearing and was a credible witness. Considering his testimony and the transcript, this Court finds Counsel could have researched and developed the alternative cause of death (renal failure) as part of his representation of Applicant. Based on the information and evidence presented as part of the PCR,

this Court finds Counsel's performance deficient for failing to present the alternative theory of death (renal failure). Unlike the testimony presented by Dr. Karch, the experts at the PCR hearing offered an alternative cause of death. However, as explained below, despite this Court finding Counsel's performance deficient for failing to research and present the alternative theory of death, this Court disagrees that a reasonable probability exists that the alternative cause of death theory would have changed the outcome of trial and finds Applicant was not prejudiced by Counsel's deficient performance.

Applicant was convicted of homicide by child abuse. As the Supreme Court noted on direct appeal, the elements of this offense require the State to prove beyond a reasonable doubt Applicant caused the death of a child under the age of eleven while committing child abuse or neglect where the death occurs under circumstances manifesting an extreme indifference to human life. State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018).

What is not contested in the instant PCR case are the facts in the record related to the elements of extreme indifference towards Applicant's child. This Court will not attempt to better the summary the evidence of the extreme indifference than already set forth by both the majority's and the dissent's explanations in the State v. Greene opinion, and as recited by the State in its post-trial brief (Applicant's addiction, how she hid the pregnancy from medical providers, prescriptions from multiple doctors, her excessive consumption of MS Contin and other prescription medicines). A person's knowing exposure to a child in the person's care to dangerous drugs outside a doctor's care may constitute extreme dangerousness. State v. Phillips, 416 S.C. 184, 196, 785 S.E.2d 448, 454 (2016) (finding "[i]t is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous"). "By any standard the delivery of a controlled substance to a child, not under the direction of a physician in regard to dosage, is an act

that is inherently dangerous." State v. Taylor, 626 A.2d 201, 202 (R.I. 1993); see also State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way.")

The medical evidence presented as part of the present PCR, as previously mentioned, was credible and substantial. Further, unlike Dr. Karch's testimony, the expert testimony offered a possibility of an alternative cause of death. Given the circumstantial nature of the medical evidence presented at trial, the medical evidence presented as part of this PCR convinces this Court that Counsel was deficient in his investigation and representation of Applicant. While the State argues that counsel did not render deficient representation (Counsel employed Dr. Karch and the State asserts the Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight), this Court views Counsel's conduct through the lens of Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Similar to the present PCR, the trial attorneys in Ard v. Catoe presented a viable defense based on the investigation they performed. In granting a new trial, the Court felt the investigation was insufficient and the trial attorneys should have called an alternative expert to present facts to the jury concerning gunshot residue on the Victim's hand. However, in the instant case, despite this Court's finding of deficiency of counsel, this Court finds Applicant failed to establish prejudice. In the present case, the evidence of extreme indifference and medical causation overlap and are linked together.

The State discounts the importance of the two medical experts presented during this PCR by asserting its proximate cause analysis is dispositive, therefore the Applicant cannot establish prejudice. This Court finds the State's assertion of proximate cause is misplaced. The experts in the PCR established, among other things, the child would not have died but for renal failure. There

is no assertion that the child's renal failure was caused by morphine. Unlike the numerous cases cited by the State for the proposition that "the fact that other causes also contribute to the death does not relieve the actor from responsibility," there is no factual or medical information that causally connects the morphine and renal failure. Further, the expert testimony establishes that Victim could die from renal failure regardless of the high morphine level.

However, considering the trial record and with a view towards the Supreme Court majority's analysis in its direct appeal opinion in State v. Greene, this Court finds that relief is not warranted because as a whole, the Applicant's presentation of an alternative cause of death would not likely have affected the outcome of the trial. Under a PCR analysis, even though an applicant may establish a trial attorney rendered deficient performance (as rendered by reasonableness under prevailing professional norms), an application must still be denied if Applicant does not establish prejudice from the deficiency of counsel. To establish prejudice, an applicant must show that but for the deficiency of counsel, there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

"The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The main piece of evidence presented by the prosecution at trial establishing causation was the lethal level of morphine found in Victim. Applicant does not challenge the efficacy of that number.[1] Further, Applicant does not challenge the prosecution's theory of the case at trial that

[1] Dr. Twombley admitted that if the morphine and its metabolites are not cleared, a lethal level morphine may accumulate in a child in less than 24 hours. PCR1 Tr. p. 213, lines 7-18.

the morphine in Victim came through breast milk rather than some alternate form of delivery. Accordingly, the prosecution proved that lethal amounts of morphine passed through Applicant's breast milk. The prosecution's evidence further includes the findings of the forensic pathologist, Dr. Wren, that the cause of death was respiratory failure due to morphine toxicity and additional effects of other medications found in Victim's blood.[2] Dr. Twombley agreed that lethargy, a reported symptom, is consistent with respiratory failure and further agreed that the reported weight loss[3] may also be consistent with central nervous system depression. PCR 2 Tr. pp. 219-20. This supports Dr. Eagerton's testimony at trial that Victim died from a chronic exposure: Dr. Eagerton, an expert in forensic toxicology and pharmacology, testified "the lethargy, maybe trouble breathing. . . . I don't know how to interpret that exactly, but . . . there were some symptoms that were conveyed that were consistent with morphine toxicity." Tr. p. 361, lines 15-18. Dr. Eagerton added: "[I]f you can't metabolize it, then the drug may build up in your body and you become – you have a toxic dose whenever you wouldn't normally have a [toxic] dose." Tr. pp. 361-62.

"A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (citation omitted). "The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." Id. Given the toxic level of morphine in Victim, and that even Applicant's experts admitted morphine could have played a role in Victim's death,[4] abundant evidence supports the causation element of homicide by child

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[2] Medically, the "synergistic drug interaction" idea was not supported in this PCR and was not a conclusion defended by the State during this PCR

[3] The medical records indicated Victim was 7 lbs., 2 oz. when born. In her second week, Victim weighed 7 lbs., 11 oz. At the time of death, Victim only weighed 7 lbs., 6 oz—a loss of five ounces since her two week check-up. Tr. p. 525, lines 11-15.

[4] Dr. Scialli admitted that the morphine level could have led to respiratory depression and Victim's death. PCR 1 Tr. p. 84, lines 1-14.

abuse. The jury is simply unlikely to look past the high morphine levels and conclude the cause of death was not morphine toxicity. Therefore Applicant was not prejudiced by counsel's failure to present this alternative cause of death.

This Court notes the Supreme Court's evaluation of causation in State v. Greene, and this Court has before it the Record on Appeal, including the transcript, which it has reviewed. Even though this Court is impressed with the presentation and the quality of the witnesses, and even though this Court agrees with trial counsel that renal failure as a causation defense should have been explored, the circumstantial evidence presented at trial on causation, and the majority's analysis of that evidence, strongly influences this Court to deny the PCR application. This Court is not convinced a jury would likely reach a different result if the renal failure theory of death was presented.

Leading questions

This Court also finds trial counsel erred by failing to object to the State's leading questions, primarily during Wendy Bell's testimony. However, Applicant was not prejudiced by the deficiency. First, even if the questions posed were technically leading, Wendy Bell did not respond with simple yes/no answers, but elaborated or explained the concept posed to her. Further, generally speaking, the content of the answers, such as whether the morphine level was potentially lethal, was not a fact in dispute. And some leading questions were merely a follow up or summation of testimony Ms. Bell already provided.

Counsel is not ineffective because the prosecutor would simply be able to rephrase the questions, the information elicited was admissible, and Ms. Bell did not simply provide yes no answers even when the questions were leading. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) ("Burnett does not point out any specific instances and explain how those instances

likely would have resulted in a different trial outcome. It appears that the leading questions could have been simply rephrased. In any event, assuming there were instances where objections should have been made, Burnett has failed to show how they likely prejudiced his defense."); United States v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990) (rejecting ineffective assistance claim: "Bosch, however, does not maintain that any of this testimony would not have been admissible had it been elicited through nonleading questions.").

Synergistic effects

Dr. Scialli's testimony established some clarity that medical science does not support the idea of "synergistic effect" of the other drugs taken by Applicant. The State notes in the Post-Trial Brief that "For the most part, the prosecution's experts only stated that medications "could" have a synergistic effect with each other." And the solicitor did not argue or mention to the jury any "synergistic" effect of the drugs. Respondent's Post-Trial Brief, pp. 38-39. Thus, trial counsel was not ineffective for failing to challenge the "synergistic effect" of the multiple-medications. Counsel convinced the trial judge that to tell the jury the cause of death needed to be a schedule II drug and morphine was the only schedule II found in the victim. Notably, counsel convinced the judge that the "synergistic effect" was insufficient for the jury to convict appellant of homicide by child abuse in this case. Further, Counsel explained that the number everyone was concerned with at trial was the lethal level of morphine in Victim's blood. PCR2 Tr. pp. 81-82. This Court does not find counsel ineffective for not objecting to expert testimony about synergistic effects.

Canadian study (After-discovered evidence)

One of the studies discussed during trial by both prosecution witnesses and Dr. Karch (the Canadian study) was retracted in 2020. The paper discussed the death of a thirteen day-old child from high-morphine levels after the breastfeeding mother took lawfully prescribed codeine

(codeine metabolizes to morphine). Madadi P. et al. Safety of codeine during breastfeeding. Fatal morphine poisoning in the breastfed neonate of a mother prescribed codeine, Can Fam Physician 2007; 53:33-5. The retraction cited in Applicant's pleadings notes that the study published in 2007 had been cited in hundreds of articles prior to the 2020 retraction. Ross T. Tsuyuki & Nicholas Pimlott, Risks of maternal codeine intake in breast-fed infants: A Joint Statement of Retraction from the Canadian Pharmacists Journal and Canadian Family Physician, Canadian Pharmacists Journal v. 154(1) (Nov. 18, 2020).

The retraction followed the publication in May 2020 of a paper criticizing the study. Zipursky, et. al. The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, 108(5) Clinical Pharmacology & Therapeutics (May 2020). The conclusion from that article is as follows:

> Neonatal opioid toxicity resulting from maternal codeine use during breastfeeding could only arise from a highly improbable combination of factors: a high maternal codeine dose, unusually high concentrations of opioids in breast milk, a large volume of neonatal milk intake, and – critically – profoundly impaired neonatal opioid clearance. The unlikely occurrence of such a scenario is consistent with the paucity of reports of neonatal opioid toxicity, despite the use of these drugs by millions of nursing mothers over the past two decades.
>
> This should not be viewed as an endorsement of opioid use while breastfeeding. Codeine in particular is an unpredictable analgesic choice given its variable conversion to morphine, while other opioids such as oxycodone carry greater abuse liability. Acetaminophen and non-steroidal anti-inflammatory drugs are generally sufficient for the management of postpartum pain. When opioids are required, short courses should not be viewed as hazardous to breastfeeding neonates.

Id. (emphasis added).

On the balance, the Canadian study was exploited by the defense, rather than the prosecution. Counsel testified part of his strategy was to argue that the State should have tested for any genetic defects and failed to, and he used the Canadian study to explain the high number

and explain that a genetic defect would "prove that through no fault of [Applicant], that the number got that high." PCR 2 Tr. pp. 68-69 (direct quote p. 69, lines 11-13). He agreed Dr. Karch used the Canadian study to argue a genetic defect could explain the buildup of morphine. PCR 2 Tr. p. 77, line 14 –p. 78, line 14.

An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

> (1) Is such as would probably change the result if a new trial was had;
>
> (2) Has been discovered since the trial;
>
> (3) Could not by the exercise of due diligence have been discovered before the trial;
>
> (4) Is material to the issue of guilt or innocence; and,
>
> (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

The retraction is not evidence sufficient to grant a new trial based on after-discovered evidence. During trial, the study was primarily used by Mr. Wise during cross-examination of State witnesses' and during Dr. Karch's testimony to suggest an unexpected genetic defect could be the reason for the high morphine level. Moreover, the retraction, at best, is evidence that is impeaching and does not qualify as after-discovered evidence.

This Court agrees that the Zipursky paper's repudiation of the Canadian study would offer some benefit Applicant during the criminal trial. However, while evidence at the PCR hearing produced clarity as to the Canadian study in that it is no longer considered a credible source to be relied upon for medical information, this Court cannot find that Applicant has met her burden of proof as to these allegations for the reasons stated above.

Cumulative error doctrine

This Court has found counsel deficient for multiple errors. This Court would note South Carolina does not recognize the cumulative error doctrine. However, it is proper to examine the record as a whole. Lorenz v. State, 351 S.C. 184 (2008) (citing Green v. State, 351 S.C. 18 (2002) and Simpson v. Moore, 367 S.C. 58 (2006)); see also Smalls v. State, 422 S.C. 174 (2018); Wong v. Belmontes, 558 U.S. 15, 25 (2009) ("The type of 'more-evidence-is-better' approach advocated by Belmontes and the Court of Appeals might seem appealing – after all, what is there to lose? But here there was a lot to lose."); Id. at 26 ("[T]he reviewing court must consider all the evidence – the good and the bad – when evaluating prejudice. . . . Here, the worst kind of evidence would have come in with the good."). Viewing the record as a whole, this Court concludes Applicant was not prejudiced by counsel's deficient performance as discussed above as this Court concludes that the deficiencies do not create a reasonable probability of a different result.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant this application. 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 appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Austin v. State, 305 S.C. 453 (1991). Rule 71.1(g), SCRCP, provides that if applicant wants appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 8th day of May, 2023.

J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

Exhibit 2

(Order Denying Petitioner's Motion to Reconsider and Amend)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Stephanie Irene Greene, S.C.D.C. No. 359489,	)	Case No.: 2019-CP-42-01605
	)	
Applicant,	)	
	)	**ORDER DENYING APPLICANT'S**
v.	)	**RULE 59(e), SCRCP MOTION**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before this Court by Applicant Stephanie Greene's May 18, 2023 Motion to Reconsider and Amend its May 6, 2023 Order denying post-conviction relief. The Respondent through Assistant Attorney General David Spencer made a Return to the motion dated June 5, 2023. On July 18, 2023, a virtual hearing was heard before this Court on the motion. The Applicant was present and represented by counsel and Blake T. Williams argued the motion on her behalf. The Respondent was represented Deputy Attorney General Donald J. Zelenka due to Mr. Spencer's unavailability due to illness.[1]

After, once again, reviewing the transcripts and considering the arguments offered by both sides, the present motion is not granted. On October 3, 2023, the Court made initial findings and requested the prevailing party to prepare a proposed formal order denying the motion. This Order follows.

In her motion, the Applicant raised the following assertions why a motion to reconsider and amend the judgment denying post-conviction relief should be granted.

[1] This Court has been informed that Mr. Spencer died on October 16, 2023.

1. The Court's Order of Dismissal correctly recognizes that the testimony of Dr. Scialli and Dr. Twombley was compelling and that trial counsel was ineffective. Motion, p. 3.

2. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's deficient performance in failing to present the alternative cause of renal failure.

    A. Respectfully, the Court's findings on prejudice regarding the alternative cause of death cannot be reconciled. Motion, p. 4-9.

    B. The Court overlooked Applicant's argument about the prejudicial effect of Dr. Karch's testimony. Motion, p. 9-10.

    C. The Court overlooked Applicant's argument about the prejudicial effect of trial counsel's failure to seek to have the testimony of the State's experts excluded or restricted. Motion, p. 10-11.

3. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's deficient performance in failing to object to leading questions. Motion, p. 11-14.

4. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's failure to challenge the synergistic effect questions. Motion, p. 14-17.

5. The Court overlooked Applicant's ineffective assistance of appellate counsel argument, which represented an independent basis for granting post-conviction relief. Motion, p. 17-19.

6. The Court should reconsider its finding that the Zipursky study does not constitute new evidence warranting a new trial. Motion, p. 19-20.

7. The cumulative effect of Attorney Wise's errors constitutes a separate ground for granting post-conviction relief. Motion, p. 21-22.

Motion to Reconsider and Amend, 1- 23.

SUMMARY OF DECISION

This Court finds certain salient facts underlie its decision. First, the material facts presented during the trial that relate to the medical issues of this case and the facts presented as part of this PCR that relate to the medical issues are not in conflict but the proper conclusions to be drawn from those facts are in conflict. Second, this Court has only the trial transcript from which to view the credibility of the medical testimony presented during the trial. The medical

testimony - witnesses this Court was able to hear and view - presented during the PCR hearing, as stated in the prior order, was believable and credible. Order of Dismissal, p. 5-6, 8. Trial counsel Rauch Wise's PCR testimony also was believable and credible. Order of Dismissal, p. 6.

While the Applicant reserved all prior arguments, the focus of review for purposes of the present motion has been on the issue involving this Court's finding that applicant failed to meet her burden of proof as to the element of prejudice. This Court viewed the Sixth Amendment prejudice prong issue as her strongest argument and the one that needed the most clarity.

This Court, as it did in its original order, believes that the PCR witnesses established a highly persuasive alternative theory as to the cause of the child's death related to renal failure. This Court, again, finds that it was error for trial counsel to have not presented such a theory and therefore meet its burden of proof to show Sixth Amendment deficiency under Strickland v. Washington, 466 U.S. 668(1984). See Order of Dismissal, p. 8.

As further noted in the original order, this Court finds that the synergistic effect of drugs is not supported from the trial or PCR records. Order, p. 10, n. 2. This issue was adequately addressed in its earlier Order at page 12. Further, this Court found that the State had not defended the alleged effect deriving from the findings of forensic pathologist, Dr. Wren, that the cause of death was respiratory failure due to morphine toxicity and additional effects of other medications found in the victim's blood.[2] However, most importantly, the Applicant failed to

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[2] This Court finds that the synergistic effect of drugs is not supported from the trial or PCR records. This Court finds credible the testimony of Dr. Scialli that there is a lack of lack of medical evidence to support a "synergetic" drug theory. This Court is aware that the State argued in its Post-Hearing Brief before this Court, pages 38-40 concerning the evidence related to synergistic effect. Dr. Scialli testified that none of the medications have a synergistic effect with morphine and that no medical literature supports a conclusion that any of the drugs had a synergistic effect on morphine. PCR 1, p. 74-78. For the most part, the prosecution's experts only stated that the medications "could" have a synergistic effect with each other. See Tr.p. 260, l. 5-15 (Bell); Trp. 322, l. 2-13, 328, 341 (Kotecha); Tr.p. 350-351, 386, 390-91 (Eagerton); Tr.p. 433, 444 (Wren). Mr. Wise agreed that none of the witnesses stated that morphine and any particular drug did create a synergistic effect. PCR 2 Tr. p. 82, lines 7-11.

prove deficiency and prejudice under Strickland the in light of the limiting instruction given in this case that the jury had to find that the cause of death needed to be from a schedule II drug and morphine was the only schedule II drug found in Victim. Tr. p. 590; p. 592; PCR 2 Tr. p. 83.

Again, as found in the prior Order, this Court will not alter or change its view that the prejudice element was not met. Order of Dismissal, p. 9-11. This Court acknowledges that applicant's PCR presents substantial arguments as to the issue of prejudice. This Court reads the State's analysis as focusing on "extreme indifference" and the facts surrounding the applicant's deceitful use of morphine while she was pregnant. The facts underlying the applicant's

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> Mr. Wise testified as follows about the synergistic effect issue:
>
> Q: [W]hich number in the toxicology reports was the number that everyone was most concerned with at trial?
>
> A: Everybody was most concerned with the morphine level. . . . I mean, I think when Dr. Wren was attempting to talk about synergy finally said, I might as well say morphine death because the number was there.

Tr. p. 81, lines 15-24. Mr. Wise further commented, "[H]e wasn't talking about synergy. He was talking about the morphine was lethal." PCR 2 Tr. p. 82, lines 2-6.

Mr. Wise successfully persuaded the trial court to charge that the cause of death needed to be morphine coming through breastmilk – the trial court admonished the jury that the cause of death needed to be from a schedule II drug and morphine was the only schedule II drug found in Victim. Tr. p. 590; p. 592; PCR 2 Tr. p. 83. Mr. Wise testified as to his lack of objection: "And, you know, I could make an argument as to how that impacted it. But one thing when you talk about the synergistic effect, the jury charge was such that the State had to prove there was an excessive amount of a schedule II drug . . . ." PCR 2 Tr. p. 49, lines 8-21. Mr. Wise noted morphine was the only schedule II drug. PCR 2 Tr. p. 49, lines 18-21. Solicitor Barnette, in his closing argument, did not argue or mention any synergistic effects of morphine and the other substances found in Victim, seemingly abandoning it as a theory of causation. Solicitor Barnette argued during closing that Dr. Wren looked for a cause of death "because people want answers to those questions. They want to know why this baby died. Well, he found a reason why. It was the morphine that she gave through her breast milk to [Victim]." Tr. p. 568, lines 5-10.

This Court finds Mr. Wise was not deficient on this limited issue. Order, p. 12. Because he successfully persuaded the trial court to give a special instruction specifying that morphine was the cause of death, Mr. Wise nullified the prospect of synergistic effect as the cause of death. Mr. Wise observed the morphine level was the main focus of the parties at trial and it was the only drug within lethal levels – well above lethal levels actually. Mr. Wise did not render deficient performance in handling the issue and Applicant was not prejudiced due to the trial court's instructions and the limited testimony on the matter.

obtaining and using morphine while pregnant are very significant and highly probative to the present PCR and were the same at trial. The applicant argues that such facts do not lead to the necessary *mens rea*. This Court disagrees with the applicant.

While the PCR medical testimony supports a conclusion beneficial to applicant's legal analysis of the medical issues in this case, the trial transcript and the State's position as to "extreme indifference" are supported in the records before this Court.[3] Moreover, and as discussed herein (below) the Supreme Court (the direct appeal of the applicant's trial) has examined the underlying facts. This Court, agreeing with the Supreme Court, does not view the facts underlying the criminal case, as being in dispute. Given the Supreme Court's factual analysis and, more importantly, the majority's medical analysis when it rejected the dissent's position, this Court, even when considering the Court of Appeals' opinions offered by the applicant,[4] this Court cannot find that the applicant has met her burden of proof of prejudice.

Applicant also asserts that trial counsel's failure to seek to exclude the testimony of the State's expert witnesses was error and, by not doing so, she was denied a valid issue on appeal. This issue was raised in the motion, p. 1-11. This Court views the arguments as substantial primarily due to the convincing testimony of the applicant's medical testimony during the PCR

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[3] Applicant's claim in footnote 1 in his motion that a mother could later be prosecuted for taking prescription medicine that she is lawfully receiving is meritless. In the instant case, Applicant was not taking the medicines lawfully; she withheld important information from her doctors so she could continue to take medications that would be unavailable to her for the child's safety if her doctors were fully informed. This constitutes the deliberate and intentional conduct establishing extreme indifference. State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way.")

[4] Greene v. State, 440 S.C. 165, 889 S.E.2d 636 (Ct. App. 2023)(trial counsel's failure to request limiting instruction regarding defendant's prior conviction was deficient performance and prejudiced the defendant); Washington v. State, 440 S.C. 550, 891 S.E.2d 668 (Ct. App. 2023), reh'g denied (Sept. 21, 2023) (petitioner's trial counsel performed deficiently by failing to contemporaneously object to solicitor's statement during closing argument concerning petitioner's "pattern of robbing old folks, intimidating old folks, kidnapping old folks, holding them up[,]" as element of claim of ineffective assistance and was prejudiced by trial counsel's failure to contemporaneously object to solicitor's statement, and thus failure amounted to ineffective assistance).

hearing. Notwithstanding, the decision issued by the Supreme Court in State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018) (the direct appeal) (including Justice Few's opinion) indicates the asserted deficiencies in the State's medical presentation at trial were known and addressed. The analytical depth of the medical causation issues (including the asserted deficiency of the State's case) can be found in Sec III of the opinion where the majority addressed the dissent's causation position. The majority explained that the State provided evidence that the applicant was taking morphine and breastfeeding the child continuously, morphine can pass from a mother to a baby through breast milk, the level of morphine can build up in a baby due to the inability to process it, and the child died from a lethal level of morphine. The majority stated, "nothing more was required for the jury to make a logical deduction.[5] While this Court does not disagree with the dissent's "Proper Lens" analysis, the dissent's analysis was not accepted by the majority. Thus, based on the Supreme Court's medical evidentiary analysis, the applicant was not denied an appellate issue. Assuming an error by trial counsel in not preserving the issue, based on the Supreme Court's analysis, the issue would not have resulted in a different outcome on appeal.

In the instant case, there is *unchallenged physical evidence* that Victim had a lethal level of morphine at the time of death at 46 days old. Applicant *confessed* she was addicted to morphine and lied to her doctors to avoid losing her proscription to morphine. No evidence was

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[5] Trial counsel, prior to trial, discussed whether the Solicitor would present an expert that would opine that the morphine in Victim came through breast milk, and indicated he would challenge that opinion, if offered, under Rule 702, SCRE. No expert provided that opinion at trial, which Mr. Wise noted at the PCR hearing. Mr. Wise explained he was prepared to object if an expert offered that opinion, but it was never asked. PCR 2 pp. 46-47. Applicant claims that witnesses provided the opinion to a reasonable degree of certainty that the morphine levels in Victim came from breastmilk. However, that is simply inaccurate. Dr. Eagerton testified about some symptoms he would expect to see if Victim suffered from a slow build-up of morphine. He discussed how morphine and drugs in general are metabolized. But he did not opine that the entire morphine level found in Victim came through breast-milk. Tr. pp. 358-62. Dr. Wren also did not provide this opinion. Dr. Wren discussed studies about morphine levels found in children that breastfed from mothers taking morphine. However, Dr. Wren was blunt about the fact that he did not know how the morphine got in Victim, "I don't know how it got there. It's unquestionably there. And you can – you can argue any mechanism you want, but it's there, period." Tr. p. 444, lines 9-11. Counsel was not ineffective as no witness testified to a reasonable degree of certainty that the morphine found in Victim came through breastmilk.

presented that the morphine in Victim came from any other source than Victim's breastmilk. The record is simply replete with her furtive behavior to maintain her access and consumption of opioids which included ensuring that Applicant and Victim remained outside a knowledgeable doctor's care. The expert testimony presented at the PCR hearing maybe presents a potential defense, but one that is not supported by physical evidence. No physical evidence was presented to support the belief Victim suffered renal failure. The experts' diagnosis is ultimately based of Applicant's hearsay reports of cold-like symptoms Victim had roughly two days before Victim's death. Consistent with Ryals v. State, 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023), this Court properly determined that Applicant was not prejudiced by the deficiency of counsel that this Court found. Order, p. 7-11.

Dr. Karch's testimony

Applicant attempts to establish prejudice by attacking the quality of Dr. Karch's testimony, attempting to argue that he conceded the State's whole theory of the case. Motion, p. 9-10. This simply did not happen. Dr. Karch testified as follows:

> Q: Could the baby have ever gotten a morphine level that high from breast milk?
>
> A: Yes.
>
> Q: How?
>
> A: I don't know, but I have one case here where a baby got an 84 nanogram blood level from a mother on morphine.
>
> Q: And did that baby die?
>
> A: No.
>
> Q: All right. Is there any reported case of a baby dying from breast milk from the mother?
>
> A: No.

Tr. p. 504, line 19 – p. 505, line 4. Dr. Karch testified he was aware of a case where the morphine level was that high. It was not a theory, but a case he was apparently aware of. It was a question he was required to answer truthfully. However, Dr. Karch made clear he did not know how the level was that high. Mr. Wise ensured that the jury understood that there was no reported case of a child dying from breast milk by his examination of Dr. Karch's limited knowledge. This is hardly conceding the State's case.

Later, Dr. Karch testified as follows:

> Q: All right. Is there anything in this case in your review of everything and your knowledge that leads one to believe that breast milk contains some amount of morphine that caused the death of this child?
>
> A: Only in the sense that we know that there is morphine in breast milk or women that are using morphine. We know it isn't very much. And if you see a whole lot, they are either A, you have a – a mother that's misleading you, or B, you don't have the genetic ability to clear it.

Tr. p. 513, lines 8-16. Again, this is hardly conceding the State's case; instead Dr. Karch is asserting that the only way a number could get this high is the child's lack of genetic ability to clear the morphine, which is not dissimilar to Dr. Scialli's claim of renal failure as an extraordinary circumstance negating the intent element.

Dr. Karch also noted articles that indicate morphine consumption by a breast feeding mother is not dangerous to the breast-fed child. Tr. pp. 494-95. Dr. Karch confirmed no medical group advises against taking morphine while breastfeeding, and he was unaware of any case in which an infant received a lethal dose of morphine through breastmilk. Tr. pp. 513-14.

Dr. Karch also testified to his impressive credentials at trial. For instance, he reviewed every drug-related death in San Francisco for a ten year period while an assistant medical

examiner with the San Francisco Medical Examiner's Office. Dr. Karch advised he is published in toxicology and published The Pathology of Drug Abuse, 4th edition. Tr. pp. 487-89.

Dr. Karch testified about tests law enforcement could have run and challenged aspects of how testing was performed, something detailed further in the State's pre-trial and post-trial briefs. Tr. pp. 495-96; pp. 501-03; pp. 511-13. Dr. Karch agreed with trial counsel's calculations that Applicant would need to take 125 times more morphine to reach the level in the present case than a woman in a study who took five milligrams of morphine, resulting in her infant receiving four nanograms of morphine. Tr. pp. 507-08.

In comparison, Dr. Scialli did not claim that morphine was ingested from any other source than Applicant's breastmilk, he just claimed that because of renal failure, the morphine was not excreted as expected, and therefore it built up to lethal levels. Applicant's statement in the motion that Dr. Scialli testified that in his opinion the morphine could not reach lethal levels solely from breast milk is misleading. He opined that the amount of morphine was too high to have been achieved through breastfeeding alone without inhibition of the excretion of morphine and its metabolites. PCR 1,pp. 41, 44-48. In fact, Dr. Scialli admitted that the morphine level found in Victim could have led to respiratory depression and Victim's death. PCR 1 Tr. p. 84, lines 1-14. Similarly, Dr. Twombley admitted that a lethal amount of morphine may accumulate in a breastfeeding child in twenty-four hours. PCR1 Tr. p. 213, lines 7-18. "A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (citation omitted). "The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." Id. A jury hearing Applicant's experts admit that morphine could be the cause of death, after hearing the State's evidence as well, would

convict. Therefore, this Court correctly found Applicant was not prejudiced under the Strickland standard by the failure to call experts like the doctors testifying at the PCR hearing.

Leading questions

Applicant seeks for this Court to reconsider its rejection and find Applicant was prejudiced by Mr. Wise not objecting to several leading questions. This Court found Applicant was not prejudiced by Mr. Wise's failure to object to leading questions. Order, p. 11-12. In his motion to amend, Applicant offers several examples, some of which the witness did not answer in no/yes answers despite the questions being leading. Others concern facts not in dispute. For instance, Applicant points to two questions posed to Dr. Wren. Tr. p. 444, lines 2-16. The first question simply restates Dr. Wren's opinion as to cause of death – Dr. Wren knew his own opinion as to the cause of death. The Solicitor would inevitably elicit this testimony by restating the question as a direct question. The follow-up question, whether the morphine could have come from breast milk, despite being leading, did not result in prejudice because Dr. Wren does not answer the question with a yes or no answer, but instead he essentially answered that he does not know. This Court correctly found Applicant was not prejudiced to the extent Mr. Wise could be said to be deficient for failing to object to leading questions. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) ("Burnett does not point out any specific instances and explain how those instances likely would have resulted in a different trial outcome. It appears that the leading questions could have been simply rephrased. In any event, assuming there were instances where objections should have been made, Burnett has failed to show how they likely prejudiced his defense."); United States v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990) (rejecting ineffective assistance claim: "Bosch, however, does not maintain that any of this testimony would not have

been admissible had it been elicited through nonleading questions."). The request to amend is denied.

Ineffective Assistance of Appellate counsel

Applicant asks this Court to address a claim of ineffective assistance of appellate counsel. Motion, p. 17-19T. This issue was not addressed in the Court's prior order. The issue was raised in the post-trial briefs as well as the pre-trial briefs. Applicant contends that Mr. Wise should have raised a claim to the Supreme Court that the conviction for homicide by child abuse should be set aside as opposed to the conviction for involuntary manslaughter. Missing from the Applicant's analysis is any authority to support that argument would have been successful on appeal or that authority exists that suggests the issue would likely be successful. Not Applicant did not elicit any testimony on this claim at the PCR hearing.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

In the present case, Mr. Wise presented four issues on appeal. The first two, issues concerning directed verdict, if successful, would have resulted in a functional acquittal of all the charges. Justice Few dissented from the majority on the issue of causation, evidencing reasonable strategy from appellate counsel in raising these issues. Appellate counsel argued a double jeopardy violation under the federal constitution, and in turn, the Supreme Court vacated the involuntary manslaughter sentence under state law by adopting a new common-law rule. The fourth issue concerned the procedure for closing arguments and presented a viable issue at the time of briefing and argument, but was mooted by the Supreme Court's substituted opinion in State v. Beatty, 423 S.C. 26, 813 S.E.2d 502 (2018).

The lack of authority from Applicant in his motion makes his proposed issue to raise weaker than those issues Mr. Wise raised. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (holding "that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se."). The Supreme Court in Teamer declared the following:

> This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an .attorney to be clairvoyant or anticipate changes in the law. . . ." (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764,

> 765 (1993))), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Id.; see Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) (holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law.").

Mr. Wise showed reasonable professional judgment in the issues he selected to raise. Applicant on the other hand, has failed to show that the issue contemplated is clearly stronger than the issues raised by Mr. Wise. Nor has Applicant shown a reasonable probability of a different result. Mr. Wise did not provide ineffective assistance of counsel on appeal.

Canadian study (after-discovered evidence)

Applicant restates her argument for her after-discovered evidence claim concerning the retraction of the Canadian study. This issue was fully addressed in the Court's prior order. Order, p. 12-14. This Court denies the motion to alter or amend its analysis of this allegation.

Cumulative error doctrine

The Court denied the request to apply the so-called "cumulative error doctrine" in its order. Order, p. 14-15. The Applicant makes another request to apply it in its motion. Motion, p. 21-22. Applicant cites Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998) under the mistaken belief that the Fourth Circuit adopted the cumulative error doctrine and in so doing, was following the majority of circuits. Motion, p. 22, n. 3. However, Fisher stands for the polar opposite, rejecting the cumulative error doctrine, as has the majority of the federal circuit courts. The Fourth Circuit explained the following:

> Next Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree.

> Having just determined that none of counsel's actions could be constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n.2, 113 S.Ct. 838, 122 L.E.2d 180 (1993) ("Under [Strickland], an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates: (1) deficient performance *and* (2) prejudice." (*emphasis added*)), it would be odd, to say the least, that those same actions, when considered collectively, deprived Fisher of a fair trial.

Id. at 852.

The Fourth Circuit noted its own precedent that examined each claim of ineffective assistance of counsel individually rather than collectively. Id. (citations omitted). The Fourth Circuit concluded, "To the extent this Court has not specifically stated that ineffective assistance claims, like claims of trial court error, must be reviewed individually rather than collectively, we do so now. In so holding, we are I agreement with the majority of our sister circuits." Id. at 852-83 (citations omitted). The majority rule among the federal circuits, including the Fourth Circuit, is logical. If an individual claim of ineffective assistance of counsel fails on either prong, then no constitutional depravation occurs. Adding up claims that fall short of a constitutional error individually to reach some unknown calculus of error makes little sense. See Hunt v. Smith, 856 F.Supp. 251, 258 (D. Md. 1994) ("The fact that many claims of counsel error are pressed does not alter fundamental math – a string of zeros still adds up to zero."). This Court correctly found that no depravation occurred individually or collectively which required. As this Court previously stated: "[V]iewing the record as a whole, this Court concludes that the Applicant was not prejudiced by counsel's deficient performance as discussed above as this Court concludes that the deficiencies do not create a reasonable probability of a different result." Order, p. 15. The request to reconsider and amend by application of a cumulative error doctrine which the Supreme Court has not adopted must be denied. Consistent with the opinions of Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2008) and Strickland v. Washington, supra., this Court considered

the record as a whole, including the trial record and post-conviction record in making its assessment.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any requirement for the Court to alter or amend its prior order. The motion to amend after the Court's reconsideration must be denied.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of order denying the motion to secure the appropriate appellate review. See Rule 203, SCACR. An Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Austin v. State, 305 S.C. 453 (1991). Rule 71.1(g), SCRCP, provides that if applicant wants appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the motion to amend the Order of Dismissal of the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 17th day of November, 2023.

J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina