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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Chesterfield County
Roger E. Henderson, Circuit Court Judge

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MITCHELL RIVERS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

Opinion No. 2023-UP-261 (S.C. Ct. App. Filed July 12, 2023)

APPELLATE CASE NO. 2023-001757

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# BRIEF OF RESPONDENT

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## ISSUE PRESENTED

Did the Court of Appeals correctly reverse the PCR court's improper denial of relief where Rivers' trial counsel failed to object, on multiple occasions, to evidence of collateral injuries sustained by Child in a homicide by child abuse case, where the collateral injuries were entirely unrelated to Rivers, where the Court of Appeals found the issue was unpreserved for direct appellate review, and where there was not overwhelming evidence of Rivers' guilt?

## STATEMENT OF THE CASE

Rivers was indicted by a Chesterfield County grand jury for Homicide by Child Abuse (HBCA) during its October 2010 term following the death of Child in August 2005. App. 556-557. The State called his case to trial before the Honorable Paul M. Burch and a jury on February 8, 2011. Suzanne Mayes and Adam Foard represented the State. Matthew Swilley and Tiffany Gibson represented Rivers. App. 1. Following a multi-day trial, the jury found Rivers guilty as indicted. App. 373 ll. 4-10. Judge Burch sentenced him to a life imprisonment. App. 382 ll. 14-16.

An Anders[1] brief was filed on Rivers' behalf on or about August 15, 2012. App. 393-416. The South Carolina Court of Appeals issued an Order on September 5, 2013, which directed the parties to brief 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?" App. 417. The Brief of Appellant was submitted on December 6, 2013. App. 419-430. The State filed its Brief of Respondent on or about February 27, 2014. App. 432-455.

The Court of Appeals, after oral argument, issued an opinion affirming Rivers' sentence and conviction on February 11, 2015, holding that the issue of whether the trial court properly admitted the evidence of collateral injuries was not preserved for appellate review. App. 457-461. Rivers filed a timely application for post-conviction relief on February 27, 2015. App. 462-470. Counsel for Rivers filed an amendment to the PCR application on May 31, 2017. App. 471. The State made its Return on December 16, 2016. Ap. 473-478.

An evidentiary hearing was held on July 17, 2017, before the Honorable Roger E. Henderson. App. 480. Lance Boozer represented Rivers. Johnny Ellis James, Jr. appeared on

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1 Anders v. California, 386 U.S. 738 (1967)

behalf of the State. Rivers, Matthew Swilley, Tiffany Gibson, and Benjamin Tripp testified at the hearing.

Following the evidentiary hearing, the State filed a Memorandum Opposing Post-Conviction Relief on August 9, 2017. App. 539-544. By way of a written Order, Judge Henderson dismissed Rivers' claims and denied relief. App. 547-557. He found that while it was "undeniable that [Counsel's] failure to object failed to preserve the issue for appellate review" that Rivers "suffered no prejudice because the evidence was properly admitted to the jury." App. 551.

Rivers timely appealed the dismissal of his PCR application. The Petition for Writ of Certiorari was filed on June 18, 2018. The State filed a Return on November 5, 2018. The case was transferred to the Court of Appeals on November 19, 2018, and certiorari was granted on October 28, 2020. Final briefing was completed on May 14, 2021, and oral argument was held in the case on December 5, 2022. The Court of Appeals reversed the PCR court's denial of relief in an unpublished opinion on July 21, 2023, finding that trial counsel provided ineffective assistance by not contemporaneously objecting to the admission of evidence of collateral injuries to Child. Rivers v. State, Op. No. 2023-UP-261 (S.C. Ct. App. filed July 12, 2023).

The State filed a Petition for Rehearing and suggestion for Rehearing En Banc on August 10, 2023. The Petition for Rehearing was denied on October 12, 2023. The State filed a Petition for Writ of Certiorari in this Court on November 13, 2023. Respondent filed a Return to the Petition for Writ of Certiorari on January 2, 2024. On September 24, 2024, this Court granted the certiorari. The Brief of Petitioner was filed on October 29, 2024. This Brief of Respondent follows.

## STATEMENT OF THE FACTS

Rivers was married to Kimberly Quick Rivers, and the two lived in a house with various family members. Five to seven people lived in the home. App. 196, ll. 16-25; App. 260, l. 8-App. 261, l. 4. The couple began caring for Child after the birth mother, Kimberly's sister, was deemed unfit to have custody of Child due to her intellectual disability. App. 107 l. 8-App. 112 l. 6; App. 261 ll. 12-19. The South Carolina Department of Social Services performed a home study and, finding no problems with the Rivers' home, placed Child with them on April 22, 2005. App. 114, l. 18-App. 116, l. 9, App. 112, ll. 1-4. In late June 2005, Child developed breathing problems that required a three-day hospital stay. App. 262, l. 16-App. 263, l. 25.

On the night of August 6, 2005, Kimberly bathed Child, and Rivers picked out some clothes for him to wear to bed. Rivers, with Child in his lap, Kimberly, and Rivers' brother played video games for a couple of hours before Kimberly placed Child in their bed to go to sleep. A few hours later, Rivers and Kimberly got in their bed, and Rivers placed child on his right side before going to sleep. Rivers awoke around 6:00 a.m. to discover that Child was not breathing, and Child's face was under his armpit. Rivers immediately began performing CPR, blowing in Child's mouth, until Child began to wheeze and cry. Once Child began breathing again and his color had returned, Rivers laid him in the playpen and went outside to finish some yard work. App. 265, l. 1-App. 267, l. 22.

Approximately an hour later, Kimberly came up to Rivers as he finished cutting the lawn and informed him that Child had stopped breathing. Rivers ran into the home and began performing CPR a second time while he directed Kimberly to call 911. App. 128, ll. 2-5; App. 268, l. 4-App. 270, l. 21; App. 300, ll. 10-14. Rivers, Kimberly, and two other family members

rushed to the hospital behind the ambulance that came to pick up Child. App. 268, l. 15-App. 269, l. 14. Tragically, Child passed away. App. 270, ll. 4-21.

Rivers was arrested on September 19, 2005, after giving a statement to law enforcement. App. 221, ll. 14-22. Trial counsel was appointed to Rivers' case. App. 487, ll. 5-7. The two met three or four times before Rivers' plea-turned-trial. App. 487, ll. 8-10. Counsel began representation of Rivers in 2010 or 2011, five to six years after his arrest. App. 487, l. 11-App. 488, l. 3. Rivers confided in counsel and explained all the facts in his case. App. 493, ll. 5-7. Rivers was adamant that he wanted a trial. App. 493, l. 21-App. 496, l. 13; App. 507, ll. 16-24.

The State brought in Suzanne Mayes of the Prosecution Commission to try the case. App. 378, ll. 2-14. Following the selection of a jury, Rivers began the process of entering a guilty plea. App. 51, l. 3 - App. 55, l. 22. Immediately after hearing the allegations, Rivers indicated that he was unable to plead guilty:

> The Court: Mr. Rivers, I may [have] caused some confusion in there. That's what the State's alleging, and I fully understand that you're pleading under Alford. You're not pleading guilty straight up. But that's what the allegation in the indictment alleges. Does that clarify it for you a little bit?
>
> Rivers: Yes, sir, that clarifies it, but I can't do that. I'm sorry. I'm sorry. I can't do that. Over my heart, now, I'm sorry, I can't, I can't plead guilty to that. I'm sorry Mr. Man. I'm, I'm just sorry. I can't do that.

App. 54, l. 17-App. 55, l. 2. After the trial court reminded Rivers that he could possibly be facing a life sentence, the pre-trial hearing resumed. App. 55, ll. 3-22.

Both the State and Counsel Swilley submitted written pre-trial motions regarding the admission of collateral injuries found on Child during the autopsy. App. 387-392. The State argued that "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.' In addition, the

State maintains that such evidence of abuse and neglect is further relevant in establishing "'motive' *pursuant to SCRE Rule 404(b).*" App. 378 (emphasis added). The State then relied upon Estelle v. McGuire, 502 U.S. 62 (1991) and State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (S.Ct. 1991) for the premise that evidence of "battered child syndrome" was admissible in the case against Rivers when given by a qualified expert and offered to support the inference that a child's injuries were not sustained by accidental means. App. 378-379.

Counsel Swilley argued that the evidence was inadmissible under Rule 404(B), SCRE because the State could not connect Rivers to the collateral injuries through clear and convincing evidence. He further argued that there was no logical connection between the collateral injuries and the crime with which Rivers was charged. He relied upon State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) for the premise that evidence of alleged prior child abuse is inadmissible where there is not clear and convincing proof that the Defendant inflicted the previous injuries. App. 389-391.

Prior to the start of trial, Counsel Swilley informed the trial court of the "cross-motions to keep out certain aspects of the collateral evidence that was observed during the autopsy." App. 86, ll. 16-19. The trial court inquired whether the parties wanted to verbally argue their motions or if they would rely on their written submissions. After both sides agreed to rely on their written motions the trial court stated:

> I'm going to have to deny that motion too based especially on the recent case. These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases. All right. You're protected on the record on that.

App. 86, l. 16-App. 87, l. 12.

During opening statements the State argued that the case was about child abuse that occurred through "extreme indifference to human life. Just not caring, not caring to nurture the child or to save the child." App. 96, ll. 8-15. In discussing the evidence it anticipated being entered the State told the jury that Child died as a result of asphyxiation and that during the autopsy old and new bruises were discovered on Child's scalp. The State argued that Child "was not only asphyxiated or smothered, he was beaten and smothered. You'll hear testimony about bruising to his body." App. 97, ll. 8-23. The State ended its opening by stating:

> It is hard to grasp how a child can be subjected to *ongoing maltreatment and to understand that this was not the one and only event that little Child experience.* I ask you to keep that in mind because it's important, when considering the statement by Mitchell Rivers, that Child accidentally was smothered by him that morning. The medical evidence suggests something entirely different.

App. 99, ll. 2-9.

Counsel Swilley addressed the collateral injuries during his opening statement as well, stating:

> [Rivers] loved Child. He would never do anything to harm Child, and it will - - it's [going to] come into evidence that there were injuries discovered on this child. Pay attention. Not one shred of evidence will link anything bad that happened to that child to my client at all. Not through testimony. Not through medical evidence. No[t] through anything. Mitchell Rivers never intentionally, or under circumstances that exhibit great indifference to human life, ever harmed this child and you're [going to] see this.

App. 102, l. 17-App. 103, l. 1.

Ron Martin, the paramedic who arrived at Rivers' home and transported Child to the hospital, was the State's first witness to discuss the collateral injuries to Child. He testified to observing bruising on Child's head and scabbed over "lacerations" on Child's back and lip. He indicated that one such bruise was "consistent with a basilar skull fracture" even though there

were no skull fractures found on Child during the autopsy. App. 137, l. 16-App. 139, l. 8; App. 148, ll. 9-13. Counsel Swilley did not object to this line of questioning. On cross-examination, Martin admitted that he was unable to form a link between the prior injuries and Child's death. App. 142, ll. 10-14.

The State's next witness was Doctor Janice Ross, an admitted "arm of the prosecution in this matter." App. 166, ll. 12-15. Dr. Ross was qualified as an expert witness in the field of forensic pathology, and she was the second witness to testify about collateral injuries to Child. App. 146, ll. 4-8; App. 148, l. 7-App. 152, l. 6. Dr. Ross testified that the cause of Child's death was asphyxia due to smothering. During the autopsy she noted that there were some bruises and abrasions in the scalp area of Child, several old rib fractures that were healing, and facial petechia. App. 148, ll. 3-13; App. 150, l. 1. The scalp the bruises were of varying ages with some being more recent and others being older. App. 150, l. 3-App. 151, l. 15. She attributed the bruises on Child's head to blunt force trauma consistent with a knuckle or fist. App. 152, ll. 3-7. Dr. Ross indicated that the rib fractures, which were "*at least* seven to fourteen days old," were likely caused by squeezing of the chest cavity under a lot of pressure. App. 157, l. 5-App. 158, l. 1 (emphasis added). Counsel objected to various portions of the collateral injury testimony given by Dr. Ross on the grounds of speculation and cumulative testimony under Rule 403, SCRE, but did not object subject to the prior motion to exclude evidence of the collateral injuries under Rule 404(B), SCRE. App. 149, l. 5-App. 151, l. 21.

When asked if the collateral injuries were accidental or non-accidental, Dr. Ross responded that while the collateral injuries were not self-inflicted, they could have been accidental. App. 149, l. 1-10. During cross-examination, Dr. Ross admitted the collateral injuries did not contribute to the death of Child and stated the bruising injuries *may have*

*occurred* at the same time as the asphyxiation. App. 167, ll. 12-25. She conceded that an overweight adult[2] rolling over onto a child would have the requisite force to asphyxiate the child. She further conceded that there was no evidence of strangulation in the case. App. 168, l. 19-App. 169, l. 1; App. 170, ll. 4-9.

Dr. Clay Nichols, a forensic pathologist, was the third witness to discuss Child's collateral injuries during the State's case-in-chief. Dr. Nichols agreed that Child's cause of death was asphyxiation due to smothering. App. 182, ll. 8-10. He then stated,

> I feel that – it is my opinion, to a reasonable degree of medical certainty, that Child was subjected to physical abuse resulting in multiple rib fractures as well as multiple abrasions and contusions on his body. *The timing of the injuries indicates that these were not the same time, but he was subjected to multiple incidents of blunt trauma.*

App. 183, ll. 1-7 (emphasis added). Dr. Nichols repeatedly testified that Child had been subjected to repetitive physical abuse. He opined that the bruises found on Child were non-accidental. App. 184, l. 4-App. 185, l. 22. Once more, counsel objected on the grounds that the testimony was cumulative and speculative but did not refer to the pre-trial motion. App. 182, l. 5-App. 183, l. 7; App. 184 ll. 21-24. Dr. Nichols was the only witness to testify that the injuries to Child represented a "classic case of Battered Child Syndrome." App. 186, ll. 12-19. On cross examination, Dr. Nichols admitted that nothing he viewed connected the alleged abuse to Rivers. App. 187 ll. 6-9.

Officers Wayne Jordan, Julie Duff, and Rick Charles all testified about the collateral injuries to Child, without objection. Of the eight witnesses called by the State during its case-in-

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2 At the time of the incident, Rivers weighed over three hundred pounds. App. 264, ll. 12-25.

chief, only two[3] did not discuss the collateral injuries to Child. App. 203, l. 20-App. 205, l.5; App. 239, ll. 21-24; App. 251, ll. 22-23; App. 249, ll. 11-21. The State rested following the testimony of Rick Charles, and Counsel Swilley moved for a directed verdict. App. 254, l. 16-App. 256, l. 15. The defense then proceeded to call Rivers, Charles Rivers, Terry Johnson, and two minors, T.R. and T.C., who lived in the home during the time of the incident.

Rivers testified about how Child came into the home and how they agreed to name Child after Rivers. App. 261, ll. 9-25. Rivers testified he worked full time, from five in the morning until six at night, and that he sometimes worked weekends. Kimberly was the main caretaker of Child while he was at work. App. 264, ll. 1-11. He recalled how Child developed breathing problems to the point where you could "literally hear the fluid in his lungs like water was boiling." App. 262, l. 21-App. 263, l. 2. He and Kimberly took Child to the doctor on June 3, 2005, and Child was diagnosed with bronchitis. Child eventually ended up being hospitalized from June 20-22, 2005, due to the severity of his breathing problem. App. 263, ll. 8-25.

Regarding the morning of August 7, 2005, Rivers maintained that he never left Child while he was not breathing and that could see Child's stomach rising and falling after he laid him down in the play pen. App. 267, l. 20-App. 268, l. 3. He recounted being told by the ER doctor that Child's complexion had returned, and he had a slight pulse, but all they could do at that point was pray. When Child eventually passed, the doctor said that he had done all he could, but Child's heart could not take the strain. App. 269, l. 3-App. 270, l. 8. He recalled being approached by Investigator Jordan within ten to fifteen minutes of Child passing and being asked

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3 Dena Owen, Child's DSS case worker, and Richard Carnes, the emergency services director for Chesterfield 911 were the only two witnesses that did not testify about the collateral injuries. App. 105-127.

to write a statement. App. 271, ll. 3-15. He testified that the video statement that he gave to law enforcement was what had happened during the incident. App. 273, ll. 1-4.

During cross-examination, Rivers denied ever leaving Child while Child was not breathing. He maintained that he performed CPR on Child until his complexion returned and Child was breathing on his own before he placed Child in the playpen. He believed Child was okay when he placed him in the playpen. App. 280, l. 9-App. 281, l. 25. Solicitor Mayes asked Rivers where each of the various collateral injuries to Child came from and he responded to each question by stating "I have no idea." After being asked about the collateral injuries to Child for the seventh time he responded "I have no idea, ma'am, because, like I said, I was *never* alone with my child." App. 287, l. 13-App. 288, l. 5 (emphasis added).

Charles Rivers testified about how his son "really loved" Child and worked tirelessly to support his family, sometimes working fourteen hour days. He never observed Rivers mistreat Child and testified that Child was sick baby. App. 291, ll. 10-25. Terry Johnson, Rivers' older brother who was living in the home at the time of the incident, similarly testified that he never saw Rivers be carless with, or harm Child. He confirmed that Kimberly was the adult who stayed home during the day with Rivers' elderly mother and Child. App. 297, ll. 8-23. Johnson recounted that the morning of August 7, 2005, he had awoken around six in the morning and was preparing breakfast for his mother when he heard Child crying. He commented on Child's crying to his mother and was told Rivers was outside. He proceeded to use the bathroom and when he was finished he noted Child was no longer crying. Shortly after that he saw Kimberly walk outside to get Rivers. Rivers then ran inside, came out of the bedroom holding Child, placed him on the table and began performing CPR. App. 298, l. 19-App. 299, l. 17.

Rivers' niece, who was also living in the home at the time Rivers and his wife cared for Child, never saw Rivers mistreat the baby. She never recalled seeing the child injured. App. 306, l. 12-App. 307, l. 15. Rivers' younger brother, who was also living at the house in 2005, never saw Rivers mistreat the baby. He never saw the baby get hurt and opined that Rivers treated the baby well. App. 312, l. 5-App. 313, l. 18.

After the conclusion of the defense's case, counsel for both parties discussed jury charges with the trial court. The State, relying on State v. Smith, 391 S.C. 352, 705 S.E.2d 491 (Ct. App. 2011)[4] sought a charge under S.C. Code Ann. § 16-3-85(A)(2) for aiding and abetting, even though Rivers was only indicted under (A)(1) as the principal. The State asserted that because Rivers' denied causing the collateral injuries to Child and maintained that Child was breathing when he laid him in the play pen, that another person would have been the principal actor or ultimate cause of death and the jury should be allowed to consider convicting Rivers under (A)(2). App. 326, l. 1-App. 330, l. 16. The trial court indicated that it would charge the jury accordingly and did so. App. 330, ll. 9-15; App. 361, l. 24-App. 363, l. 5.

During closing arguments, Counsel Swilley reminded the jury that the State was unable to produce any evidence that showed Rivers committed the collateral injuries to Child. App. 333, ll. 18-22. Counsel argued,

> And they tried to show it over and over again, so that it just gets ingrained in your brain. Somebody testified, and Ms. Mayes would write on a posterboard so you could see it twice, time and time again. And that is a smart strategy by the state. It is a good idea, because you hear it over and over again. *And the more you hear it,*

[4] Reversed and remanded by State v. Smith, 406 S.C. 215, 219-220, 750 S.E.2d 612, 614 (2013), in which this Court held that the jury instruction on aiding and abetting was improper "because the section (A)(2) offense is not a lesser-included offense of section (A)(1), an indictment expressly charging only a section (A)(1) offense does not provide notice of a section (A)(2) charge."

> *the more you start to think that this is awful. The more you see it, the more you equate it with my client. The fact of the matter is, you can't do that. Nothing puts anything happening to that child on Mitchell Rivers. And you know if there was something that did, you would have heard it.* It was a very extensive investigation in this matter. It has been almost six years since this happened. If there was something else, against Mitchell Rivers, you would have heard it. And you probably would have heard it over and over again. Like I told you during my opening, there is not one single shred of evidence offered to show that Mitchell caused any of those injuries.

App. 334, l. 9-App. 335, l. 2

The State argued that Child "suffered in silence, for days. This was not an event that culminated in some kind of accident that morning...his ribs had been broken long before that morning." App. 345, ll. 9-17. The State conceded that "these bruises have nothing to do with how this happened." App. 345, ll. 18-19. However, the State continued to argue about the collateral injuries to Child and how he had suffered repetitive injury. App. 346, ll. 3-25. Notably, the State then argued that Rivers was guilty of HBCA because, by his own admission, "he has committed a grave omission in this case." App. 348, ll. 9-15. At the end of the State's closing argument Solicitor Mayes stated,

> You have before you the most noble of opportunities. The chance to strike back against injustice, and deliver a verdict that speaks the truth. In this case, the truth is that Child was battered. Child was beaten. That Child was smothered to death. Mitchell is guilty as charged *with failure to act with the omission and omissions that lead to the death of Child.*

App. 351, ll. 1-17 (emphasis added).

During deliberations, the jury sent a note requesting "a better definition of aiding and abetting." App. 369, l. 3-App. 370, l. 3. The jury found Rivers guilty of homicide by child abuse, and the trial judge sentenced him to life in prison. App. 373, ll. 4-10; App. 382, ll. 14-16. During the sentencing phase, Rivers maintained his innocence. App. 379, l. 23-App. 380, l. 24;

App. 382, ll. 17-22. Following the conclusion of Rivers' trial, counsel sent Rivers a letter indicating that the day the jury read the guilty verdict was the worst day of his career. App. 499, ll. 17-24.

Rivers' appeal to the South Carolina Court of Appeals began with a two-issue brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 393-416. Interestingly, the Anders brief contained a rather predictive footnote: "In the event the Court deems the matter unpreserved for direct appeal for failure to timely object contemporaneously when the testimony was elicited, then the issue may be proper for post-conviction relief." App. 404. The Court of Appeals issued an order on September 5, 2013, directing the parties to file briefs regarding the trial court's admission of collateral injuries. App. 417.

Briefs were filed by both parties. App. 419-456. The State devoted a substantial portion of its brief to addressing the preservation issue. App. 446-448. The Court of Appeals affirmed Rivers' conviction and sentence by way of a published opinion. State v. Rivers, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015); App. 457-461. The Court of Appeals noted that the trial court never ruled on the issue of admission of collateral injuries. Id. at 554, 769 S.E.2d at 265. Notably, the Court of Appeals found the issue unpreserved and remarked that the State admitted its strongest argument was the issue was unpreserved: "During oral argument, the State admitted its strongest argument was the issue presented is unpreserved. We remind the bar that our appellate courts have 'consistently refused to apply the plain error rule' and 'it is the responsibility of counsel to preserve issues for appellate review.'" Id. at 555, 769 S.E.2d 266, n. 2 (internal citations omitted).

Petitioner timely filed the present PCR application. At the evidentiary hearing, when discussing the collateral injury evidence from trial, Counsel Swilley testified that the admission

of the collateral injury evidence "substantially hindered" Rivers' defense App. 509, ll. 20-24. He recalled making a motion to suppress evidence of the injures that did not pertain to Child's cause of death because they were not relevant and could not be connected to Rivers. App. 510, ll. 4-16. He continued "I couldn't really understand the State's theory, I mean, obviously they wanted that to come in because it made him look bad but, I mean, there wasn't any response as to what would indicate that he [Rivers] caused those injuries." App. 511, ll. 1-5.

Counsel Swilley testified that he interpreted the trial court's ruling as "he had decided the motion and he had ruled against me and that his decision on the matter was final and yes, that I was protected for appellate purposes." App. 511, l. 20-App 512, l. 3. He stated he did not object to the collateral injury testimony because the matter had been decided and he thought objecting would have been "superfluous". App. 512, ll. 20-23. He admitted that such an understanding was incorrect and that he made a mistake in assuming as such. App. 513, ll. 2-6. Counsel indicated at the evidentiary hearing that he believed he was protected when each of the State's witnesses testified. App. 513, ll. 7-15. Counsel Swilley conceded that his failure to contemporaneously object to the collateral injury testimony negatively affected Rivers' trial and direct appeal. App. 516, ll. 12-20.

In the order of dismissal the PCR court found that it was undeniable that Counsel Swilley had failed to object to preserve the issue for appellate review, that Rivers could not show prejudice because the evidence was properly admitted. App. 551. In further discussing the lack of prejudice, the PCR court found that Rivers own statements and testimony established the extreme indifference necessary to convict him for HBCA. App. 553-554.

## STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us." Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "[The appellate] Court[s] will uphold the lower court's findings if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Reversal is warranted where no evidence of probative value supports the PCR court's decision, Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999), or where the PCR court's decision is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). "We review questions of law *de novo*, with no deference to trial courts." Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839 (footnote omitted).

## ARGUMENT

The core issue in this case is whether Rivers received constitutionally effective assistance of counsel during his trial for HBCA. The Court of Appeals, in a well-reasoned opinion, found that Rivers' trial counsel was deficient in failing to object to and obtain a final ruling on the admissibility of Child's collateral injuries and that deficiency prejudiced Rivers, entitling him to a new trial. The opinion issued by the Court of Appeals was in line with decades of jurisprudence in South Carolina which has repeatedly held that evidence of collateral injuries in HBCA cases is admissible *only when the evidence is the subject of a prior conviction, or the prior bad acts are linked to the defendant by proof that is clear and convincing*. Petitioner's argument that the evidence of prior injuries was properly admitted is without merit. This Court should affirm the Court of Appeals.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

**Deficient performance**

"To prove trial counsel's performance was deficient, an applicant must show 'counsel's representation fell below an objective standard of reasonableness.'" Smalls v. State, 422 S.C. 174, 818, 810 S.E.2d 836, 840 (2018). "[C]ounsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy." Stone v. State,

419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). "Under certain circumstances, [ ] counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration." Id. at 383, 798 S.E.2d at 568. "The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound." Id. at 384, 798 S.E.2d at 569.

The appellate courts of our state have repeatedly held that making a pre-trial motion to exclude or suppress evidence does not preserve the issue for appellate review because a ruling on a pre-trial motion is not a final determination. Therefore, the party challenging the evidence *must* make a contemporaneous objection when the evidence is introduced at trial to preserve the matter for review. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); State v. Wood, 362 S.C. 520, 526, 608 S.E.2d 435, 438-439 (Ct. App. 2004); State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010). Two exceptions to this rule exist. The first exception "is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021). The second exception to the contemporaneous objection requirement occurs "where a court rules after a hearing on a constitutional issue. Under those circumstances, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review." Id.

Neither exception to the preservation rules was applicable in the present case. The evidence involving the collateral injuries to Child was introduced for the first time with the third witness, not directly after the judge denied the motion and the issue was not one of constitutional law. Therefore, trial counsel was required to contemporaneously object to the admission of the evidence when the State elicited the testimony at trial. The failure to object and obtain a ruling on the key evidentiary issue in the case was deficient performance.

Notably, deficiency was established in this matter when, on direct appeal, the Court of Appeals held that the issue of the admission of Child's collateral injuries was not preserved for review because trial counsel did not make a contemporaneous objection when the State offered the evidence at trial. The Court of Appeals further noted that the trial court could not have made a pre-trial ruling purely on the motions, further highlighting the necessity of counsel to make a contemporaneous objection, writing:

> Rather, in denying Rivers's motion to exclude evidence of the victim's other injuries, the trial court stated, "These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases." Although Rivers argued in his pre-trial memoranda that "[e]vidence of alleged prior child abuse is inadmissible where there is no evidence that the [d]efendant inflicted the previous injuries," *the trial court's ruling that "child cases are getting a little different treatment" does not indicate it considered whether there was any evidence connecting Rivers to these injuries. Moreover, Rivers never objected or requested clarification from the trial court regarding its ruling. We further note that at the time of the pre-trial hearing, there had been no evidence presented as to who was responsible for the victim's other injuries. The parties had not proffered any testimony on this issue, and they had not submitted any affidavits indicating the evidence they intended to present at trial. Thus, the trial court could not have made a pre-trial ruling as to whether there was any evidence connecting Rivers to the victim's other injuries.*

State v. Rivers, 411 S.C. 551, 554, 769 S.E.2d 263, 265 (Ct. App. 2015) (emphasis added).

At the PCR hearing trial counsel did not offer a valid strategy for his failure to object. Tellingly, counsel thought that the trial court's ruling denying his motion was a final ruling sufficient for appellate review. Trial counsel did not fail to object because he perceived some benefit in allowing the evidence in, he failed to object because he was unaware of the rules of error preservation at the time of Rivers' trial. This was deficient performance which resulted in significant prejudice to Rivers.

**Prejudice**

To prove prejudice, an appellant must show a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting Strickland v. Washington, 466 U.S. at 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing Strickland, 466 U.S. at 694). In making the determination of whether a PCR applicant met their burden, "we must consider the totality of the evidence before the jury." Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (footnote omitted). "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

The PCR court found that Rivers did not suffer prejudice because the evidence of the collateral injuries was properly admitted. The PCR court also found that Rivers' own statements and testimony established the "extreme indifference" element of homicide by child abuse, therefore Rivers could not suffer prejudice because of the admission of the evidence. As the Court of Appeals held, the record does not support the PCR court's findings.

Evidence of collateral injuries in HBCA cases is considered prior bad act evidence. The jurisprudence surrounding the admission of prior bad act evidence has been firmly established in South Carolina for decades. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923) (indicating that the admission of prior bad acts creates propensity evidence that has "the inevitable tendency ... to raise a legally spurious presumption of guilt in the minds of the jurors"). "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Id. at 24, 664 S.E.2d at 483. "Further, even though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

There are three hurdles that the State must overcome before prior bad act evidence can be admitted, regardless of which exception the State seeks to admit the evidence under. First, the State must prove the prior bad act was the subject of a prior conviction or that the prior bad act was committed by the defendant through clear and convincing evidence. Second, the State must articulate a logical connection between the prior act and at least one of the five exceptions listed in Rule 404(b), SCRE. Finally, if both of those hurdles are crossed, the trial court must conduct

an analysis under Rule 403, SCRE, to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant.

At Rivers' trial, the State failed to overcome the first hurdle, therefore the evidence was not admissible. There was no evidence entered at trial that connected the collateral injuries of Child to Rivers, and prior counsel for the State even admitted during oral argument on direct appeal[5] of this matter that there was no evidence Rivers caused the collateral injuries to Child. The State wholly failed to present any proof, much less clear and convincing proof, connecting Rivers to the collateral injuries but used evidence of those injuries to convict and incarcerate him for his natural life. The admission of the collateral injuries to Child was both improper and highly prejudicial.

The Court of Appeals correctly held that the admission of the evidence of collateral injuries was prejudicial. The Court of Appeals was unable to "establish a nexus between the collateral evidence and the circumstances surrounding Victim's death such that logical relevance may be established to prove intent." See Also State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923) ("[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.") The Court of Appeals also noted that the injuries related to asphyxia are "separate and chronologically distinct from other collateral injuries," indicating that the evidence did not serve to rebut the defense of accidental smothering while sleeping. Rivers v. State, Op. No. 2023-UP-261 at *3 (S.C. Ct. App. filed July 12, 2023).

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[5] Audio of Oral Argument in State v. Mitchell Rivers, Appellate Case No. 2011-186026 dated January 8, 2015 at 18:49 – 21:36.

The State has argued that the Court of Appeals was incorrect in holding the admission of the collateral injury evidence was improper because it misapprehended the basis for which the evidence was admitted. The State asserted the evidence was admitted as "battered child syndrome" evidence, *res gestae* evidence, and was distinguished from "common scheme or plan" evidence. BOP. 17. Critically, this argument overlooks that in the written motion to admit the evidence of collateral injuries the State cited to Rule 404(b), SCRE, as the rule it was proceeding under and argued that the evidence was primarily admissible to show the absence of mistake or accident, and intent. Further, the evidence of collateral injuries was not entered "explicitly" to support the finding of Battered Child Syndrome as the evidence was initially admitted through two witnesses who made no such connection. The State did not even explain to the jury what battered child syndrome was, much less prosecute the case as one of "battered child syndrome." From the outset, the State's argument was that Rivers *failed to act and that failure to act caused the death of Child.* The collateral injury evidence was not used to support the State's theory of the case, but to paint Rivers as the type of person that abused his child. The collateral injury evidence was impermissible propensity evidence of the highest order.

The State also conclusively asserted the evidence was permissible *res gestae* evidence. However, the State has not offered any argument that the evidence of other injuries to Child were "an integral part of the crime" with which Rivers was charged or that the evidence of the other injuries to Child was "needed to aid the fact finder in understanding the context in which the crime occurred." State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005). Presumably, this is because the State never argued that affirmative acts by Rivers caused the death of Child, but that a *failure to act* caused Child's death. The criminal behavior, the "extreme indifference," according to the State has always been that Rivers did not act to save Child. Thus, the evidence

of collateral injuries, not connected by any evidence to Rivers, was not and could not be considered *res gestae* evidence.

Finally, the argument that the Court of Appeals focused on a case dealing with "common scheme or plan" evidence is without merit. Under the strictures of Rule 404(b), SCRE, evidence of other wrongs or prior acts is admissible *only* when the other wrongs or prior acts are connected to the defendant by a conviction or by clear and convincing proof. That hurdle exists regardless of which exception the State is attempting to prove.

The State primarily relies upon State v Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991), and Estelle v. McGuire, 502 U.S. 62 (1991), to argue that evidence of collateral injuries is essentially *per se* admissible in HBCA cases, regardless of whether the evidence of prior injuries can be connected to the defendant. Petitioner then cites various cases from various other jurisdictions to support its proposition and wholly ignores the jurisprudence of our State. In every HBCA case prosecuted in South Carolina where there was evidence of collateral injuries admitted, the appellate courts affirmed the conviction *only* where the State was able to show, by clear and convincing proof, that the defendant was connected to those prior injuries. *Compare* State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (holding evidence of child's previous injures was inadmissible absent conviction or clear and convincing proof that defendant inflicted the prior injuries); State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) (holding clear and convincing evidence did not show that defendant placed child victim in attic or handcuffed victim to a bed, and thus evidence was inadmissible under other-acts rule); *with* State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011) *overruled on other grounds by* State v. Smith. 406 S.C. 215, 705 S.E.2d 612 (2013) (holding evidence of "other acts" admissible where the record supported the trial judge's ruling that the evidence was clear and convincing that Smith committed the "other

acts"); State v. Cook, 440 S.C. 308, 891 S.E.2d 35 (Ct. App. 2023) (holding that there was clear and convincing evidence in the record that supported admission of prior bad act evidence that minor's prior arm injury was caused by Cook). The State fails to acknowledge that the appellate courts of our State have never relied upon Estelle[6] for the proposition that evidence of prior injuries or Battered Child Syndrome evidence is admissible, regardless of whether it can be connected to the defendant. In must also be noted that the United States Supreme Court in Estelle was examining a claim of federal habeas and looked solely at the evidentiary rules of California in examining the propriety of the admission of prior acts or wrongs. That case, despite how it is often relied upon, does not stand for the proposition that prior bad acts evidence is *per se* admissible in HBCA cases.

Neither Lopez nor Estelle created a rule that evidence of collateral injuries or evidence of Battered Child Syndrome is automatically admissible – the cases set forth the proposition that the evidence is generally *relevant* and therefore admissible subject to the rules of evidence and case law of a *particular jurisdiction*. Further, in both cases, there was clear and convincing proof offered by the State that the defendants had caused at least some prior injuries. In Lopez, the defendant's other minor stepchildren testified to the abuse of the minor victim that they witnessed; in Estelle, both a neighbor and the defendant's wife offered testimony of prior instances of rough treatment at the hands of the defendant.

The State repeatedly asserted that the evidence was not introduced to establish the identity of the perpetrator but to disprove accident or mistake and establish intent. In the same breath, the State argues Rule 404(b), SCRE, is "categorically inapplicable" in cases such as

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[6] Estelle has been cited by ten cases in South Carolina, most frequently for its holding on the propriety of jury instructions. It has been cited by the Dissent in one HBCA case, State v. Pierce, 326 S.C. 176, 485 S.E.2d 813 (1997).

Rivers, because the evidence is admitted not to establish identity, but to show a recognized medical condition of the victim and to show the absence of mistake or accident or to establish intent. The Rules of Evidence do not cease to exist simply because of the nature of the crime charged. Rule 404(b), SCRE applies with equal force in all criminal cases in South Carolina and there are no special exceptions for HBCA cases. As stated in The Criminal Law of South Carolina, "any instance of child abuse may be difficult to prove, given the unavailability of the victim as a witness, due to either incompetence or death. Crucial evidence may involve instances of prior abuse of the child. There must be, *of course*, clear and convincing evidence that the defendant inflicted the prior injuries." McAninch, Fairey, & Coggiola, The Criminal Law of South Carolina, 6th ed.2013, pg. 234 (emphasis added).

As the Court of Appeals correctly held, the evidence fails to establish the intent of Rivers and the collateral injuries are distinct and separate from the ultimate cause of death such that they do not rebut the defense of accident or mistake. The jurisprudence of this State is clear that evidence of this nature must be connected to the accused to be admissible. The State did not submit clear and convincing evidence connecting Rivers to the prior injuries. Trial counsel failed to object and obtain a final ruling on this issue, precluding it from appellate review. Rivers has established prejudice in this matter.

**Sufficiency of remaining evidence**

Rivers' own statements do not lessen the prejudice he suffered by trial counsel's failure to object to and obtain a ruling on the admissibility of the collateral injuries. The State avers that Rivers' statements that after he revived his child, he placed him in the playpen and went outside to do yardwork, meet the definition of extreme indifference within the HBCA statute. However, our appellate courts have defined extreme indifference to human life in HBCA cases to be when

a "defendant displays sheer apathy in the face of a life-threatening situation to a child." State v. Thompson, 420 S.C. 192, 209, 802 S.E.2d 623, 631 (Ct. App. 2017) (finding extreme indifference where a mother failed to help her child bleeding out through a shirt); State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) (finding extreme indifference when a mother left her child at her residence knowing that he would be killed).

In the case *sub judice*, Rivers did not act with sheer apathy. He performed CPR, made sure Child had started breathing again, and that Child's color had returned. He believed he had done what was necessary to save Child's life at that time. As the Court of Appeals wrote,

> "There is a stark difference between *failing to act when doing so would prevent certain death, and negligently failing to follow up with additional care after an action which would have prevented death based on a mistaken belief that a child is no longer in danger.* Thus, in the absence of the prior-bad-acts evidence, there is a reasonable probability that a jury could have had a reasonable doubt that Rivers exhibited an "extreme indifference to human life," integral to a finding of HCA."

Rivers v. State, Op. No. 2023-UP-261 at *4 (S.C. Ct. App. filed July 12, 2023) (emphasis added). The State has also conceded that it lacked other evidence to support a conviction by stating Rivers may have been doomed by trial counsel's reliance on Judge Burch's statement that he was protected "as the other evidence to refute Rivers' accident defense is limited." COA Cert. Pet. pg. 17.

The State could not connect any of Child's collateral injuries to Rivers but discussed those injuries ad nauseum throughout the trial. The only purpose of the collateral injury evidence was to insinuate that Rivers was a child abuser. The prejudice that flowed from that characterization, when there was no evidence that Rivers ever intentionally harmed Child, cannot be overstated. Rivers has shown both deficient performance and prejudice which is supported by

the record. The remaining evidence was not sufficient, by itself, to support a conviction for Homicide by Child Abuse. This Court should uphold the opinion of the Court of Appeals.

## CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that this Court uphold the opinion of the Court of Appeals finding ineffective assistant of counsel and remand this case back to the Court of General Sessions for a new trial.

Respectfully Submitted,

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This 16th day of December, 2024.