

VOLUME III OF III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Michael S. Holt, Circuit Court Judge

DEMETRIUS A. GOODWIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001205

APPENDIX

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1 never told Mr. Goodwin about that, and it wasn't --
2 the no was not mine to say or give. I should have
3 just said -- I should have said, I need to discuss
4 that with him, and gone and had that discussion
5 with him. And I didn't.

6 Q And so you just -- you guys went back after that
7 chambers conference and started trial?

8 A Yes.

9 Q And you then recall not telling him about or asking
10 him about it until months later?

11 A It was two or three months later. I didn't
12 remember that. I -- we went back and we started
13 trial and we tried the case. And in the last
14 decade I have woken up a thousand times in the
15 middle of the night trying this case. It was
16 probably about two or three months after the trial
17 that I, in the middle of the night while I was
18 trying this case over again in my head, that I
19 remembered that conversation and that I didn't tell
20 him that.

21 Q So you were dreaming that you were retrying this
22 case?

23 A I was not dreaming, I was awake.

24 Q Oh.

25 A I would wake up and I -- when I had -- well, I

1 would wake up and I wasn't able to sleep. I
2 thought about this case a lot and what I did wrong
3 and what I should have done. And it was in that
4 context. It was not dreaming. I was not asleep, I
5 was awake.

6 Q You briefly testified about the statements given by
7 your client and that you felt that they were
8 coerced?

9 A Yes.

10 Q Is that correct?

11 A Yes.

12 Q What was your strategy in addressing those?

13 A I don't -- I mean, to the extent that we addressed
14 it, I mean, I know I talked about it in the closing
15 argument, tried to convince the jury that it was
16 coerced. I should have, like I should have gotten
17 an expert on that. But I know we challenged the
18 Jackson v. Denno. That was assigned to
19 Ms. Pinnock. And as Ms. Singletary testified
20 about, we divvied up the witnesses and the labor
21 and, but I guess the strategy was to argue that it
22 was coerced.

23 Q Okay. And did you, your team make an argument
24 during opening statement?

25 A I believe Ms. Singletary addressed that during

1 opening.

2 Q Okay. And Mr. Waller brought up the testimony of
3 Dr. Bradley Marcus and Ms. Singletary objecting --

4 A Yes.

5 Q -- to that line of questions, correct?

6 A Yes.

7 Q And based on the transcript and other testimony
8 today, a bench conference was had after that
9 objection?

10 A Yes.

11 Q Do you recall if it was you who spoke to the judge
12 about the basis of the objection at that time?

13 A I don't recall. I believe it -- I believe
14 Ms. Singletary and I both went up to the bench, and
15 I don't recall which one of us addressed it at the
16 bench. I didn't actually -- I don't have -- I
17 don't have an independent memory of that, I just
18 know what is in the transcript.

19 Q Do you recall if during that conversation either
20 one of you asked the judge to strike the testimony
21 or if the judge just did that on his own?

22 A I don't recall.

23 Q And do you -- I think you testified you did put the
24 objection on the record after Dr. Marcus was done
25 testifying?

1 A Yes.

2 Q At that point did you feel that you had done
3 everything you needed to preserve that issue?

4 A I -- I mean, I probably felt that way, but I don't
5 know if I did. I mean, obviously I didn't get a
6 ruling on the mistrial request, but from the
7 transcript -- I mean, I probably felt like I had
8 done enough, done what I needed to do. I don't
9 remember it specifically, but whether I thought I
10 had or not doesn't -- I mean, I still have to --
11 supposed to get a ruling on issues in order to
12 preserve them.

13 Q Did you renew all of your motions and objections
14 prior to the end or at the end of trial?

15 A I believe I did.

16 Q And now moving to the issue about the jury charge.
17 Did you and your team work on it, or was it just
18 you that prepared that?

19 A It was just me.

20 Q Okay. And you testified that you reviewed all of
21 the case law around this and that you wanted the
22 language, the holding language from Jarrell,
23 correct?

24 A Correct.

25 Q And I think that you testified your issue with the

1 jury charge that was given was the State's -- the
2 opinion that McKnight should be in there, or
3 something?

4 A My issue with the jury charge that was given is
5 that the holding from Jarrell was cut in half with
6 the language from McKnight. So where you have --
7 in Jarrell you have two clauses, one conditioned
8 upon the other. In the jury charge as it was
9 given, you have two clauses with all this other
10 language in the middle of it, and you can't --
11 there is no way for the jury to know that one of
12 those clauses is conditioned upon the other, as
13 Jarrell held, because there is all this other
14 language in the middle of it.

15 Q So regardless of Jarrell being split, everything in
16 that part of the jury charge is pulled from some
17 case law, correct?

18 A I believe everything is pulled from some case law,
19 but if you pull language out of case law and
20 reorganize it, it loses meaning. And so just
21 because it is there doesn't mean it is accurate and
22 correct and that the jury would know what extreme
23 indifference is based on the way that you read --
24 if you reorder the words, they change meaning.

25 Q And you testified at the time that y'all were

1 working on the charge, you didn't realize that
2 Jarrell's holding had been split?

3 A Correct.

4 Q But in hindsight now you realize that?

5 A Correct.

6 Q Had you ever worked on a homicide by child abuse
7 case prior to this one?

8 A Prior to this one I had had some homicide by child
9 abuse cases, but they had pled, the ones I had
10 worked on prior to this. Since this, I have not
11 had another homicide by child abuse case.

12 Q And so this was your first time preparing charges
13 for --

14 A For homicide by child abuse, yes.

15 Q And you specifically asked the Court to include the
16 extreme indifference aspect because --

17 A I specifically asked for extreme indifference, and
18 I specifically asked for the language from Jarrell.

19 Q Okay.

20 A And I had prepared -- I had prepared jury charges,
21 not homicide by child abuse, but I clerked for a
22 federal judge, and that was part of my job working
23 for him, so I was very familiar with preparing jury
24 charges, but this was the only time I did for
25 homicide by child abuse.

1 Q Okay. And you testified earlier that the State
2 wanted State v. McKnight to be included and that
3 when you reviewed your jury charge, that you I
4 think submitted it, and it included language from
5 McKnight?

6 A I don't know if I submitted it. Okay? When I
7 spoke with -- when I was speaking with you
8 yesterday, I looked back into the electronic file,
9 and I found an electronic copy of a prepared jury
10 charge that I had prepared the week before, had
11 saved it I think the week before this trial
12 started. And I don't know -- in fact, I have -- in
13 my physical file, when I go to my physical file, I
14 have that one, the one that I sent you that does
15 include the language from McKnight, I also have
16 another one in this physical file that is an out of
17 state Vermont case and a New Hampshire case, and I
18 have three copies of each, and they all have my
19 original signatures on them. I have them here. I
20 have got the one that is the South Carolina law
21 that includes Jarrell and McKnight. And then I
22 have the one that includes the Vermont and the New
23 Hampshire case law. I have three copies of each.
24 Normally -- my normal practice is to, when I am
25 doing jury charges that I want to submit to the

1 Court, I make three copies, one for the Solicitor,
2 one for myself, and one for the Court. And when I
3 submit them to the Court, that is how -- I give one
4 to the Solicitor and I give one to the Court, I
5 keep one for myself. Because there is not a copy
6 of a submitted jury charge in the record and
7 because I have got the three copies with my
8 original signatures on them here in my file, it
9 makes me think that I did not submit a written jury
10 charge to the Court. Okay? I don't remember if I
11 did or not, but I do have -- that's what I have in
12 my physical file. And so I don't think I submitted
13 a written jury charge, but I know that I wanted
14 them to charge State v. Jarrell.

15 Q And is it fair to say that in State v. Jarrell all
16 of the language in cases used is included?

17 A Yes.

18 Q In State v. Jarrell?

19 A Yes.

20 Q So the judge did take under consideration your
21 request on the record to include Jarrell?

22 A Yes. That language is included, but as I said, it
23 is split.

24 Q Yes.

25 A And so it doesn't accurately portray the law.

1 Q Okay.

2 A It doesn't --

3 Q And did you review the opinion by the Court of
4 Appeals in Mr. Goodwin's case?

5 A In what?

6 Q Mr. Goodwin's?

7 A I did at the time. I haven't reread it recently.
8 When it came out I read it.

9 Q So you probably wouldn't recall that the cases they
10 cite, the language they cite is exactly what is in
11 the jury charge?

12 A I don't recall that specifically. If it is there,
13 it is there. I still think -- I still think that
14 even if all of the words are present, if they are
15 not in the correct order, you change the meaning,
16 or water down the meaning. I still think it is an
17 issue. If you reorder the words, just because they
18 are there doesn't mean the meaning is conveyed to
19 the jury.

20 Q So is it your opinion that the jury instructions as
21 a whole don't make sense?

22 A I believe that the section on extreme indifference
23 did not make sense. I believe that the jury did
24 not understand the definition of extreme
25 indifference because of the way that the jury

1 charge was crafted. And I think that the jury also
2 asked a question about extreme indifference in
3 their deliberations because they wanted to be
4 recharged on it and they didn't understand what it
5 meant. And I think that the way the jury charge
6 was drafted played a role in that. And I should
7 have objected to that, and I did not.

8 MR. DAVIDSON: Beg the Court's indulgence.

9 (Pause.)

10 MR. DAVIDSON: Thank you. No further
11 questions.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Waller, anything else?

14 MR. WALLER: Yes, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. WALLER:

17 Q Ms. Hines, would it surprise you that neither you
18 nor the State asked for anything from State v.
19 McKnight in your charge conference with the judge?

20 A Yes.

21 Q That would surprise you?

22 A It would surprise me if we didn't.

23 Q Neither you nor the State argued requesting
24 language from State v. McKnight? You requested
25 State v. Jarrell.

1 A Uh-huh.

2 Q The State requested the definition from the
3 statute.

4 A Oh.

5 MR. WALLER: And, Your Honor, that is on Page
6 729 through 731.

7 A Oh, okay.

8 MR. WALLER: Of the trial transcript.

9 A Yes. 729 you say?

10 Q Correct. Towards the bottom through 731.

11 A Yes. No, that does surprise -- I was thinking it
12 was that they were wanting the language from
13 McKnight, but if they were wanting the language
14 from the statute --

15 Q Do you recall what McKnight was about? Just -- I
16 know it has been a while.

17 A The case itself was, I believe, and it has been ten
18 years since I have read it, but I believe that
19 McKnight was a -- I think it was a pregnant woman
20 who used drugs and caused a miscarriage and the
21 baby died and was charged with homicide by child
22 abuse. I believe that was McKnight.

23 Q That's correct.

24 A Okay.

25 Q Factually it was much different than in this case?

1 A Very much, yes.

2 Q Just for clarity, Mr. Davidson asked -- when he was
3 asking about the plea offer extended, you mentioned
4 involuntary manslaughter?

5 A It wasn't -- no, it was voluntary.

6 Q That is what it says, correct?

7 A Yes. What I remember is that Ms. Campbell turned
8 to me and said, Would he take voluntary? And I
9 said, No.

10 Q Okay.

11 A And that was it. It was just that quick, that --
12 it was right there at the judge's desk. The judge
13 was asking about, Is this something we can work
14 out, that kind of thing. And she turned to me and
15 said, Will he take voluntary? And I said, No.

16 Q Okay. You testified at length about your belief in
17 Mr. Goodwin's innocence?

18 A Yes.

19 Q And your understanding of Ms. Singletary's belief
20 in his innocence?

21 A Yes.

22 Q Did that have any influence on the quickness of
23 your rejection of that offer?

24 A That was 100 percent influenced -- it had 100
25 percent influence on the quickness of my rejection

1 of the offer. I was so -- I was so caught up in my
2 belief that he was innocent, and I worked -- I
3 almost -- I worked myself sick during this trial.
4 I worked -- and I absolutely did not -- I didn't
5 even consider -- I mean, that is why I say at some
6 point I recall smarting off to one of them about,
7 He would take time served. Our -- we were so
8 engrossed in our belief of his innocence that I was
9 not -- I was -- it was just no. And I flat out --
10 I was not hearing her. I was not hearing any kind
11 of talk about offers. I was so convinced of his
12 innocence that I was -- I -- that is why it was a
13 flat no. That is why I smarted off to one of them.
14 And I characterize it that way just being honest.
15 That is what I remember. Our relationship -- our
16 rapport with the Solicitors during this trial was
17 very cold, very distant, because we were so
18 convinced of his innocence that we did not -- you
19 know, a lot of times during trial, during the
20 breaks, the two sides, the Solicitors will chat
21 with the Public Defenders or the Defense attorneys.
22 There was none of that during this trial, because
23 we believed in his innocence so deeply and so
24 strongly and took it so personally that that is
25 what happened. In that conversation when she said,

1 Would he take voluntary? I said, No. I was taking
2 it personally. I made the decision. And I should
3 have told him and let him make the decision. That
4 was my job.

5 Q I know you testified that you were out for some
6 time shortly after this trial for approximately a
7 year. Did you have any contact with his appellate
8 counsel?

9 A I had very little. I spoke with LaNelle, with
10 Ms. Durant, a couple of times. And I remember --
11 and I wasn't out of work, I was just -- you know,
12 working part-time, working -- having to take time
13 off, but I was never actually out of work.

14 Q Okay.

15 A But I did speak with Ms. Durant at the Public
16 Defender conference. I can't remember -- I don't
17 remember if it was the 2011 Public Defender
18 conference or if it was the 2012 Public Defender
19 conference. I was diagnosed in January of 2012.
20 So this was tried in March of 2011. It would have
21 been a conference between that time. I do remember
22 speaking with Ms. Durant at the Public Defender
23 conference about this case specifically.

24 Q Did you have any input into what issues she might
25 have raised?

1 A No.

2 Q I have nothing further. Thank you.

3 A Uh-huh.

4 THE COURT: Anything else?

5 MR. DAVIDSON: No, Your Honor.

6 THE COURT: All right. Thank you, ma'am. You
7 may step down.

8 THE WITNESS: Thank you.

9 (Witness steps down.)

10 MR. WALLER: Nothing further from the
11 Applicant.

12 MS. KLEIN: Your Honor, the State would recall
13 Ms. Luck Campbell.

14 THE COURT: Ms. Campbell?

15 (Ms. Campbell approaches.)

16 THE COURT: Ms. Campbell, you have already
17 been sworn. You can be seated.

18 THE WITNESS: Thank you.

19 (Witness seated.)

20 THE COURT: If you will just state your name
21 once again for the record, please.

22 THE WITNESS: It is Kathryn Luck Campbell
23 Hubbird.

24 THE COURT: And the last name now is?

25 THE WITNESS: Hubbird, H-U-B-B-I-R-D, Your

1 Honor.

2 THE COURT: Thank you.

3 K. LUCK CAMPBELL,
4 after being previously sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. KLEIN:

7 Q Thank you for staying around, Ms. Hubbard. I just
8 have a few follow-up questions.

9 A Uh-huh.

10 Q You have been present through the testimony for the
11 remainder of this afternoon, is that correct?

12 A Yes.

13 Q And you just overheard the testimony from Ms. Hines
14 regarding a conversation that occurred between the
15 two of you?

16 A Yes.

17 Q Okay. Ms. Hines has alleged that the morning of
18 trial in Judge Young's chambers you turned to her
19 and offered a plea of voluntary manslaughter. Do
20 you recall that interaction?

21 A I did not offer her a plea to voluntary
22 manslaughter or involuntary manslaughter
23 or anything else.

24 Q So no plea was ever made prior to trial in this
25 case?

- 1 A No plea offer was ever made.
- 2 Q No plea offer was ever made?
- 3 A When I was present.
- 4 Q To your knowledge, did Ms. McDuffie or Mr. Potts or
5 anyone else on your team extend a plea offer?
- 6 A No.
- 7 Q If that conversation had happened in judge's
8 chambers, would you have requested that Ms. Hines
9 go speak to her client?
- 10 A Yes.
- 11 Q And you did not request that she speak to her
12 client?
- 13 A No. Because there was no offer made to request for
14 her to go speak to her client. In addition to
15 that, there were several other people in the
16 chambers when supposedly this happened, including
17 Ms. McDuffie, Mr. Potts, and her co-counsel.
18 Clearly -- I mean, there was a discussion with the
19 judge about the type of trial it was going to be,
20 that we were ready to go to trial, and things of
21 that nature. But at no time would I have ever just
22 turned around and just off the top of my head gone,
23 Oh, will he plead to voluntary manslaughter, I am
24 making you an offer? That just did not happen. I
25 would have also been obligated to probably run this

1 one by my boss, in addition to, before making that
2 offer, I would have had to consult with the family
3 who was supportive of him and I had not had any
4 contact with.

5 Q And do you believe that the State had a very strong
6 case against Mr. Goodwin at that time?

7 A And the appropriate offer in this case would not
8 have been voluntary manslaughter. I mean, the only
9 offer in this case was homicide by child abuse
10 based on the evidence. Because in addition to the
11 cause of death -- there was blunt force trauma to
12 this child. There were broken ribs. There were
13 other injuries. There was a history of prior abuse
14 that never came in during trial, but it was there.
15 Things of that nature. So basically the only
16 appropriate offer in this case, in my opinion, then
17 and now, would have been homicide by child abuse.

18 Q And that is ultimately what you were prepared and
19 proceeded on trial for?

20 A Correct.

21 Q Is there anything that I have not asked you that
22 you would like to articulate for the record?

23 A The only other thing I wanted to address briefly is
24 about the statements that she said in her opinion
25 were coerced. Basically it is not unusual for us

1 to consult with law enforcement and/or the
2 Coroner's Office in a homicide by child abuse case.
3 None of those statements were custodial. There was
4 no coercion involved. And what she conveniently
5 left out -- and the transcript has got all this in
6 it, Judge -- but, you know, the meeting where
7 supposedly he was coerced by the coroner, the
8 initiating party in that was the Defendant and his
9 wife, or common law -- I don't know, girlfriend,
10 Ms. -- I don't remember her last name. They
11 initiated that meeting. It was during the course
12 of that meeting where they wanted to meet with the
13 pathologist and with the coroner about the cause of
14 death -- and this was in April -- that he then
15 requested to go and talk to the coroner by himself.
16 So to infer that any of these were coerced or in
17 any way -- they were, Number One, not custodial.
18 Number Two, the coroner is not law enforcement.
19 And, Number Three, he was free to go at the end of
20 the day. And these meetings were set up at his
21 request.

22 And that is the only thing I wanted to
23 address.

24 Q And to briefly follow up on that, those were the
25 findings of Judge Young during the Denno hearing,

1 correct?

2 A Yes.

3 Q He found that the statements were not coerced and
4 they were voluntarily?

5 A Yes. And it is clearly laid out and all the facts
6 are clearly in the record. And the only other
7 thing I would note is that when the jury charge --
8 before it was given to the judge, we reviewed it
9 and they reviewed it, the language that was used
10 there. So she was aware of it. And, additionally,
11 if she missed it somehow, it was read to the jury
12 out loud in front of her. And at the end the judge
13 always asks, Do you have any additions or
14 exceptions, and she didn't raise any of those. So
15 she was aware of the language.

16 Q And to briefly address an issue that came up
17 regarding the coroner's report, I believe that it
18 was at some point mentioned that it stated the
19 cause of death was unknown for a brief period of
20 time? During an investigation for homicide by
21 child abuse or general homicide, is it common for
22 the cause of death to remain unknown until further
23 investigation and the etiology can be completed?

24 A Yes, that is very common. That happens all the
25 time. In fact, I had one case up in Lancaster

1 where they didn't get the autopsy back for a year.
2 It just took that much time for everything to come
3 out.

4 Q Thank you. I have no further questions.

5 THE COURT: Thank you. Mr. Waller?

6 MR. WALLER: I have nothing further of this
7 witness.

8 THE WITNESS: Thank you, sir.

9 THE COURT: Thank you, Ms. Hubbard. You may
10 step down.

11 THE WITNESS: I appreciate it.

12 (Witness steps down.)

13 MS. KLEIN: Your Honor, the State does not
14 plan to recall any other witnesses, and we would
15 ask that Ms. Hubbard be released.

16 THE COURT: All right. There are no
17 objections that Ms. McDuffie and Ms. Campbell, Ms.
18 Hubbard be released?

19 MR. WALLER: No objection.

20 THE COURT: All right. Thank y'all for being
21 here.

22 (Ms. McDuffie and Ms. Hubbard excused.)

23 THE COURT: Mr. Waller, anything else?

24 MR. WALLER: Nothing, Your Honor, other than
25 we spoke I believe in chambers earlier regarding

1 submitting proposed orders.

2 THE COURT: Yes.

3 MR. WALLER: I will put that on the record.

4 The parties will submit proposed orders.

5 THE COURT: All right. And Mr. Davidson and
6 Ms. Klein, that is your understanding as well?

7 MS. KLEIN: Yes, Your Honor.

8 THE COURT: Okay. All right. Okay. Well,
9 thank you, everybody. If there is nothing further,
10 I will conclude the trial. I think we have one
11 exhibit in, Applicant's Number 1. I don't think
12 there is anything else in, is there, Madam Court
13 Reporter?

14 THE COURT REPORTER: No, sir.

15 THE COURT: Thank you.

16 Good luck to you, sir. You were well
17 represented, Mr. Goodwin. Certainly the AG's
18 Office was well represented as well.

19 MR. WALLER: Thank you, Your Honor.

20 THE COURT: If nothing further, we are
21 adjourned.

22 SCDC folks, thank y'all for being here.

23 (WHEREUPON, the proceedings adjourned at
24 3:21 p.m.)

25 (END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Certified Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 14th day of July, 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 21, 2022

s/Deborah M. McCurdy, RPR

Deborah M. McCurdy, RPR
Certified Court Reporter

**RICHLAND COUNTY PUBLIC DEFENDER
RICHLAND COUNTY JUDICIAL CENTER**

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October 18, 2013

Mr. Demetrius Antoine Goodwin
Inmate Number: 345308
BRCI
4460 Broad River Road
Columbia, SC 29210

Mr. Goodwin;

I have received your letter and I will get your case file to you as soon as possible. I understand that you are preparing your PCR. In anticipation of that, I have to tell you of a mistake that I made with regard to your trial. On the day the trial began, when we were in the judge's chambers, the solicitor made an offer for you to plead to voluntary manslaughter. I told her no and I never told you about it. By the time we left the judge's chambers, I just forgot. That was a mistake on my part. It was not my decision to make. It was your decision and I never gave you that opportunity. If you had been given that option, the outcome may have been different. You need to include this in your PCR as a ground for ineffective assistance of counsel. I have spoken with Ms. Singletary and Ms. Pinnock about this. Ms. Pinnock remembers that conversation that I had with the solicitor also. Ms. Singletary does not.

Sincerely,



Kris Hines
Assistant Public Defender

kh



Demetrius A. Goodwin | Order of Dismissal | 2015-CP-40-2461

40-03175). Applicant was represented by Kris Hines, Nicole L. Singletary, and Tracy E. Pinnock¹, Esquires. Applicant proceeded to trial on March 18, 2011, before the Honorable W. Jeffrey Young. Applicant was convicted as indicted, and Judge Young sentenced Applicant to twenty-five years.

A timely Notice of Appeal was filed on Applicant's behalf, and an appeal was perfected by LaNelle C. DuRant, of the South Carolina Office of Indigent Defense. Following the submission of briefs, the South Carolina Court of Appeals affirmed Applicant's conviction. State v. Goodwin, No. 2013-UP-110 (S.C. Ct. App filed March 13, 2013). Applicant then filed a Petition for Writ of Certiorari. The Supreme Court of South Carolina dismissed the Writ as improvidently granted. State v. Goodwin, No. 2015-MO-012 (filed March 18, 2015). The Remittitur was returned to the lower court on March 19, 2015.

FACTS GIVING RISE TO THE CONVICTION

On February 6, 2009, Applicant asked his cousin to take him and his 23-month-old daughter (Victim) to the hospital because she was not breathing. (Trial Tr. p. 165, ll. 3 – 9; p. 184, ll. 2 – 11; p. 206, ll. 3 – 11). A team of medical professionals attempted to revive Victim, but she was pronounced dead after approximately thirty minutes of unsuccessful resuscitation measures. (Trial Tr. p. 167, ll. 7 – 13; p. 173, ll. 12 – 14). Dr. Bradley Marcus performed an autopsy and ruled the death a homicide based on some unexplained rib fractures. (Trial Tr. p. 424, ll. 1 – 5). Dr. Matthew Marcus, a radiologist, confirmed the rib fractures with X-rays and determined that squeezing could have caused the fractures. (Trial Tr. p. 504, ll. 1 – 2; p. 508, ll. 1 – 13). He further determined that CPR could not have caused the fractures because one of them was posterior, and

¹ This Order will collectively refer to Kris Hines, Nicole Singletary, and Tracy Pinnock as Trial Counsel. When referring to them individually, they will be addressed as Counsel Hines, Counsel Singletary, and Counsel Pinnock.

with CPR injuries, only anterior rib fractures would occur. (Trial Tr. p. 507, ll. 4 – 7; p. 510, ll. 23 – 25; p. 511, ll. 1 – 8).

On February 7, 2009. Investigator Mauldin, of the Richland County Sheriff's Department, interviewed Applicant, in which he gave a statement. (Trial Tr. p. 271, ll. 15 – 16; p. 272, ll. 18 – 23). In the statement, Applicant reported that on February 5, 2009, he heard the Victim and his cousin's children playing on the stairs at his cousin's house, heard a thud, and saw the Victim lying flat at the bottom of the stairs.² (Trial Tr. p. 275, ll. 2 – 10). Applicant explained that she cried and then got back up and was jumping, playing, and laughing. (Trial Tr. p. 275, ll. 20 – 24). Applicant stated that when they arrived home, Victim vomited twice. (Trial Tr. p. 276, ll. 16 – 17). Applicant also stated he noticed marks on Victim's forehead and chest when he bathed her that night and a mark on her back the next day. (Trial Tr. p. 277, ll. 9 – 12). Applicant explained that he woke up from a nap at 11:45 am on February 6, 2009, and heard Victim wheezing. (Trial Tr. p. 277, ll. 20 – 21). He explained in his statement:

I went to go pick her up. She gave a small cry and looked like she was hurting. Her body seemed limp. I put her on the bed in her mother's room. I saw that her breathing was getting slower. I tried to do some CPR. We don't have a phone in the house and I don't have a cell phone. When I was doing CPR I noticed green mucus coming out of her nose. When I was doing mouth to mouth, I saw a yellowish substance on her mouth. I turned her on her side so it could run out. I ran outside to go to my cousin's house. I saw him outside. I told him that something was wrong with [Victim] and that he needed to call 911. I ran back into the house and saw that she had gotten worse. I came back outside and called my cousin to the house. He came over and tried to wake her by calling her name. We decided that it would take too long for an ambulance to get here so we got in his car, drove to the hospital.

² In order to ascertain what happened, investigators obtained the services of the Assessment Resource Center to attempt to interview the four-year-old child who was playing with Victim when the fall would have happened, but he was unable to respond to questioning. (Trial Tr. p. 316, l. 18 – p. 318, l. 20).

(Trial Tr. pp. 277, l. 22 – 278, l. 13.)

On April 13, 2009, Applicant went to the sheriff's department, where he was advised of his rights, and gave a statement. (Trial Tr. p. 323, ll. 2 – 4; p. 324, ll. 20 – 25; p. 325, ll. 14 – 16). In the statement, on February 6, 2009, Applicant woke up and heard Victim wheezing, so he ran to her, saw she was not responding, picked her up, held her tight, put her on the bed, and ran to his cousin's house. (Trial Tr. p. 331, ll. 21 – 25). Then, Applicant reported that he went back to his home and started CPR. (Trial Tr. p. 332, ll. 1 – 2). When asked by the investigator if he hugged Victim tightly to hurt her on purpose, Applicant explained, "I picked her up and she cried a little. She didn't hug me back like she normally does. I hugged her really tight. It got worse after I hugged her. I didn't do it on purpose. I swear that I didn't mean it." (Trial Tr. p. 332, ll. 5 – 13).

Next, Investigator Martin asked if the hug knocked the air out of her. (Trial Tr. p. 332, ll. 14 – 15). Applicant stated, "Yeah. She started making a hiccupping sound like she couldn't breathe. That's when I laid her down to get Terrell."³ (Trial Tr. p. 332, ll. 16 – 18). When asked if he thought he could have squeezed Victim hard enough to break her ribs, Applicant replied, "Yes, I was so scared." (Trial Tr. p. 333, ll. 13 – 15). Applicant admitted in his statement that the day before Victim died that he grabbed Victim's face for swearing and spanked her legs for spitting on people. (Trial Tr. p. 332, ll. 19 – 23; p. 333, ll. 24 – 25). When Investigator Martin asked Applicant why he did not mention hugging Victim when Investigator Mauldin interviewed him

³ From the record, Terrell is seemingly a nickname for Marquis Carter, Applicant's cousin who drove Victim and Applicant to the hospital. Additionally, although Applicant refers to him as his cousin, Carter's testimony is that he only knew Applicant for about a year. (Trial Tr. p. 332, l. 2 – 3).

the day of the incident, Applicant stated, "I didn't want anyone to think that I had killed her." (Trial Tr. pp. 332, l. 24 – 333, l. 1.)

On April 15, 2009, a meeting was held with Victim's family in which they were told that Victim's death was caused by asphyxiation or squeezing, not by a fall. (Trial Tr. p. 224, ll. 2 – 15; p. 225, ll. 10 – 20). Shortly after, Applicant asked to speak to Coroner Gary Watts alone, and he provided that he realized that when he squeezed Victim in a hug for one to two minutes, he had killed her. (Trial Tr. p. 226, ll. 11 – 12; p. 227, ll. 2 – 4). Then Applicant provided another statement to Investigator Martin, which stated in part:

Question: When you hugged [Victim] very hard, did that cause her death?

Answer: Yes, but it was unintentional—I'm sorry. But it wasn't intentional. I was scared at the time and I didn't have a ride or a way to make contact. I just wanted to hug her for comfort.

(Trial Tr. pp. 343, l. 21 – 344, l. 1.) Subsequently, Applicant was charged with homicide by child abuse.

CURRENT ACTION BEFORE THIS COURT

Applicant timely commenced this post-conviction relief action on April 23, 2015, and amended July 22, 2021. In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
 - a. "Trial counsel failed to notify applicant of plea offer"
2. "Ineffective Assistance of Appellate Counsel"
 - a. "Appellate counsel failed to raise all meritorious claims on appeal"
3. "As to representation rendered by Kris Hines, Esquire, Nicole Singletary Esquire, and Tracy Pinnock, Esquire:"
 - a. "Counsel was ineffective for failing to object to the incorrect charge on Homicide by Child Abuse being presented to the jury, thus failing to preserve the issue for appeal."

- b. "Counsel was ineffective for failing to properly preserve their objection and motion for mistrial related to improper burden shifting comments made during the testimony of Dr. Bradley Marcus."

At the evidentiary hearing, PCR counsel for Applicant proceeded on all pled allegations.

SUMMARY OF RELEVANT TESTIMONY

ASSISTANT SOLICITOR K. LUCK CAMPBELL'S TESTIMONY

On direct examination, Assistant Solicitor Campbell testified that she recalled this case, and in speaking with defense counsel, Applicant maintained his innocence and was not going to plead to anything. (PCR Tr. p. 11, ll. 10 – 13). Assistant Solicitor Campbell testified that in some cases, they actively pursue plea negotiations, and in other cases, they do not. (PCR Tr. p. 10, ll. 1 – 3).

On cross-examination, Assistant Solicitor Campbell testified that:

Basically, this case was a very strong medical case as far as child abuse went. And in addition to that, the [Applicant] confessed to multiple people on multiple occasions to harming this child, so in my opinion it was, as far as homicide by child abuse cases go, a strong case for the State.

(PCR Tr. pp. 12, l. 22 – 13, l. 2). Assistant Solicitor Campbell was asked whether she had contacted defense counsel to see if Applicant was interested in negotiating a plea, to which she replied:

That is done in some cases. In this case, I specifically remember the position from the day we got the case, had any interaction with the Defense, to the moment the jury came in, is that basically they had spoken to their client, he wasn't pleading to anything, and therefore there were no plea negotiations to be had. I even remember -- I think we went back on the first day of trial, and I don't know that that was conveyed to Judge Young, but basically, we told Judge Young, you know, This is a trial, we are going forward.

(PCR Tr. p. 13, ll. 14 – 24).

Assistant Solicitor Campbell further testified that they had met with the defense on several occasions to go over discovery, and the defense indicated in those meetings that their client had no desire to plead. (PCR Tr. pp. 14, l. 18 – 15, l. 5). Assistant Solicitor Campbell was asked whether she or anyone in her office ever extended a plea offer to Applicant or his defense team, to which she replied, "Not that I'm aware of." (PCR Tr. p. 17, ll. 14 – 24).

ASSISTANT SOLICITOR JOANNA A. MCDUFFIE'S TESTIMONY

On direct examination, Assistant Solicitor McDuffie testified that she and Assistant Solicitor Campbell were initially assigned to this case, and Carter Potts was brought in as third chair later. (PCR Tr. p. 20, ll. 15 – 20). Assistant Solicitor McDuffie testified that was involved before Applicant's arrest in multiple "meetings with law enforcement, SLED, and medical professionals about the case." (PCR Tr. pp. 20, l. 25 – 21, l. 2). Assistant Solicitor McDuffie was asked whether she had any recollection of a plea offer being made in the case to which she replied "No, I specifically recall that there were no offers in this case." (PCR Tr. p. 21, ll. 16 – 19).

On cross-examination, Assistant Solicitor McDuffie testified that she had met with the defense on numerous occasions, and her impression was that this was going to trial because Applicant maintained his innocence and was not going to plead. (PCR Tr. p. 22, ll. 12 – 24). Then Assistant Solicitor McDuffie was asked whether Applicant or trial counsel ever expressed interest in a plea, and she replied, "No, the opposite is true." (PCR Tr. pp. 22, l. 25 – 23, l. 3).

APPLICANT'S TESTIMONY

On direct examination, Applicant testified that Nicole Singletary, Kris Hines, and Tracy Pinnock were appointed as his attorneys in this case. (PCR Tr. pp. 26, l. 23 – 27, l. 6). Applicant testified that he gave three separate statements that were admitted at trial, and he was able to review them and the circumstances of how he gave those statements with his attorneys. (PCR Tr. p. 28,

ll. 12 – 23). Applicant testified that he and Singletary discussed what they were up against at trial and what their defense would be regarding the expert witnesses. (PCR Tr. pp. 29, L. 19 – 30, l. 8). However, Applicant testified that he never saw any of the expert's reports that were presented at trial. (PCR Tr. p. 30, ll. 13 – 21). Applicant testified that his attorneys never discussed what the experts were going to testify to at trial. (PCR Tr. p. 30, ll. 22 – 25).

Applicant testified that he decided to go to trial because he did not feel like his actions "fit" with homicide by child abuse. (PCR Tr. p. 31, ll. 6 – 23). Applicant testified that his lawyers did discuss the elements of homicide by child abuse with him. (PCR Tr. pp. 31, l. 24 – 32, l. 1). Applicant testified that their defense was their pathologist and "trying to get the rundown on statements" he made to police. (PCR Tr. p. 32, ll. 7 – 19). Applicant testified that he was able to communicate with his lawyers during the trial and during breaks at trial. (PCR Tr. p. 33, ll. 17 – 25). Applicant testified that there were no plea offers that he was made aware of, but had one been made, it was something that could have been taken into consideration. (PCR Tr. p. 34, ll. 1-6; p. 35, ll. 3 – 6).

Applicant testified that he was able to briefly speak with Appellate Counsel after trial and she gave him the "rundown" on the issue she was going to argue in her brief. (PCR Tr. p. 35, ll. 11 – 19). Applicant testified that he did not have a chance to question Appellate Counsel, but he did not have any issues he wanted her to consider. (PCR Tr. p. 35, ll. 20 – 25).

On cross-examination, Applicant testified that Singletary had left the Public Defender's Office prior to his trial but came back to help with his case because she thought she could help and wanted to help. (PCR Tr. p. 37, ll. 9 – 18). Applicant testified that he remembered the discovery "vaguely." (PCR Tr. p. 37, ll. 22 – 24). Applicant testified that he did not understand why he was charged with Homicide by Child Abuse because "[he] was always told . . . the whole thing was an

accident." (PCR Tr. 38, ll. 8 – 15). Applicant testified that their strategy at trial was one "based off of medical experts and basically statements." (PCR Tr. p. 39, ll. 3 – 9). Applicant testified that if a plea had been brought to him, he would have considered it. (PCR Tr. p. 39, ll. 13 – 21). However, Applicant testified that he never told his attorneys he would consider a plea because "it never came up." (PCR Tr. p. 39, ll. 22 – 24).

Applicant testified that his attorneys were supportive of the strategy and defense of his innocence in prep for trial. (PCR Tr. 40, ll. 7 – 10). Applicant testified that he agreed with Appellate Counsel's argument, but, he thought she should have included a "State v. Day" issue regarding the admissibility of his out-of-court statements. (PCR Tr. pp. 41, l. 18 – 42, l. 15).

On redirect examination, Applicant testified that his attorneys explained the sentencing range for Homicide by Child Abuse to him. (PCR Tr. p. 44, l. 21 – 45, l. 3).

TRIAL COUNSEL NICOLE L. SINGLETARY'S TESTIMONY

Counsel Singletary testified that she left the Public Defender's Office before trial started, but she promised Applicant she would come back and assist in his trial. (PCR Tr. pp. 47, l. 2 – 49, l. 19). Counsel Singletary testified that the allegation was that Applicant squeezed his daughter tight enough to fracture ribs and "may have shook her" which resulted in death. (PCR Tr. p. 50, ll. 18 – 23). Counsel Singletary testified that their strategy at trial was that Applicant did not cause the murder because his daughter had a rare neurological disorder that actually caused her death. (PCR Tr. p. 51, ll. 3 – 7).

Counsel Singletary was asked about the statements and how they dealt with them, and she testified to the following:

I would say that we actually did. And I was actually looking back through my notes earlier from like talking to Mr. Goodwin about the different meetings and the different statements that he made. And to kind of give some context, and I think you alluded to it earlier,

the actual child passed away in February, but Mr. Goodwin was not arrested until about April of that year. Now, during that time, basically the coroner -- the Richland County Coroner's Office had several meetings, I think there were about three meetings with Mr. Goodwin. And so what the Coroner's Office would do is, they would meet with Mr. Goodwin and his family, and then they would say, Well, how did this happen? Explain to us what happened. And so Mr. Goodwin would say, Hey, I don't know what happened, like this is -- like I don't know what was happening. Like he didn't know. So what would happen is the Coroner's Office would go back to the Prosecution's Office and say, Hey, you spoke to Mr. Goodwin. He said this. So as a result of them talking to the Prosecution's Office, then they would call another meeting with Mr. Goodwin and say, Okay, now tell us again exactly what happened. Like, and so he would tell them, this is what happened. The Coroner's Office would then consult with the Prosecution's Office and then would go back to Mr. Goodwin and say, Well, no, it couldn't have happened this way, you had to have done something. And so that is when miraculously the confession occurred.

(PCR Tr. pp. 51, l. 19 – 53, l. 2). Counsel Singletary testified that there was one statement provided by Applicant shortly after the child's death, one on April 13th and one on April 15th at the Coroner's Office. (PCR Tr. p. 53, ll. 6 – 17).

On cross-examination, Counsel Singletary testified that she believed in Applicant's innocence so much that she would not have considered a plea offer. (PCR Tr. p. 56, ll. 11 – 19). Counsel Singletary testified that a plea offer was made on the day of trial, but she was not present when it was presented, and she did not find out about it until Counsel Hines told her three years after Applicant's conviction. (PCR Tr. pp. 57, l. 7 – 58, l. 5). Counsel Singletary testified to the following regarding her opening statement:

Okay. So, I -- the opening strategy was that this was a father who woke up and realized that his daughter was not breathing. And then, as a result -- and just, if you look at the transcript, one of the things that we tried to say, and I did say in opening statement, I believe, is that there was some mucous that was coming out of her nose, and so forth. And so he reacted. He grabbed his daughter. He went next-door to a neighbor. And I believe the neighbor's name was Chris. He did CPR. And so what we said in the opening statement was this

was a father that was actually trying to save his daughter, and that the rib fractures actually came from him actually doing CPR on the daughter, and that the daughter actually had a rare neurological disease.

(PCR Tr. pp. 58, l. 23 – 59, l. 13).

Counsel Singletary then testified to the defense strategy on how to handle the statements made by Applicant as follows:

Yes. And we actually planted that seed in the opening statement. In the opening statement, I actually talked about possible statements and talked about the meeting and talked about it was a father that, after being questioned over and over and over again, he finally was exhausted and said, I must have done something. I don't know what I did, but I must have done something. So, we started that from the very beginning in the opening statement to convey that to the jury to say that, even though you are going to hear this, this is our reason for why this occurred.

(PCR Tr. p. 60, ll. 8 – 19).

Counsel Singletary testified that she objected to Dr. Bradley Marcus' testimony, and the judge gave a curative instruction and struck the testimony from the record, and it was preserved for appellate review. Counsel Singletary testified that she did not see a problem with the jury charges as given, contrary to Applicant's assertion that the jury charge of homicide by child abuse was incorrect. (PCR Tr. pp. 62, l. 15 – 63, l. 12).

On redirect examination, Counsel Singletary testified that her objection to Dr. Marcus' testimony was to the comment "until proven otherwise" and not to the testimony being suggestive of child abuse. (PCR Tr. p. 64, ll. 5-9).

On re-cross examination, Counsel Singletary testified that on the objection and after a bench conference, the judge struck the statement of Dr. Marcus. (PCR Tr. p. 65, ll. 15 – 24). Counsel Singletary testified that the strategy behind the objection to Dr. Marcus' statement was to lessen the likelihood of prejudice by highlighting it to the jury. (PCR Tr. pp. 65, l. 15 – 22).

APPELLATE COUNSEL LANELLE C. DURANT'S TESTIMONY

On direct examination, Appellate Counsel DuRant testified to the procedure she goes through when a case is assigned to her. (PCR Tr. pp. 71, l. 14 – 72, l. 3). Counsel DuRant testified to how she selected issues to be raised as follows:

Well, of course, as I was stating, you have to look for the objections, but then there may be several issues, some more significant than others. Sometimes there will be no issues, then we would write an Anders brief, which I think you are familiar with an Anders brief. But if I found an issue that I felt was really the winning issue, I would raise just that issue, because I did not want to dilute it with other minor issues. And that is what happened in Mr. Goodwin's case. I don't remember any other issues right off the top of my head, but I do remember feeling that this was a very significant issue, because after reading the transcript, I knew that Mr. Goodwin did not have extreme indifference towards this child. He did not mean to hurt that child. And I felt the Court -- the definition of extreme indifference as the Court has used cases and as the statute said, is very broad. It applies to many levels of homicide by child abuse. And I just did not think Mr. Goodwin fit any of those.

(PCR Tr. pp. 72, l. 11 – 73, l. 6). Appellate Counsel DuRant testified that she felt the judge gave two conflicting definitions of extreme indifference in the jury charges, but she felt it was covered in her main argument of not granting a directed verdict. (PCR Tr. pp. 73, l. 15 – 74, l. 23).

Appellate Counsel DuRant testified that she did not see any issues with the statements Applicant made to police, because she thought they were voluntary statements. (PCR Trp. 74, l. 24 – 75, l. 9). Appellate Counsel DuRant testified that she chose the issue she felt was the best issue, and she thought the one she chose with Applicant was winnable; however, she did not remember there being any other issue that she could raise. (PCR Tr. pp. 75, l. 10 – 77, l. 20).

On cross-examination, Appellate Counsel DuRant testified that there may have been other issues present in Applicant's case, but none stood out as strongly as the one she raised. (PCR Tr. p. 79, ll. 13 – 22). Appellate Counsel DuRant testified that most of the time, she would talk with

defendants on the phone at some point while representing them. (PCR Tr. p. 80, ll. 1 – 10). Appellate Counsel DuRant testified that appellate defenders are not required to raise all meritorious issues. (PCR Tr. p. 80, ll. 19 – 23). Appellate Counsel DuRant testified that the issue she raised for Applicant, in her opinion, is still the strongest issue. (PCR Tr. p. 81, ll. 3 – 6).

On redirect examination, Appellate Counsel DuRant testified that if the Court of Appeals found an error in the denial of a directed verdict or improper jury charge, it is typically remanded for another trial. (PCR Tr. pp. 81, l. 22 – 82, l. 5).

TRIAL COUNSEL TRACY E. PINNOCK'S TESTIMONY

On direct examination, Counsel Pinnock testified that the strategy, in this case, was medically heavy and that a lot of focus was on the expert testimony, and that it did not make sense that Applicant would hug his child to death. (PCR Tr. p. 84, ll. 2 – 9). Counsel Pinnock testified that she handled the Jackson v. Denno⁴ hearing. (PCR Tr. pp. 84, l. 18 – 85, l. 4). Counsel Pinnock testified that she participated in meetings and trial preparation. (PCR Tr. p. 85, ll. 16 – 20). Counsel Pinnock testified that at some point before the trial began, Counsel Hines was presented with a plea offer from the Solicitor's Office. (PCR Tr. pp. 86, l. 3 – 87, l. 3). Counsel Pinnock testified that she did not remember any conversation about the plea offer with Applicant. (PCR Tr. p. 87, ll. 4 – 7).

Counsel Pinnock testified that she did not remember the jury charge conference. (PCR Tr. p. 87, ll. 8 – 23). Counsel Pinnock testified that she was present in meetings with their expert; however, she does not remember if they discussed the expert's findings with Applicant. (PCR Tr. pp. 87, l. 24 – 88, l. 9).

⁴ Jackson v. Denno, 378 U.S. 368, 12 L.Ed.2d 908 (1964).

On cross-examination, Counsel Pinnock testified that in preparation for trial, she reviewed discovery, went to meetings, took notes, performed research, bounced ideas off other counsel, and was there to learn. (PCR Tr. p. 89, ll. 14 – 23). Counsel Pinnock testified that there was a plea offer made and that she is "confident" Assistant Solicitor McDuffie was there and Counsel Hines, but unsure about anyone else present. (PCR Tr. p. 90, ll. 2 – 13). Counsel Pinnock was asked about the documentation of the alleged plea conversation, and the following colloquy occurred:

Pinnock: No. And like I said, I can't give you the details of what led up to that being said or even what was said, you know, from the Solicitors to us. I do recall a retort by Ms. Hines that was something along the lines of, Well, you know, he would plead to time served or something in response to what was said to us, but that is really -- that is all that sticks out.

Question: Okay. And given the evidence and the testimony that was going to occur, in your opinion was credit for time served a reasonable rebuttal offer?

Pinnock: I mean, I can't -- back then, I mean, I couldn't judge that. When I say I had never dealt with something this serious before, I never had. So I can't really pass judgment on the 2011 Tracy.

Question: Okay. Did you ever have a discussion with Mr. Goodwin about that lobby conversation?

Pinnock: No.

Question: Are you aware if Ms. Hines had a conversation with him?

Pinnock: I don't know if she did or not.

(PCR Tr. p. 91, ll. 1 – 21).

Counsel Pinnock testified that she could not remember if the plea offer was mentioned in the judge's chambers before trial and that it would not be her responsibility to take that offer to Applicant because she was the third chair lawyer. (PCR Tr. pp. 91, l. 22 – 93, l. 23).

On redirect examination, Counsel Pinnock testified that Counsel Hines alleged retort to the plea offer was "very clipped." (PCR Tr. p. 95, ll. 12 – 21). Counsel Pinnock testified that she would characterize Counsel Hines' retort as "I guess serious and kind of dismissive of what was offered." (PCR Tr. p. 95, ll. 22 – 25).

On re-cross examination, Counsel Pinnock testified that anytime an offer is made, they are required to present it to their client even if the offer is ridiculous; however, she does not remember the specifics of the offer, just a characterization of Counsel Hines' retort. (PCR Tr. pp. 96, l. 9 – 14).

TRIAL COUNSEL KRIS HINES' TESTIMONY

On direct examination, Counsel Hines testified that she had discovery when she took over the case from Counsel Singletary and received more discovery mid-trial that was never used in the case in chief. (PCR Tr. pp. 99, l. 21 – 101, l. 12). Counsel Hines testified that in preparation for the trial, she provided the following testimony:

We met with him a number of times. We met with his family. We talked to him, you know, went through the discovery with him, and we talked to him about the expert that we had hired. I think we met with him and his family and the expert one day at Ms. Singletary's office so that the expert could explain to him what he was talking about, Dr. Kessler. And we, you know, we went through discovery. We talked about whether he should testify or not. Of course, that got thrown into a tailspin when we got all those jail calls because we did not know what was on them.

(PCR Tr. pp. 101, l. 15 – 102, l. 1). Counsel Hines testified that she discussed Applicant's statements he made to law enforcement with him. (PCR Tr. p. 102, ll. 2 – 4). Counsel Hines testified that she discussed with Applicant the Jackson v. Denno hearing that would occur and what to expect. (PCR Tr. p. 102, ll. 5 – 16).

Counsel Hines testified that when she took over the case, she started from the beginning and reviewed the prior attorney's notes but started her own and reviewed a "fresh copy" of discovery. (PCR Tr. p. 102, l. 24 – 103, l. 9). Counsel Hines testified that she discussed the charges and Applicant's constitutional rights with him. (PCR Tr. p. 103, ll. 10 – 13). Counsel Hines was asked about the jury charge on the definition of extreme indifference, and the following colloquy occurred:

Question: Okay. Let me ask first about the charge of homicide by child abuse and the definition of extreme indifference. Let's talk about that some. What preparations did you make? What research did you do into that? Do you recall?

Hines: Yes. That was my issue at trial. And I know Ms. Singletary and Ms. Pinnock testified they didn't really recall that much because that was my issue to research. In preparation for the trial, I read every homicide by child abuse case. I have got them in the back. I pulled specifically to bring up here with me *State v. Jarrell*, because I think that is the relevant one. I read all of the homicide by child abuse cases and characterized them. I wrote down my directed verdict argument. I am the one that prepared the -- argued the request for the jury charge issue. And so that was the preparation that I did as far as the case law.

Question: Okay. And you actually brought up to the Judge State v. Jarrell⁵?

Hines: Yes.

Question: Is that correct?

Hines: Yes.

Question: There was some discussion between you and the Solicitor's Office regarding the proper definition. I believe the statute says one thing. *State v. Jarrell* was a very specific holding of the definition. And it is my

⁵ State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (2002).

understanding the judge kind of left for y'all to work out --

Hines: Actually, that is not how I remember it.

Question: Okay.

Hines: The way I remember it, we were in chambers. The judge's law clerk was sitting at the computer. And I had asked for -- I had wanted the language in Jarrell. And in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by deliberate act culminating in death. That is the holding in Jarrell. And that is what I wanted. And the State wanted the language from McKnight⁶. And the judge's law clerk was typing. And what ended up happening is that the definition of State v. Jarrell got cut in half, and the language from McKnight got inserted in the middle of it. I should have objected to that, and I didn't. That was a mistake on my part. But if you read the transcript, you'll see the first part of Jarrell where extreme indifference is a mental state akin to intent, and then you see the language from McKnight is in there, and then at the end of it, it ends with, characterized by a deliberate act culminating in death. Well, I think when you read Jarrell, that the mental state akin to intent, that you have to have it characterized by the deliberate act culminating in death. If that condition, the second part of that condition is the first part of that, so when you stick the language from McKnight right in the middle of that sentence and break up that sentence, I don't think that the definition of extreme indifference was clear. And I know I didn't object to it, and I should have. And I believe I was ineffective for not objecting to that.

Question: Okay. So your recollection is that the definition given by State v. Jarrell was kind of split in half and some other language was kind of put in the middle, and then it finished out the definition from State v. Jarrell?

Hines: That is my recollection. Now, I didn't realize it. At the time that that was happening, I didn't realize that that is what was happening.

⁶ State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003).

Question: Okay.

Hines: Okay? In reading the transcript later when I got the PCR, that is when I realized what -- how it had played out. I do remember that the judge's law clerk was typing on the computer in chambers, typing that out as we were discussing it in chambers.

Question: Okay. So y'all had a charge conference where you were provided a copy, either a hard copy or electronically by the clerk?

Hines: I -- I don't remember. I had a proposed jury charge in my computer file. I don't remember if I gave that written -- and it actually -- the proposed jury charge that I had prepared ahead of time for trial actually did include the language from McKnight and the language from Jarrell. It was not what ended up in at the end. I can't remember if I offered that -- I think it would have been clocked and been part of the record had I offered it in writing -- or if we just argued. I can't remember that. I do specifically remember that I wanted this language from Jarrell, and the reason why is that my original copy of Jarrell from that trial is right here, and it is highlighted, it is underlined, there is a mark here, and there is a star on that language. And I had it folded open to that page when I pulled it out of the file.

Question: Okay.

Hines: And that is the language that I wanted for the definition of extreme indifference, but I don't believe it was accurately conveyed in the jury charge.

(PCR Tr. pp. 103, l. 17 – 107, l. 20).

Counsel Hines testified that she did not object to the jury charge as given and that it was a mistake. (PCR Tr. p. 108, ll. 9 – 14). Counsel Hines testified that while Counsel Singletary objected to Dr. Marcus' testimony, it was her witness, and she placed it on the record because "if it is [her] witness [she has] to argue the objections and issues." (PCR Tr. p. 109, ll. 6 – 18). Counsel Hines testified that she did not ask for a more curative instruction from the judge because she made

a mistake. (PCR Tr. p. 110, ll. 4 – 9). Counsel Hines testified that she did not realize that the judge did not rule on her objection till now, and she should have "requested a ruling on the motion for a mistrial in order to preserve it." (PCR Tr. p. 110, ll. 10 – 19).

Counsel Hines was asked whether a plea offer was ever extended, to which she replied no and provided the following:

And I -- what I recall -- and I don't remember -- I was here in the courtroom for Ms. Pinnock's testimony. I don't remember that conversation. I do remember at some point in the lead-up to trial making a -- a smarting off to the Solicitor saying, I think he would - - something to the effect that, He would take simple assault. And I think that was in response to something. But I don't remember that. I do remember saying something like, He would take simple assault. But what I remember is when we were in judge's chambers the morning of the -- Monday morning, we were in the judge's chambers, and Judge Young asked if there had been any plea negotiations in the case. We were sitting -- I was sitting -- there were two chairs in front of the judge's desk, and Ms. Campbell was in one and I was in the other, and the other attorneys were behind us. And Ms. Campbell turned to me and said, "Would he take voluntary?" And I just looked at her and said, "No." And I never -- I actually didn't remember that that happened until two or three months later. I never told Mr. Goodwin about that.

(PCR Tr. pp. 110, l. 25 – 111, l. 25). Counsel Hines testified that she did consider the offer in the judge's chambers as one she should have taken to Applicant but did not. (PCR Tr. p. 112, ll. 2 – 5). Counsel Hines testified that she sent Applicant a letter in 2013 after he requested his file to file a PCR, to provide the details of the plea offer that she never discussed with him so that he could raise it as an issue in his PCR application. (PCR Tr. pp. 113, l. 5 – 114, l. 15).

On cross-examination, Counsel Hines testified that she believed Applicant was innocent, and that belief grew stronger the longer she represented Applicant. (PCR Tr. p. 117, ll. 13 – 21). Counsel Hines was asked what convinced her of his innocence in this case, to which she provided the following:

Well, I believed the expert in this case. I mean, first of all -- well, the statement -- I think the statement was coerced. The circumstances under which they obtained the third statement, I believe that was coerced by the coroner. The cause of death of the pathologist, Dr. Marcus Bradley, or Bradley Marcus, I can never remember what order his name goes in, but the cause of death was listed as unknown until February 16th, which was -- or the 15th, which was the day that the third statement was obtained. On that day, Dr. Marcus changed his cause of death on the autopsy report from "unknown etiology" to "homicide, asphyxiation." And I think it was based solely on that third statement, and I think -- I have always believed that third statement was coerced by the coroner. They took him in -- they brought the family into the Coroner's Office and they took Mr. Goodwin into a room -- the coroner took Mr. Goodwin into a room, separate room, and had a conversation with him that day and came out, and he was like, Oh, well, here, take your statement. Law enforcement was there. And then the pathologist, Dr. Kessler, that I had hired, found streptococcal pneumonia in Ms. -- in DG's adrenal glands, and I believed that. I believed that that was the cause of death. There were signs -- I think -- and it was right at the very end that he came up with that that diagnosis. In retrospect, I should have probably asked for a continuance and tried to get more experts to back that up. But I believe that -- you know, when we had -- we had asked -- they had the slides, the pathology slides, we asked that they do gram stains and other kind of stains. One of the stains that we -- we asked for separate special testing on the slides, the autopsy slides, and one of them was to show bacteria and the other one was to have fungus show up. Silver stain, I think it might have been. And when, you know, the bacteria showed up, it was in the adrenal gland. Our pathologist's opinion was -- and I believe that this is -- I still believe that this is what happened -- but our pathologist's opinion was that Demetra had been sick and that a secondary infection had taken over and attacked her adrenal glands and that -- which is why there was streptococcal pneumonia in the adrenal glands, and that that had caused sepsis and attacked her whole body, and that that is what actually killed her. You know, the State put on a forensic pediatrician who testified that she had been vaccinated for the streptococcal -- for pneumonia, and that the pneumonia vaccine was 100 percent effective against all strains of pneumonia, which is, I found out later, realized later, not true. It is called Prevnar 13 because it is effective against 13 strains of pneumonia, of which there are over 99, and it is not 100 percent effective as those 13. As we have learned in the last year, there are no vaccines that are 100 percent effective. I think that was a completely inaccurate medical statement on the part of the State's expert, and I should have had an expert to negate that, to tell the

actual, you know, medical truth. But that is why I believed in his innocence, I think that was your question, all of those reasons. And I still believe in it.

(PCR Tr. pp. 117, l. 24 – 120, l. 16). Counsel Hines testified that she did not have an expert to refute the State's expert regarding vaccine efficacy, and she should have objected to the statement. (PCR Tr. pp. 122, l. 10 – 123, l. 4).

Counsel Hines testified that she did not recollect the meeting in the hallway with the Assistant Solicitor that Counsel Pinnock testified about earlier. (PCR Tr. pp. 123, l. 20 – 124, l. 2). Counsel Hines testified that while in chambers, she does remember Assistant Solicitor Campbell offering involuntary manslaughter, but she said no. (PCR Tr. p. 125, ll. 4 – 9). Counsel Hines testified that she did not remember if Judge Young had any reaction to that conversation. (PCR Tr. p. 125, ll. 12 – 21). Counsel Hines testified that at trial, they attempted to convince the jury that Applicant's statements were coerced, and she argued that in closing. (PCR Tr. p. 128, ll. 6 – 22). Counsel Hines testified that she objected to Dr. Marcus' testimony when he was through and feels she did everything she needed to do to preserve that issue. (PCR Tr. pp. 129, l. 23 – 130, l. 12).

Counsel Hines testified that the jury charge on the definition of extreme indifference was wrong because it contained case law from two cases, and it lost meaning when it was reorganized into the jury charge. (PCR Tr. pp. 130, l. 20 – 131, l. 24). Counsel Hines testified that she did not realize that the holding in Jarrell had been split, but now she does know. (PCR Tr. pp. 131, l. 25 – 132, l. 5). Counsel Hines testified that she asked for the language from Jarrell to be included on extreme indifference. (PCR Tr. p. 132, ll. 15 – 18). Counsel Hines testified that the judge did include the language from Jarrell as she requested, but he split it with the language from the State's request to include language from McKnight. (PCR Tr. pp. 133, l. 1 – 134, l. 23). Counsel Hines

testified that because the language is split, it does not accurately portray the law. (PCR Tr. p. 134, ll. 22 – 25). Counsel Hines testified that the jury instructions on extreme indifference "did not make sense," and the jury did not understand the definition of extreme indifference. (PCR Tr. p. 135, ll. 20 – 25).

On redirect examination, Counsel Hines testified that she did not know the State did not request language from McKnight and that the State only requested the language from the statute. (PCR Tr. p. 136, l. 17 – 137, l. 4).

ASSISTANT SOLICITOR K. LUCK CAMPBELL'S TESTIMONY ON RECALL

Assistant Solicitor Campbell testified that she did not offer Counsel Hines "a plea to voluntary manslaughter or involuntary manslaughter or anything else." (PCR Tr. p. 142, ll. 21 – 23). Solicitor Campbell testified that she never offered a plea in this case and that, to her knowledge, no one else in her office ever made a plea offer. (PCR Tr. pp. 142, l. 24 – 143, l. 6). Solicitor Campbell testified that if she had made that offer in the judge's chambers, she would have asked Counsel Hines to go and speak with her client. (PCR Tr. p. 143, ll. 7 – 10). Solicitor Campbell provided the following testimony regarding what happened in the judge's chambers:

No. Because there was no offer made to request for her to go speak to her client. In addition to that, there were several other people in the chambers when supposedly this happened, including Ms. McDuffie, Mr. Potts, and her co-counsel. Clearly -- I mean, there was a discussion with the judge about the type of trial it was going to be, that we were ready to go to trial, and things of that nature. But at no time would I have ever just turned around and just off the top of my head gone, Oh, will he plead to voluntary manslaughter, I am making you an offer? That just did not happen. I would have also been obligated to probably run this one by my boss, in addition to, before making that offer, I would have had to consult with the family who was supportive of him and I had not had any contact with.

(PCR Tr. pp. 143, l. 13 – 144, l. 4).

Solicitor Campbell further testified to the following:

And the appropriate offer in this case would not have been voluntary manslaughter. I mean, the only offer in this case was homicide by child abuse based on the evidence. Because in addition to the cause of death -- there was blunt force trauma to this child. There were broken ribs. There were other injuries. There was a history of prior abuse that never came in during trial, but it was there. Things of that nature. So basically, the only appropriate offer in this case, in my opinion, then and now, would have been homicide by child abuse.

(PCR Tr. p. 144, ll. 7 – 17). Solicitor Campbell went on to testify to the following:

Question: Is there anything that I have not asked you that you would like to articulate for the record?

Campbell: The only other thing I wanted to address briefly is about the statements that she said in her opinion were coerced. Basically, it is not unusual for us to consult with law enforcement and/or the Coroner's Office in a homicide by child abuse case. None of those statements were custodial. There was no coercion involved. And what she conveniently left out -- and the transcript has got all this in it, Judge -- but, you know, the meeting where supposedly he was coerced by the coroner, the initiating party in that was the Defendant and his wife, or common law -- I don't know, girlfriend, Ms. -- I don't remember her last name. They initiated that meeting. It was during the course of that meeting where they wanted to meet with the pathologist and with the coroner about the cause of death -- and this was in April -- that he then requested to go and talk to the coroner by himself. So, to infer that any of these were coerced or in any way -- they were, Number One, not custodial. Number Two, the coroner is not law enforcement. And, Number Three, he was free to go at the end of the day. And these meetings were set up at his request. And that is the only thing I wanted to address.

Question: And to briefly follow up on that, those were the findings of Judge Young during the Denno hearing, correct?

Campbell: Yes.

Question: He found that the statements were not coerced and they were voluntarily?

Campbell: Yes. And it is clearly laid out and all the facts are clearly in the record. And the only other thing I would note is that when the jury charge -- before it was given to the judge, we reviewed it and they reviewed it, the language that was used there. So she was aware of it. And, additionally, if she missed it somehow, it was read to the jury out loud in front of her. And at the end the judge always asks, Do you have any additions or exceptions, and she didn't raise any of those. So she was aware of the language.

Question: And to briefly address an issue that came up regarding the coroner's report, I believe that it was at some point mentioned that it stated the cause of death was unknown for a brief period of time? During an investigation for homicide by child abuse or general homicide, is it common for the cause of death to remain unknown until further investigation and the etiology can be completed?

Campbell: Yes, that is very common. That happens all the time. In fact, I had one case up in Lancaster where they didn't get the autopsy back for a year. It just took that much time for everything to come out.

(PCR Tr. pp. 144, l. 21 – 147, l. 3).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses at the evidentiary hearing and evaluate their credibility, and the Court has weighed their testimony accordingly in its discussion below. This Court finds the combined record of the trial transcript, and the testimony and evidence presented at the evidentiary hearing establishes Applicant received effective assistance of counsel. Accordingly, this Court denies relief and dismisses this application with prejudice. Set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code.

STANDARD OF REVIEW

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient

to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation [—] only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an

adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance 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." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result

is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

FINDINGS AS TO SPECIFIC CLAIMS RAISED

Applicant has alleged multiple claims of ineffective assistance of trial counsel and asserts that as a result of Trial Counsel's purported errors, he is entitled to a new trial. This Court finds Applicant has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation 1: Trial Counsel Failed to Notify Applicant of Plea Offer

Applicant alleges Trial Counsel was constitutionally ineffective for failing to notify him of a plea offer allegedly provided by the Solicitor's Office. This Court finds this allegation is without merit.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given "[w]hen defense counsel allows the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]" *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsel's deficient performance a defendant would have accepted

the State's proposed plea bargain and that he would have benefited from the offer." Bell v. State, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if Applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel[.]" if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it[.]" and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting Frye, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved for limited situations. Bell, 410 S.C. at 443, 765 S.E.2d at 7.

At the evidentiary hearing, Applicant testified that a plea offer was never relayed to him by Trial Counsel. Applicant testified that if a plea offer had been made, it would be something he could have taken into consideration. Applicant testified he never asked Trial Counsel to pursue a plea, nor did he inquire with Trial Counsel about potentially pleading.

Counsel Hines testified that before the trial in the judge's chambers, Solicitor Campbell asked if Applicant would take voluntary manslaughter. Counsel Pinnock testified to a conversation in the Solicitor's lobby where an offer was made but rejected by Trial Counsel Hines in a swift manner. Counsel Pinnock could not recall what exactly happened; she just remembered how Counsel Hines reacted to the conversation. Counsel Hines testified that when Applicant requested his defense file so he could file an application for PCR, Counsel Hines told Applicant to raise the allegation that she failed to convey the alleged plea offer made by Solicitor Campbell.

Solicitor Campbell testified that she was not aware of any plea offer that was ever made by her or by anyone in her office. Solicitor Campbell adamantly held that this case was always going to trial, and Applicant had no desire to plead. Solicitor Campbell testified that she had no recollection of the offer that Counsel Hines referred to in her testimony. Solicitor Campbell

testified that if she had made the offer to Counsel Hines, she would have insisted that Counsel Hines confer with Applicant. Solicitor Campbell testified that if she were to make an offer in this case, it would not have been voluntary manslaughter because it did not fit with the facts. Furthermore, Solicitor Campbell testified that the only charge, in this case, was homicide by child abuse, and that was based on the evidence. As well, Solicitor McDuffie testified that she specifically remembered that there were no plea offers made in Applicant's case.

As an initial matter, this Court finds Solicitor Campbell's and Solicitor McDuffie's testimony **credible** that no plea offer was ever extended to Applicant's Trial Counsel, and the record does not support Applicant's contention that a plea offer was ever made to Trial Counsel. As such, Applicant has failed to demonstrate how any of his trial counsel was ineffective for not conveying a plea offer some of his trial counsel testified existed. Assuming there was a plea offer, Applicant indicated in his testimony that it would have just been something for him to consider. However, it is the Solicitor's Office that manages plea deals, and they **credibly** testified that no plea deal ever existed.

This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 2: Appellate Counsel Failed to Raise All Meritorious Claims on Appeal

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to raise all meritorious claims on appeal. This Court finds this allegation is without merit.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)).

"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, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (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 . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). 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)).

This Court finds Applicant has additionally failed in his burden to prove ineffective assistance of Appellate Counsel. Appellate Counsel has no duty to raise every colorable issue on appeal and is certainly not expected to raise issues not properly preserved. Appellate Counsel **credibly** testified to her process for reviewing a case and testified she briefed the most meritorious issue she could.

This Court finds Appellate Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Appellate Counsel's performance in this matter. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 3(a): Trial Counsel Failed to Object to the Incorrect Jury Charge on Homicide by Child Abuse, Thus Failing to Preserve the Issue for Appeal

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the incorrect jury charge on homicide by child abuse, thus failing to preserve the issue for appeal. This Court finds this allegation is without merit.

Counsel Singletary testified that she did not recall there being an objectionable issue with the judge's jury charge of homicide by child abuse.

Counsel Hines testified that while in the judge's chambers discussing jury charges, the State was asking for the definition of extreme indifference from State v. McKnight, and she wanted the language from State v. Jarrell. Specifically, Counsel Hines testified that the holding in Jarrell provides 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. Counsel Hines testified that the State wanted the language from McKnight. Counsel Hines testified that what ended up happening is that the definition of Jarrell got cut in half, and the language from McKnight got inserted in the middle of it. Counsel Hines testified that she should have objected to that, and she did not. Counsel Hines testified that she did not think that the definition of extreme indifference was clear.

However, on redirect examination, Counsel Hines testified that she did not know the State did not request language from McKnight and that the State only requested the language from the statute.

Appellate Counsel DuRant testified that she felt the jury charges the judge gave were conflicting because he gave two different definitions of extreme indifference. However, Counsel DuRant testified that the jury charge of extreme indifference was covered by her main argument of not granting a directed verdict that she raised on appeal. Counsel DuRant testified that if the

appellate court found an error in the lower court not granting a directed verdict, the remedy would be a new trial; as well, the remedy for error found in a jury charge would be a new trial. The Court of Appeals rejected Counsel DuRant's argument and affirmed Applicant's conviction and sentence.

"In reviewing jury charges for error, [the reviewing court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "[A] charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). If the charge "is substantially correct and covers the law [it] does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)). "Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011)). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583–84 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)).

At trial, the jury was charged on extreme indifference to human life as follows:

And the State must also prove beyond a reasonable doubt that the death occurred under circumstances showing an extreme indifference to human life. Extreme indifference to human life is the nature of a culpable mental state and therefore is akin to intent. In this state, 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. Otherwise stated, a person acts under circumstances manifesting extreme indifference to the value of human life when he engages in deliberate conduct which culminates in the death of

some person. Conduct of the parent which evidences a settled, characterized or may -- conduct of the parent which evidences a settled purpose to forego parental duties may fairly be characterized as willful because it manifests a conscious indifference to the rights of a child to receive support and consortium from the parent.

(Trial Tr. p. 803, ll. 3 – 21).

In Jarrell, the Court of Appeals addressed extreme indifference as follows:

Extreme indifference is in the nature of “a culpable mental state ... and therefore is akin to intent.” State v. Vowell, 276 Ark. 258, 634 S.W.2d 118, 119 (1982) (citation omitted). In this state, 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. See State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (discussing the requisite mental state for recklessness); see generally Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999) (“Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as willful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent.”). At least one other jurisdiction with a similar statute has found that “[a] person acts ‘under circumstances manifesting extreme indifference to the value of human life’ when he engages in deliberate conduct which culminates in the death of some person.” Davis v. State, 325 Ark. 96, 925 S.W.2d 768, 773 (1996).

State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002).

This Court finds no deficiency in Trial Counsel not objecting to the jury charge because there was no basis for an objection to the jury charge as it was correct and sufficiently covered the law applicable to the case. See Burton, 302 S.C. at 498, 397 S.E.2d at 92. Notably, the trial court read verbatim from the Jarrell case and merely read the last sentence from Davis before the language from Rockwell. Furthermore, any notion from Trial Counsel that the McKnight language was inserted into the jury charge—is true—because McKnight block quotes Jarrell. See State v. McKnight, 352 S.C. 635, 644–45, 576 S.E.2d 168, 173 (2003). Even if this Court were to find there was an objectionable basis for the jury charge, this Court finds Appellate Counsel DuRant

credibly testified that the issue of the jury charge was covered by the main argument she submitted on appeal. The Court of Appeals affirmed Applicant's conviction.

This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 3(b): Trial Counsel Failed to Properly Preserve Their Objection and Motion for a Mistrial Related to Improper Burden Shifting Comments Made During the Testimony of Dr. Bradley Marcus.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly preserve their objection and motion for a mistrial related to alleged improper burden-shifting comments made during the testimony of Dr. Bradley Marcus. This Court finds this allegation is without merit.

Specifically, Applicant contends the following colloquy was not preserved for appellate review:

A: Fractures on ribs, especially in the posterior location are, you know, very, very suggestive of child abuse until proven otherwise.
 SINGLETARY: Objection, Your Honor.
 COURT: What's your objection, specifically?
 SINGLETARY: May we approach, Your Honor?
 COURT: Y'all come here.
 (Off-the-record discussion.)
 COURT: All right. The jury will disregard the last statement.

(Trial Tr. p. 419, ll. 10 – 19).

At the close of Dr. Marcus' testimony, the following colloquy occurred regarding the previous objection:

HINES: Your Honor, if I could.
 COURT: Yes, ma'am.

HINES: When Dr. Marcus was on direct I did make an objection and we had a conference at the bench. I just wanted to put on the record my objection –

COURT: You may do so at this time if you like.

HINES: -- to burden shifting because he made a comment about this being child abuse and, unless otherwise proven differently. And I objected to that and Your Honor advised the jury to disregard it. I would go ahead and move for a mistrial at this point based on that because I don't know that the curative instruction is sufficient.

COURT: State?

McDUFFIE: Your Honor, I believe the question asked Dr. Marcus in which he respond -- he gave that answer to was: What do these rib fractures tell you or what do they mean. In no way was the State intending to try to burden shift. I believe the curative instruction is fine or if Your Honor or the defense wishes a further curative instruction, the State has no objection. Your Honor did strike the testimony from the record and we believe that's sufficient.

COURT: All right. I sustained your objection. I did tell the jury they should strike it. If you want me to give an additional charge, I'm going to charge them very strongly that the burden remains on the State throughout the trial and that will be the last, one of the last things they hear from me. So I don't think there's been any burden shifting but your exception is noted.

HINES: Thank you, Your Honor.

(Trial Tr. p. 496, l. 1 – p. 497, l. 9).

At the evidentiary hearing, Counsel Singletary testified that she objected to Dr. Bradley Marcus' testimony, and the judge gave a curative instruction and struck the testimony from the record, and it was preserved for appellate review.

This Court finds that Applicant has failed to meet his burden in proving Trial Counsel was deficient or that he was prejudiced by any deficiency. Applicant has failed to prove, either by the presentation of evidence or from the support of the record, that Trial Counsel was ineffective for failing to object and preserve the alleged burden-shifting comment made during the testimony of

Dr. Marcus Bailey. Trial Counsel did object to this testimony on the record, a curative instruction was given, and Trial Counsel renewed her objection, thereafter, ensuring it was preserved. Furthermore, this Court finds that the record wholly disputes Applicant's allegation.

This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

|CONCLUSION PAGE FOLLOWS|

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 relief. The Court finds Trial Counsel and Appellate Counsel's representation was neither deficient nor prejudicial. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

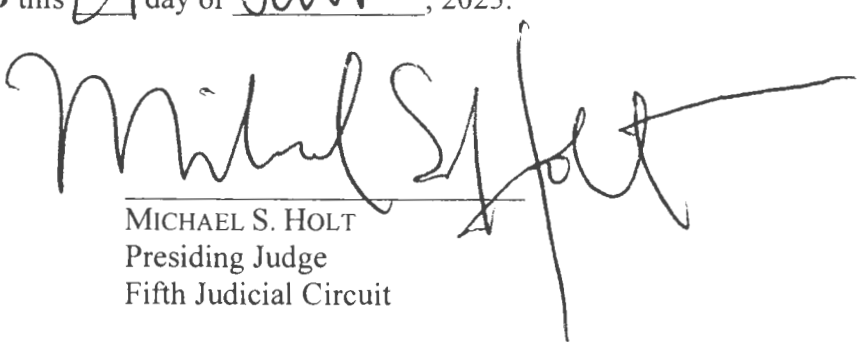
1. Post-conviction relief is denied and the application for post-conviction relief be dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 29 day of JUNE, 2023.

RECEIVED

JUL 28 2023

S.C. SUPREME COURT


MICHAEL S. HOLT
Presiding Judge
Fifth Judicial Circuit