STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Chesterfield County
Court of Common Pleas

The Honorable Paul M. Burch, Trial Judge
The Honorable Roger E. Henderson, PCR Judge

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SC Court of Appeals

Appellate Case No. 2017-002302

MITCHELL RIVERS. .... Petitioner.

v.

STATE OF SOUTH CAROLINA. .... Respondent.

BRIEF OF RESPONDENT

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STATEMENTS OF ISSUE ON APPEAL

Petitioner's Statement of Issue on Appeal

Did the PCR court err in denying Petitioner relief, where trial counsel failed to offer a contemporaneous objection, on multiple occasions, to prior injuries suffered by a child in a homicide by child abuse case, where the evidence of prior injuries was unrelated to Petitioner and where the Court of Appeals found the issue unpreserved?

Respondent's Counterstatement of Issue on Appeal

Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failing to object to admission of prior injuries suffered by Victim because the evidence of Victim's collateral injuries was admissible and necessary to prove intent and disprove Petitioner's defense of accident, and, even if it was not admissible, Petitioner was not prejudiced because the evidence did not impact the results of the proceedings?

STATEMENT OF THE CASE

Mitchell Rivers (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. During its October 2010 term, the Chesterfield County Grand Jury indicted Petitioner for homicide by child abuse (2010-GS-13-1072). Petitioner was represented by Matthew Swilley and Tiffany Gibson, Esquires (hereafter "Counsel"). Assistant Solicitors Suzanne Mayes and Adam Foard, Esquires, from the Fourth Circuit Solicitor's Office, represented the State. On February 8, 2011, the case proceeded to trial before the Honorable Paul M. Burch. On February 15, 2011, the jury found Petitioner guilty of the crimes charged. Judge Burch sentenced Petitioner to life imprisonment.

Petitioner filed a timely notice of appeal, which was perfect by Benjamin J. Tripp, Esquire, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), which offered the following issues:

1. Whether the trial court reversibly erred by admitting evidence of prior physical abuse to Child where the State provided no evidence indicating the injuries were inflicted by [Applicant], and where the injuries did not cause Child's death?"
2. "Whether the trial court reversibly erred by failing to grant [Applicant's] motions for directed verdict in his trial for Homicide by Child Abuse where the State's theory for proving that the death occurred 'under circumstances manifesting an extreme indifference to human life' was based on the failure to obtain adequate health care, despite the facts that [Applicant] provided CPR and called 911?"

The Court denied the petition to be relieved as counsel and directed the parties to address the following issue and any other issues of arguable merit: "Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?" *State v. Rivers*, S.C. Ct. App. Order dated Sept. 5, 2013. The parties briefed the issue and proceeded to oral arguments on January 8, 2015. The South Carolina Court of Appeals affirmed Applicant's convictions by

opinion dated February 11, 2015. Specifically, the Court found that the issue of whether "the trial court erred in admitting evidence of the victim's other injuries because no evidence connected [Petitioner] to the injuries" was not preserved for appellate review. *State v. Rivers*, 411 S.C. 551, 553, 769 S.E.2d 263, 265 (Ct. App. 2015). The remittitur was issued on February 27, 2015.

Petitioner timely filed a PCR application on February 27, 2015, alleging:

1. Ineffective assistance of counsel:
    a. "Counsel failed to object to testimony and argue at trial child's prior injuries were not connected to Applicant."
    b. "Counsel's failure to object to the section (A)(2) charge to jury as lesser included offense of section (A)(1) constituted deficient performance."
    c. "Defense counsel [failed to object to] Supplemental instructions [that] impermissibly enlarged indictment."
    d. "Defense Counsel's failure to preserve appellate review the issue of admissibility of evidence of collateral injuries constituted deficient performance."
2. Ineffective assistance of appellate counsel:
    a. "The issue appellate counsel raised on appeal was 'unpreserved' when 'directed verdict' issue was unequivocally 'preserved for appellate review.'"

Respondent made its return on December 16, 2016. The evidentiary hearing occurred on July 17, 2017, before the Honorable Roger E. Henderson. Lance S. Boozer, Esquire was Petitioner's attorney. Johnny Ellis James, Jr., Esquire of the South Carolina Attorney General's Office represented Respondent. The allegation that Counsel was ineffective for failure to object to the lesser-included jury charge was withdrawn.

The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections on October 18, 2017. The court held:

1. Trial Counsel was not ineffective for failure to object to evidence of the victim's injuries because Petitioner was not prejudiced by this deficiency because the evidence was properly admitted to the jury.
2. Appellate Counsel was not ineffective for failing to raise the Court's denial of the motion for a directed verdict on appeal because Appellate Counsel's decision to focus

> on the issue specifically identified by the Court in its denial of his *Anders* petition was the exercise of reasonable professional judgment.

Thus, the request for relief was denied. Petitioner appeals from the denial of relief based upon the allegation that Trial Counsel was ineffective for failure to offer a contemporaneous objection, on multiple occasions, to prior injuries suffered by a child in a homicide by child abuse case. The petition for writ of certiorari was filed on June 18, 2018 and the return filed November 5, 2018. The South Carolina Supreme Court transferred the matter to the South Carolina Court of Appeal November 19, 2018. Certiorari was granted on October 28, 2020. The brief of petitioner was filed March 5, 2021.

STATEMENT OF FACTS

On August 7, 2005, at 7:10AM, emergency medical technician Ron Martin responded to a 911 call involving an infant (hereafter "Victim"), who was not breathing, had no pulse, and had petechial hemorrhage to the face. (App. 126-29). Martin and his colleagues administered basic life support and tried advanced measures to resuscitate. (App. 129-30). Victim was pronounced deceased at the hospital. (App. 134-35). Dr. Janice Ross performed an autopsy on Victim and determined the manner of death was homicide and the cause asphyxia. (App. 147-48).

Investigators Wayne Jordan of the Chesterfield County Sheriff's Office obtained written statements from Petitioner (Victim's adoptive father) and Kimberly Quick Rivers (Petitioner's wife and Victim's adoptive mother). (App. 195-96). In his statement, Petitioner stated he was mowing the lawn at the time of the incident when Kimberly yelled out to him and said that the baby was not breathing. (App. 201). Petitioner stated he told his wife to call 911 and an ambulance came to take him to the hospital but, ultimately, the baby died. (App. 201).

SLED became involved shortly thereafter, when the autopsy report came back. (App. 209). On September 15, 2005, Investigator Jordan and other law enforcement agents met with Petitioner again and re-interviewed him. (App. 209-12). Following that interview, Jordan obtained a videotaped statement from Petitioner. (App. 212). On September 19, 2005, Petitioner gave another written statement. (App. 214). Investigator Jorden read this statement to the jury at trial, which included the following account:

> That night our baby had slept in the same bed, and I was – laid him on the side between my chest and armpit, and we both went to sleep.
>
> Around 6:00 AM I woke up and the baby was not breathing, and I tried my hardest and hardest to do CPR that morning to bring him back, and his color had started coming back and he had started breathing.
>
> So, I laid him down in the play pen and went outside to clean off the yard. I came

> back inside and she said he stopped breathing. So, I told her to call 9-1-1 to help me this time, and I kept doing CPR like she said till the ambulance get [sic] there, and then I did, I know I was wrong for not calling the 9-1-1 first when that happened, and I should have told them that, everybody, but I did not know what to do. Lord knows I would never hurt my own son, and I'm sorry, and I regret it everday [sic]. But I please beg you, all of you to please help me.

(App. 220-21).

At trial, Sergeant Julie Duff, of the Florence Police Department, testified about her role in re-interviewing Petitioner with SLED. (App. 232-33). She recalled that during the interview, Petitioner told them he wanted to change his story and told them Victim had slept in the crook of his arm and was not breathing in the morning. (App. 238-39). He also admitted he had not fed the baby a bottle and changed him. (App. 239). Duff testified that Petitioner said he placed Victim face down in the play pen and went outside, without waking his wife and telling her something was wrong. (App. 239). Duff stated, "[h]e went outside, he knew the baby was not breathing, and he said he went outside to smoke some crack, and he said later his wife notified him that the baby was not breathing. He also stated that he must have accidentally smothered the baby in his arm." (App. 239).

SLED Agent Rick Charles also testified regarding re-interviewing Petitioner. (App. 244-45). After finding nothing in Victim's stomach, Agent Charles questioned Petitioner about inconsistencies in his prior statement; Petitioner changed his story and provided the above statement. (App. 250). Petitioner was arrested following that statement that same day and charged with homicide by child abuse. (App. 221, 385-86).

The trial court held a pre-trial *Jackson v. Denno* hearing to determine the admissibility of Petitioner's statements. (App. 28-86). The trial court determined Petitioner freely, voluntarily, and intelligently gave the statements without coercion, duress, threats, or promises and, thus, denied Petitioner's motion to suppress. (App. 86-87). The trial court denied Petitioner's motion

to suppress evidence of abuse. (App. 87). Upon denying the motion, the trial court told Counsel: "You're protected on the record on that." (App. 87).

In its written motion in support of evidence of abuse, the State argued "the constellation of injuries is evidence of child abuse and neglect, directly relevant pursuant to SCRE Rule 404(b) to counter the argument of 'mistake or accident.'" (App. 387-88). Additionally, the State maintained the evidence of abuse and neglect established "motive" pursuant to Rule 404(b), SCRE. In its motion, the State pointed out that evidence of head and scalp injuries and external abrasions were sustained within the same general timeframe of the fatal injury. Therefore, the State argued the "constellation of injuries [was] relevant and necessary in establishing evidence of child abuse and neglect." (App. 387-88). Petitioner argued in his motion that because the collateral injuries were not attributed to him, the evidence could not be introduced under Rule 404(b), SCRE. The trial court denied Petitioner's motion.

Dr. Janice Ross, the pathologist who performed the autopsy on Victim, testified at trial regarding Victim's injuries. (App. 148). She described bruises and abrasions around the scalp, on the head—mostly in the back, including several small circular ones—and several healing rib fractures. (App. 148-51). Dr. Ross noted contusions that were consistent with blunt force trauma such as a knuckle or fist. (App. 152). She testified the petechiae and the contusions to Victim's head occurred contemporaneously with the asphyxiation. (App. 154-55). Specifically concerning the rib fractures, Dr. Ross testified the child's chest cavity had to have been squeezed with a lot of pressure to fracture the back of the rib cage. (App. 157). Dr. Ross estimated the fractures occurred between seven to fourteen days prior to the time of death. (App. 157-58). Petitioner did not object to the testimony.

Dr. Ross reported the manner of death was homicide and the cause of death was asphyxia

due to smothering. (App. 147-48). She stated the homicide was based on "the findings of the petechia[e], . . . causing asphyxia, smothering, and the contusions around his head. There was also, internally around his brain, was subdural hemorrhage, which goes along with a blunt force trauma to the head." (App. 154). Dr. Ross testified "it would take significant force . . . to put pressure on the chest . . . and to stop the breathing or to put something around the neck to cause the petechia[e]." (App. 156).

On cross-examination, Dr. Ross stated that the injuries did not indicate who the perpetrator was and that they did not cause the death. (App. 166-67). Dr. Ross testified the abrasions on Victim occurred contemporaneously with the death. (App. 167). While she testified the abrasions did not cause the death, she did not know if they were related to the asphyxiation. (App. 167). Dr. Ross agreed that the Victim's breathing problems they might have caused some degree of asphyxiation, not petechiae. (App. 169). The petechiae occurred due to pressure on the blood vessels around the neck or upper chest. (App. 169).

Dr. Clay Nichols, the deputy chief medical examiner for North Carolina, also testified after reviewing Dr. Ross' autopsy data and findings and the multiple rib fractures, abrasions, and contusions on Victim's body. (App. 177, 181, 183). Dr. Nichols pointed out the multiple bruises, brain bleeding, and subdural hematoma could not have been caused by CPR and stated, "[t]his is a classic case of Battered Child Syndrome." (App. 186). Petitioner did not object to the admission of Dr. Nichols' testimony regarding the collateral injuries to Victim or specifically to Dr. Nichols' using the phrase "Battered Child Syndrome." Instead, the only objections Petitioner made were based on bolstering, cumulative testimony, and speculation. (App. 181-84). Dr. Ross and Dr. Nichols both testified the rib fractures had to have occurred sometime after June 20, 2005, when Victim had x-rays that did not show rib fractures. (App. 158-59, 184).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State,* 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State,* 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failing to object to admission of prior injuries suffered by Victim because the evidence of Victim's collateral injuries was admissible and necessary to prove intent and disprove Petitioner's defense of accident, and, even if it was not admissible, Petitioner was not prejudiced because the evidence did not impact the results of the proceedings.

On appeal, Petitioner argues the PCR court erred in denying him relief because trial counsel failed to offer a contemporaneous objection, on multiple occasions, to prior injuries suffered by a child in a homicide by child abuse case because they were irrelevant and unpreserved for appeal. However, the PCR court properly rejected this argument, finding that the trial court still would have excluded the evidence consistent with its pre-trial ruling and the appellate courts would have affirmed the trial court's ruling in appeal because the collateral injury evidence was properly admissible, and because Petitioner otherwise testified to his own extreme indifference sufficient to support his conviction beyond a reasonable doubt. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny relief.

In a PCR action, the petitioner bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense

counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is

a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Concerning admissibility of evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision made on an improper basis, such as an emotional one. *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001).

In *State v. Martucci*, this Court discussed the importance of admitting evidence of prior

incidents of abuse in a homicide by child abuse trial. 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008). The Court of Appeals stated, "[w]hen a child is brought to an emergency room with injuries in various stages of healing, there is evidence of recurring child abuse. If the multiple, separately concurring injuries are not admissible in child abuse prosecutions, *the crime would be virtually impossible to prove*." *Id.*, 380 S.C. at 254, 669 S.E.2d at 609 (emphasis added). "As a result of the difficulties in proving child abuse, *evidence which shows a pattern of abuse becomes even more probative* than it might otherwise be." *Id.*, 380 S.C. at 256, 669 S.E.2d at 611 (emphasis added, citations and quotations omitted). The Court of Appeals found the evidence "established a pattern of continuous abuse or neglect necessary to prove homicide by child abuse" and made it more probable that the child was a victim of child abuse or neglect. *Id.*, 380 S.C. at 254, 669 S.E.2d at 610.

The Court of Appeals affirmed the admission of evidence in *Martucci* under the common scheme or plan exception pursuant to *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), and under the *res gestae* theory. Here, the situation remains different because no evidence directly tied Petitioner to the injuries. However, whether or not the injuries are tied to Petitioner's identity is of no consequence where the evidence serves to establish the absence of mistake or accident. The record need not reflect the exact manner in which a collateral injury occurred. *State v. Smith*, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct. App. 2011), *overturned on other grounds*, 406 S.C. 215, 750 S.E.2d 612 (2013). "When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted the injuries." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *see also State v. Elliott*, 475 S.E.2d 202, 215 (N.C. 1996) (quoting verbatim in affirming the admission of evidence of prior injuries to show intent, not identity); *State v.*

Koon, 730 So.2d 503, 511 (La. Ct. App. 1999) (quoting *Estelle* verbatim for proposition that evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who inflicted the injuries); *State v. Chavez*, 793 N.W.2d 347, 354-55 (Neb. 2011) (Affirming the admission of evidence of collateral injuries where the child victim had three different caregivers because it served to show intent); *cf State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991) (Permitting testimony of injuries to show battered child syndrome where given by a properly qualified expert). The United States Supreme Court in *Estelle* found that evidence of collateral injuries and "battered child syndrome" were admissible to disprove accident where the defendant argued that the child victim died after falling from the couch. *Estelle* at 69.

Petitioner argued Victim's killing was an accident at trial, and thus demonstrates the crucial import of the collateral evidence under the *Estelle* theory. "[T]he prosecution must prove all the elements of a criminal offense beyond a reasonable doubt. . . . By eliminating the possibility of accident, the evidence regarding battered child syndrome was clearly probative of that essential element[.]" *Estelle* at 69; *see also Pausch v. State*, 596 So.2d 1216, 1219 (Fla. Dist. Ct. App. 1992) (Affirming the admission of evidence the child victim was undernourished and subjected to excessive force where defendant argued the death was caused by an accidental fall, emphasizing the evidence was relevant to show the victim's death was "the result of an intentional act by *someone*, and not an accident") (emphasis original); *State v. Heath*, 957 P.2d 449, 463 (Kan. 1998) (Affirming the admission of evidence concerning battered child syndrome to disprove accident even when the injuries to the child were so severe as to make it obvious to the jury that the injury was not accidental).

Petitioner argues that because he had a slew of family members testify as character witnesses at trial, and because nobody could testify to the singular source of collateral injuries

inflicted upon Victim, *Martucci* is distinguished and inapplicable in this case. However, that nobody could testify to seeing Petitioner inflict blows upon Victim reinforces the unique and extraordinary importance of the collateral injury and battered child syndrome testimony.

More broadly, behind the false veils often concealing the turpitudes of abusive parents, innocent children are forced to suffer from the strategically-placed wrath and cruelty perpetrated on them by the individuals who are supposed to serve as their greatest protectors: their parents. Abusive parents who create socially-acceptable caricatures of themselves when surrounded by individuals who would otherwise serve as the lifeline for the battered children by reporting these instances, are intentionally shielded by the abusers who selectively direct their torment towards the most defenseless among us and outside of the view of their non-recipients. With this intentional shielding of horrors comes a hollow void in the body of evidence surrounding the case available to rebut the nearly certain defense of "accident" delivered by the abuser that can, in many cases, only be potentially countered by the scars, bruises, and fractures themselves possessed by lifeless bodies originally filled by the souls who were pummeled into an indefinite silence. Stripping the victim, and carriage of justice more generally, of the sole remaining avenue for exposing the perpetrator's sins to the world by disallowing the only remaining evidence of the abuse from being entered in at trial would truly be the last nail in the coffin of an otherwise deeply saddening betrayal of a child's trust in the most severe of ways. Though the victim is gone, the interests of justice still remain, and it is the interests of justice that require an atonement that cannot be successfully brought absent the admission of the sole piece of evidence available to speak on the deceased's behalf.

Thus, because the evidence of collateral injuries and battered child syndrome was admissible under South Carolina law, under the United States Constitution, and indeed *must* be

admissible under South Carolina law if it is to serve the purposes of justice at all, Counsel's non-renewal of his pre-trial objection is of no consequence, and this Court should deny relief.

Further, even if this evidence was inadmissible, Petitioner is still not prejudiced because Counsel's failure to object did not impact the results of the proceedings. A person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . ." S.C. Code Ann. § 16-3-85(A)(1). "For the purposes of the [homicide by child abuse] statute, 'extreme indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 366-67 (Ct. App. 2002)).

Petitioner's own statements and testimony established the extreme indifference sufficient to convict him for homicide by child abuse. Specifically, Petitioner left his helpless child alone immediately after reviving him by CPR. (App. 267). Petitioner did not call for follow-up medical attention. (App. 267). Petitioner did not wake his wife to monitor or attend to the child, who by his testimony slept through his performing CPR on the Victim. (App. 267, 282). Petitioner went outside and stayed outside until his wife woke and found the child dead. (App. 267-68). *See State v. Thompson*, 420 S.C. 192, 209, 802 S.E.2d 623, 631 (2017) (finding the parents showed extreme indifference when Victim's shirt was wet with blood four days after he died, indicating he wore it during the final beating, with both parents present, and the appearance of blood made the parents aware of the need for medical attention and the failure of the parent to act upon the awareness constituted "a deliberate act"); *State v. Jarrard*, 350 S.C. 90, 98-99, 564 S.E.2d 362, 367 (2002) (finding that the mother showed extreme indifference by leaving her child home

alone with the father while "knowing her child would be killed while she was gone" and the death could have been prevented if she had stayed home). Thus, because of the testimony establishing Petitioner's extreme indifference, any error in admitting evidence of collateral injuries was harmless, and would not have changed the outcome of trial. Accordingly, this Court should affirm the PCR court's denial of relief.

CONCLUSION

For the reasons stated above, this court should deny relief and affirm the PCR Court's findings that Petitioner had effective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
Chelsey F. Marto

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ATTORNEYS FOR RESPONDENT

April 30, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Court of Common Pleas
The Honorable Roger E. Henderson, Circuit Court Judge

RECEIVED
Apr 30 2021
SC Court of Appeals

Appellate Case No. 2017-002302

MITCHELL RIVERS,

Petitioner.

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the **Brief of Respondent** has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

This 30th Day of April 2021.

s/ Chelsey F. Marto
Chelsey F. Marto
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RECEIVED
Apr 30 2021
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

April 30, 2021

The Honorable Jenny A. Kitchings
Clerk of Court — SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: **<u>Mitchell Rivers v. State of South Carolina</u>**
Appellate Case No. 2017-002302
Lower Court Case No. 2015-CP-13-0108

Dear Ms. Kitchings:

Enclosed for filing is the **Brief of Respondent** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
SC Bar #104191

CFM/ec

cc: Taylor D. Gilliam, Esquire