

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

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Case No. 2012-CP-40-4268

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RECEIVED

FEB 26 2014

S.C. Supreme Court

Andrea Person, #00338104,.....Petitioner,

v.

State of South Carolina.....Respondent.

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NOTICE OF APPEAL

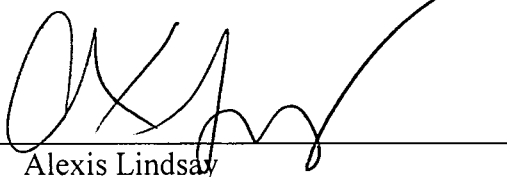
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Pursuant to Rule 243, SCACR, Andrea Person, #00338104 (“Petitioner”), appeals the Order of Dismissal (“Order”) of the Honorable James R. Barber, III denying Petitioner’s Application for Post-Conviction Relief dated January 22, 2014 and filed, with Form 4, January 30, 2014. Counsel for the Petitioner received written notice of the Order on February 3, 2014. A copy of the Order is attached hereto.

*[Signature page follows]*

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By:

A handwritten signature in black ink, appearing to read 'Alexis Lindsay', is written over a horizontal line.

Alexis Lindsay  
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Columbia, South Carolina  
February 27, 2014

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Attorney for Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4004268

Andrea #338104 Person

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court

**ORDER INFORMATION**

This order  ends  does not end the case.  
Additional Information for the Clerk :

**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 30 January 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Andrea #338104 Person

Alexis Kaylor Lindsay

Robert Daniel Corney

Andrea #338104 Person

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court *Jeanette W. McBride*

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS )  
FOR THE FIFTH JUDICIAL CIRCUIT )

Andrea Person, #00338104, )  
Applicant, C.C.P. 2 )

Case No. 2012-CP-40-4268

v. )

State of South Carolina, )  
Respondent. )

ORDER OF DISMISSAL

2014 JAN 28 AM 10:24  
CLERK OF COURT  
FIFTH JUDICIAL CIRCUIT

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for post-conviction relief filed June 19, 2012. Respondent made its Return on July 3, 2012, requesting an evidentiary hearing be held. Thereafter, Applicant, through her counsel, filed an Amended Application on September 25, 2013. An evidentiary hearing into the matter was convened October 2, 2013, at the Richland County Courthouse. Applicant was present at the hearing and was represented by counsels Alexis K. Lindsay, Esquire, and Thornwell F. Sowell, III, Esquire. Respondent was represented by Assistant Attorney Generals Megan E. Harrigan and Walt Whitmire of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the May 2007 term of the Richland County Grand Jury for Homicide by Child Abuse (2007-GS-40-3570). Douglas S. Strickler, Esquire, and Elizabeth Fielding Pringle, Esquire, represented Applicant. On November 16-20, 2009, Applicant proceeded to a jury trial before the Honorable Alison R. Lee, where she was convicted as indicted. Judge Lee sentenced Applicant to twenty-two years imprisonment.

**SCANNED**

A notice of appeal was filed and an appeal was perfected on Applicant's behalf. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentenced by unpublished opinion. State v. Person, 2012-UP-068 (S.C. Ct. App. filed February 8, 2012). The Remittitur was issued on March 5, 2012.

In her amended application for post-conviction relief, Applicant alleged the following specific allegations of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel at a critical stage of the case, the pre-trial Jackson v. Denno hearing, including the failure to properly prepare for the hearing, the failure to call witnesses or offer testimony at the hearing, the failure to effectively cross-examine the State's witnesses, the failure to make any sort of argument to the judge regarding the voluntariness of the statement, and failing to advise Applicant on the importance and implication of the hearing or her right to testify at it.
2. Ineffective assistance of trial counsel for calling Dr. Kimberly Collins as an expert witness and/or for failing to properly prepare the witness.

Applicant proceeded forward on these grounds as listed in her amended application at the evidentiary hearing.

#### **SUMMARY OF FACTS ADDUCED AT TRIAL**

On November 17, 1997, Gina Ulengchong ("Gina") gave birth to a baby boy, Zachary ("Victim"). (Tr. p. 110). Gina remained at home with Victim for approximately six weeks and then enrolled him in Applicant Andrea Person's home day care. (Tr. p. 111). Applicant took care of Victim at her home during the day on Mondays through Fridays. (Tr. p. 112). Typically, Gina dropped Victim off with Applicant at approximately 7:30 a.m. and picked him up by 6:00 p.m. (Tr. pp. 113-114).

In April of 1998, Victim was diagnosed with a slight case of pneumonia and received antibiotics as treatment. (Tr. p. 113). However, the treating physician took x-rays of Victim's chest after the diagnosis, and no signs of pneumonia were present in Victim's lungs. (Tr. pp.

440-441). Victim was sick for approximately one week, responded to the treatment, and got better. (Tr. p. 114). He never had any trouble breathing while ill. (Tr. p. 114). In October of 1998, Gina took Victim to the doctor to seek treatment for a stuffy nose. (Tr. pp. 114-115). Victim was again given antibiotics and recovered from his illness. (Tr. p. 115). His symptoms did not return. (Tr. p. 115).

On the evening of December 1, 1998, Victim appeared fine and slept through the night. (Tr. p. 116). On the following morning, Gina dropped Victim off at Applicant's day care around 7:30 a.m. to 7:45 a.m. (Tr. p. 117). Victim was not ill at the time, was laughing, seemed fine, and did not have a stuffy nose or fever.<sup>1</sup> (Tr. p. 117).

Later that morning, Mandy Fortson, a certified emergency medical technician and volunteer with the Sandhill Fire Department, was dispatched to Applicant's home in response to a report of an infant male not breathing. (Tr. pp. 144-145; p. 147; p. 149). She arrived on the scene within two to four minutes and entered the residence. (Tr. p. 149; p. 151). Upon entry, Fortson observed Applicant, who appeared nervous and tearful, pacing back and forth while using the phone. (Tr. p. 151; p. 155). Victim was lying on his back on the middle of Applicant's living room floor. (Tr. p. 152; p. 154).

Fortson asked Applicant about Victim's medical history and condition, and Applicant informed her Victim had pneumonia two weeks earlier but was off his medication and was better as far as Applicant was aware. (Tr. pp. 52-53). Applicant told Fortson she fed Victim before his nap, laid him down in a collapsible crib, found him unresponsive twenty to forty minutes later, and attempted to revive him. (R. pp. 156-157; p. 161). Fortson observed a small trickle of

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<sup>1</sup> During trial, Applicant testified on cross-examination she told Gina that Victim needed to be taken to the doctor at the time he was dropped off. (R. p. 364). However, in rebuttal, Gina testified Applicant never told her Victim was sick and needed to be taken to the doctor when she dropped him off at Applicant's day care on the morning of his death. (R. p. 516).

formula coming out of the corner of Victim's mouth. (Tr. p. 157). She then began to perform C.P.R. on Victim, and one and a half to two ounces of milk came out of Victim's mouth and nose. (Tr. p. 159). Victim's skin was cold when Fortson began compressions.<sup>2</sup> (Tr. p. 168). Subsequently, paramedic Andrew Stewart arrived on the scene and assisted Fortson in the resuscitation efforts. (Tr. p. 162). Together, Stewart and Fortson performed C.P.R. on Victim for eight to ten minutes prior to the ambulance's arrival. (Tr. pp. 164-165). Once the ambulance arrived, Victim was rapidly transported from the scene. (Tr. p. 165).

Fortson remained at the day care for several hours to provide assistance to Applicant. (Tr. pp. 166-167; p. 174). She attempted to get in touch with Victim's parents and advise them of the situation. (Tr. p. 167). She also examined Victim's crib and found a bottle containing eight to ten ounces of formula that was "ice cold." (Tr. pp. 171-172). The crib had a large pool of liquid on the mattress at the bottom, and the liquid was already soaked in and absorbed into the mattress. (Tr. pp. 171-172). Additionally, Fortson spoke with Applicant, who repeatedly expressed concern for herself and what was going to happen. (Tr. pp. 172-173). However, Applicant never inquired about Victim's condition. (Tr. p. 173).

Meanwhile, while at work, Gina received word to call her babysitter around 10:30 a.m. (Tr. p. 118). She quickly called Applicant's home, and a paramedic answered the phone and told her Victim had been taken to the hospital. (Tr. p. 118). Gina went to the hospital and left a message for her husband. (Tr. p. 118). Her husband joined her at the hospital, and they were informed Victim had died. (Tr. pp. 119-120).

Later that day, Deputy Coroner Eric McFarland spoke with both Gina and Applicant and went to Applicant's residence in response to Victim's death. (Tr. pp. 182-183; p. 184).

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<sup>2</sup> Fortson believed Victim's skin was colder than it should have been based on the time frame reported by Applicant, and she concluded Victim was deceased at the time she began performing resuscitation efforts. (R. pp. 64-65).

Applicant informed McFarland she put Victim in his crib and found him blue in color when she checked on him approximately thirty minutes later. (Tr. p. 187). McFarland asked Applicant if Victim had been ill, and Applicant did not report anything significant. (Tr. pp. 187-188). McFarland then relayed the information he collected to a pathologist, and an autopsy was conducted. (Tr. pp. 188-189).

Dr. William Armstrong, a pathologist and expert in forensic pathology, performed the autopsy of Victim on December 2, 1998. (Tr. pp. 340-342). During his examination, Dr. Armstrong discovered no signs of external injuries but found that Victim had a mild case of pneumonia. (Tr. pp. 344-345). Tissue samples were collected for analysis. (Tr. p. 189). Additionally, Dr. Armstrong noted Victim had swelling of the brain, acute hemorrhagic edema in his lungs, and blue fingernails and extremities. (Tr. p. 346; p. 347; pp. 352-353). Based on the autopsy results, Dr. Armstrong concluded Victim died from pneumonia based on the lack of any other specific findings. (Tr. p. 347). However, he did not have Victim's medical records or a specific time line of the day of Victim's death at the time he made his initial findings. (Tr. p. 348). Subsequently, the preliminary report prepared by the Coroner's Office left the cause and manner of Victim's death open for continuing investigation. (Tr. p. 190; p. 195). However, the coroner signed a certificate of death for Victim on February 22, 1999, which listed the cause of death as lobular pneumonia and the manner of death as natural. (Tr. p. 195).

Several years later, on April 2, 2007, Sergeant Kevin Isenhoward, an investigator with the Richland County Sheriff's Office, responded to Applicant's home day care to investigate the death of another child in Applicant's care<sup>3</sup>. (Tr. pp. 248-249). Through his investigation into the incident, Sergeant Isenhoward learned about the death of Victim in 1998. (Tr. p. 249).

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<sup>3</sup> Another infant child died in Applicant's home on April 2, 2007; this was the third child to die while under Applicant's direct care and supervision. (Jackson v. Denno Tr. p. 75-76).

However, Applicant failed to reveal anything about Victim's death when Sergeant Isenhoward spoke with her that day. (Tr. p. 249).

On April 10, 2007, Sergeant Isenhoward spoke with Victim's mother about Victim's health before he died. (Tr. pp. 249-250). He then contacted Applicant and spoke with her the next day at the sheriff's department. (Tr. p. 250). During their meeting, Applicant was advised of her rights, signed a waiver of rights form, voluntarily agreed to speak with the officer, and informed him she did not reveal Victim's death during their April 2, 2007 encounter because she did not want to look bad. (Tr. p. 251). She then left the sheriff's department after their meeting. (Tr. p. 251).

Subsequently, Sergeant Isenhoward arranged another meeting with Applicant, and she voluntarily returned to the sheriff's department around 1:00 p.m. on April 17, 2007. (Tr. p. 251). Sergeant Isenhoward met Applicant in the lobby and noticed her appearance and personal hygiene had gradually deteriorated with each of their meetings. (Tr. pp. 252-253). He then took her to an interview room to meet with Lieutenant James White, with the interview beginning at approximately 1:05 p.m. (Tr. p. 216; p. 251). At the outset, Lieutenant White informed Applicant of her rights, and she again signed a waiver of rights form. (Tr. p. 216; p. 219; p. 221). They progressed with the interview, including a polygraph examination, and Applicant initially denied injuring Victim. (Tr. p. 230; p. 242). However, Lieutenant White advised Applicant he did not believe she was being truthful with her statements about Victim's death. (Tr. p. 230). Applicant then confessed to placing her hand over Victim's face and mouth for approximately fifteen seconds after she could not get Victim to stop crying. (Tr. p. 231). Applicant stated Victim became motionless and quiet so she returned him to his crib. (Tr. p. 232). Applicant indicated she panicked, left Victim in the crib, and returned fifteen minutes later to find Victim

lifeless. (Tr. p. 232). Applicant informed the officer she then called emergency services and falsely reported how Victim died. (Tr. p. 233). She expressed remorse and stated she was untruthful because she was afraid she would go to jail. (Tr. p. 232; p. 233).

Following her statements, Lieutenant White contacted Sergeant Isenhoward and informed him Applicant admitted to suffocating Victim. (Tr. p. 234; pp. 253-254). Sergeant Isenhoward entered the interview room, knelt beside Applicant, and asked her what happened. (Tr. p. 254). With Lieutenant White present in the room, Applicant repeated her statements to Sergeant Isenhoward. (Tr. p. 234; pp. 254-255). Applicant stated she placed her hand over Victim's mouth for fifteen to twenty seconds until he went limp, left him for fifteen minutes, discovered him lifeless, called 911, and repeatedly lied to everyone about his death from that point forward. (Tr. p. 234; pp. 254-255). She said she did it because Victim was fussy, irritable, and crying. (Tr. p. 255).

Afterwards, Applicant used the bathroom and drank some water; she was offered something to eat but declined any food (Tr. p. 256). Sergeant Isenhoward then brought Applicant to Deputy Chief David Wilson's office, and she again revealed the circumstances of Victim's death. (Tr. p. 256; p. 258; p. 320). Applicant told the officers Victim was fussy when he arrived and would not take a pacifier. (Tr. p. 259; p. 321). She indicated he was uncooperative and she was afraid he was going to wake the other children. (Tr. p. 259). Applicant stated she held Victim, and, when he continued to cry, she put her hand over his nose and mouth for fifteen to twenty seconds until he stopped crying in order to quiet him. (Tr. p. 140; pp. 197-199). Chief Wilson asked Applicant to demonstrate how much pressure she applied to Victim's face, and Applicant demonstrated a firm grip on Chief Wilson's hand. (Tr. p. 259; p. 323). Applicant stated Victim then gasped for air, stopped crying, and she put him in his crib.

(Tr. p. 259; p. 323). She informed the officers she later discovered he was lifeless and gave a false report of his death to the 911 operator. (Tr. pp. 259-260). Applicant indicated she had a hysterectomy around the time of Victim's death and believed it might have been affecting her behavior. (Tr. p. 264; p. 324).

Next, Sergeant Isenhoward took Applicant to his cubicle in order to take a written statement from her. (Tr. p. 264). Sergeant Isenhoward recorded Applicant's written statement at 3:56 p.m. after informing her of her rights. (Tr. p. 267; p. 270). In the statement, Applicant admitted the following about Victim's death:

On that day [Victim]'s mother dropped him off at my house at [my address]. He arrived there at around 8am. He was sick with a cold and was very fussy. I fed him when he arrived that morning and laid him down for a nap. I got him up at around 9:00-9:30 am and changed his diaper. I fed him his second bottle at around 10am. He was still fussy and I couldn't pacify him. He was sick and full of cold. I went on about dealing with all of the other children and he was crying the whole time. It was naptime and I still couldn't pacify him. I picked him up and held him in my arms. I tried to pacify him and rock him to sleep. He was not responding to it. He was still crying very loudly. He was whining and I didn't want the other children to wake up. I put my hand over his nose and mouth and held it there for 15-20 seconds. [Victim] got quiet. When I took my hand off he took a deep breath and it appeared to me that he fell asleep. He wasn't moving and I carried him into the daycare room. I put him in his crib. I went and cleaned up the house and straightened up the kitchen and living room. That took about 15-20 minutes. I got worried because he had been crying all day and now he wasn't crying anymore. I went into the daycare room and checked on [Victim]. I picked him up and he wasn't breathing. I immediately tried to give him mouth-to-mouth resuscitation. He wasn't responding to it. I called 911. A short while after that the ambulance arrived and took him to the hospital.

(Tr. pp. 273-274; State's Ex. #9 at Tr.). Applicant indicated she felt her actions were responsible for Victim's death, stating: "Yes. I should have chosen a different way to handle him. I should not have put my hand over his face. It was not my intent to kill him. I just wanted him to go to

sleep. I am so sorry.” (Tr. pp. 278-279; State’s Ex. #9 at Tr.). Applicant concluded the statement by stating:

I cannot convey how sorry I am. I should have taken a step back. If I could change things I would. I’m tired of holding on to this. It feels good to say it to someone. I know this is going to change things in my life with my friends but it is the right thing to do. I was wrong for what I did. I want to ask for forgiveness and move on in my life.

(Tr. p. 280; State’s Ex. #9 at Tr.). After the statement was prepared, Applicant reviewed each page and signed it multiple times. (Tr. pp. 280-283). In addition to Sergeant Isenhoward, Chief Wilson witnessed Applicant sign the statement. (Tr. pp. 275-276).

After making the statement, Applicant alerted Sergeant Isenhoward she wanted to apologize to Victim’s parents. (Tr. pp. 283-284). He offered her a blank piece of paper to write a letter to Victim’s family, and Applicant wrote an apology. (Tr. pp. 284-285). In the apology letter, Applicant stated: “Please forgive me and know it was not my intention to cause you such loss. I didn’t want to hurt him. But I did. I should have stopped & walked away. What I did was wrong and I’m so sorry.” (Tr. p. 286).

Subsequently, Applicant was arrested and indicted for homicide by child abuse. After a renewed investigation into Victim’s death, the coroner’s report was amended on April 18, 2008, to reflect a cause of death of cardiac arrest due to asphyxiation due to hand over mouth, and the manner of death was ruled a homicide. (Tr. p. 189). Applicant was also indicted for two additional counts of Homicide by Child Abuse for the deaths of two other infants who died while in Applicant’s care. The State intended to call all three cases to trial together. (August 12, 2008 Motions Hearing Tr.). Upon motion of Applicant’s trial counsel, the trial court ruled that the cases must be severed, making a specific finding that the charges could not be tried together because they did not arise out of a single chain of circumstances. (August 12, 2008 Motions

Hearing Tr.). The trial court also denied the State's motion to reconsider this ruling (August 28, 2008 Motions Hearing Tr.).

On October 30, 2009, Applicant, alongside her counsels Douglas Strickler and Fielding Pringle, appeared for a Jackson v. Denno hearing before Judge Lee to determine if Applicant's statements were admissible. At the hearing, the State called four witnesses: Captain James S. Smith of the Richland County Sheriff's Department; Lieutenant James E. White of the Richland County Sheriff's Department; Investigator Kevin Isenhoward of the Richland County Sheriff's Department; and Chief David Wilson of the Richland County Sheriff's Department. After examination and cross examination of all witness, the Court ruled that Applicant's statements were "made freely and voluntarily and without coercion or threats or promises" and were admissible. (Jackson v. Denno Hearing Tr.)

Applicant then proceeded to trial. During trial, Victim's mother and Fortson testified about their experiences on the day of Victim's death. (Tr. pp. 116-117; pp. 152-157). Additionally, the investigating officers testified about the circumstances surrounding Applicant's statements to law enforcement. (Tr. p. 215; pp. 255-256; p. 321). The officers confirmed no threats, force, coercion, or interrogation techniques were employed to elicit Applicant's statements. (Tr. p. 223; p. 231; p. 245; p. 261; p. 308; p. 334; pp. 338-339). They further testified Applicant was cooperative, remorseful, relieved, and volunteering of her statements. (Tr. pp. 245-246; p. 260; p. 309; pp. 335-336; p. 339). The officers denied suggesting any details or information to Applicant during the interviews. (Tr. p. 245; pp. 298-299; p. 308; p. 322).

During Chief Wilson's testimony, the following exchange occurred while the solicitor was questioning the witness:

[Solicitor]: Once she had made that statement, the written statement, did you have any contact with her that day?

[Witness]: I did.

[Solicitor]: And not on this case --

[Witness]: No.

[Solicitor]: Not on any matter --

[Witness]: No.

[Solicitor]: -- concerning this event?

[Witness]: No, sir.

[Defense Counsel]: Objection, Your Honor. I have a matter of law to take up.

[Trial Judge]: Yes, sir. You can approach.

(Tr. p. 329). The trial judge then conducted a bench conference with counsel, noted an objection for the record, and allowed questioning to continue. (Tr. p. 330). Following the bench conference, the solicitor did not ask any additional questions regarding the objected-to line of questioning. (Tr. p. 330).

Subsequently, outside the presence of the jury, the trial judge acknowledged Applicant made a mistrial motion based on an allegedly improper question asked to Chief Wilson. (Tr. pp. 371-372). Applicant asserted the reference to law enforcement contact with Applicant related to another matter or charge "raised the speculum of additional charges" and warranted the grant of a mistrial. (Tr. p. 372). The trial judge noted earlier testimony established Applicant had been contacted by officers in another matter. (Tr. p. 373). The trial judge concluded that "[w]hile . . . it probably would have been best for the question and the answer not to have been given," Applicant had not been prejudiced. (Tr. p. 373). The trial judge then prohibited any further discussion of the matter during trial and denied Applicant's motion for a mistrial. Tr. p. 373).

In addition to the officers' testimony, the State presented testimony from several medical experts. (Tr. p. 340; p. 397; p. 423). First, Dr. Armstrong testified about his findings during his autopsy of Victim. (Tr. p. 342). Dr. Armstrong opined the cause of Victim's death was suffocation. (Tr. pp. 349-350). He testified it would have been unusual for Victim's mild case of pneumonia to be fatal. (Tr. p. 350). He noted the reported time line of Victim being well and then deceased within two and a half hours was too rapid of a time period for Victim to have died of pneumonia. (Tr. p. 351). He further noted his findings of brain swelling, blue coloration in Victim's fingernails and extremities, and redness in the lungs were consistent indicators of strangulation. (Tr. p. 347; pp. 351-353). When questioned about the lack of external signs of strangulation, he testified placing one's hand over a child victim's nose and mouth would hardly ever leave detectible marks. (Tr. p. 370). Based on his review of all available information, Dr. Armstrong concluded Victim was suffocated, and he testified he would have had this opinion in December of 1998 if all the available information would have been available at that time. (Tr. pp. 349-350; p. 353).

Dr. Clay Nichols, the chief medical examiner for Richland County and an expert in forensic pathology, testified he reviewed all the available information regarding Victim's death, including the autopsy report, the emergency room report, Applicant's statements, Victim's medical records, information from law enforcement, and tissue samples from Victim's lungs. (Tr. pp. 397-398; pp. 399-400). Based on his analysis, Dr. Nichols testified Victim died of asphyxiation due to suffocation. (Tr. p. 400). He opined Victim's mild case of pneumonia was insufficient to cause death. (Tr. pp. 400-401). He testified Victim's fine health two and a half hours prior to his death and the reported timeframe of his death were inconsistent with a death caused by pneumonia. (Tr. pp. 401-401). He noted Applicant's admission of responsibility for

Victim's death was consistent with his findings. (Tr. p. 421). Additionally, he noted it was quite common to find no marks present on the body of a suffocated child. (Tr. p. 403).

Finally, Dr. Gratin Smith, a pediatrician and an expert in the field of pediatrics, testified about his review of the records and information related to Victim's death. (Tr. pp. 423-424). Dr. Smith testified he found a small amount of pneumonia present in Victim's lungs, with the signs of pneumonia confined to only a portion of one of Victim's lungs. (Tr. p. 429). He stated an infant dying of pneumonia typically would exhibit obvious symptoms of fast breathing, increased exertion to expand the lungs, fatigue, and a struggle to breathe. (Tr. p. 430). Dr. Smith testified the obvious signs of critical illness and respiratory failure would have been noticeable several hours before the child's death, with a death from pneumonia taking days. (Tr. pp. 430-431). Based on his analysis and review, Dr. Smith concluded Victim did not die of pneumonia. (Tr. pp. 431-432).

Subsequently, the State rested, and Applicant moved for a directed verdict. (R. p. 295). Applicant asserted the State failed to prove the corpus delicti of the charged offense independent of her confession. (Tr. p. 449). After hearing argument from counsel, the trial judge determined there was sufficient evidence establishing the corpus delicti of the offense. (Tr. p. 456). Therefore, after viewing the evidence in a light most favorable to the State, the trial judge denied Applicant's motion. (Tr. pp. 457-458). Applicant then renewed her motion for a mistrial, and the trial judge again denied the motion after finding Applicant was not prejudiced. (Tr. pp. 458-459).

Applicant's husband, Rodney Person testified first on Applicant's behalf. (Tr. pp. 481-501). He testified that he met Applicant while both were students at the University of North Carolina at Chapel Hill (Tr. pp. 482-483). He testified that his entire family, including

Applicant, was very close with Victim and his family. (Tr. pp. 486-487). He testified that his wife ran a day care out of their home and she cared for Victim every day. (Tr. pp. 488). He testified that he went to the hospital on the day of Victim's death and Applicant was "extremely upset . . . crying, pacing." (Tr. p. 490). He testified that on April 17, 2007, he learned that Applicant was at the Richland County Sheriff's Department and he went to check on her. (Tr. p. 491). He testified that he spoke with Investigator Isenhoward, whom he had met previously and he described as "respectful," who asked Rodney if his wife had any history of mood swings. (Tr. pp. 492-494; p. 498). Rodney testified that his wife "can be naïve when it comes to dealing with people" and that "she is more trusting than most people." (Tr. p. 494).

Applicant testified next on her own behalf. She testified that she went to the University of North Carolina at Chapel Hill on a "full ride scholarship" and that she was only four credit hours short of graduating when she left school to get married. (Tr. pp. 503-504). She testified that she was very close with Gina, Victim's mother, and had cared for Victim's siblings in addition to Victim. (Tr. pp. 509-510). She testified that at the time of Victim's death, she had been running a day care out of her home for approximately five years. (Tr. pp. 506-507). She testified that she had cared for Victim since he was approximately six weeks old. (Tr. p. 511). She testified that on the day Victim passed away, he arrived at her home at 7:30 a.m. and was "fussy." (Tr. pp. 512-513). She testified that she rocked him in her arms in an attempt to make him comfortable and stop his crying. (Tr. p. 513). She testified that she fed him a bottle of milk, followed by a bottle of juice when he was still fussy. (Tr. p. 514). She testified that following this second bottle, she put Victim down for a nap, and after an unknown period of time, she found him face down in a pool of fluid. (Tr. p. 516-517). She testified that she took him into the living room, placed him on the floor, called 911, and began to perform C.P.R. (Tr. pp. 517-519).

She testified that she went to the hospital to check on Victim and was told that he had walking pneumonia and his lung had collapsed. (Tr. pp. 522-523).

Applicant testified that she was interviewed by Investigator Isenhoward on April 2, 2007 at her home. (Tr. p. 525). Thereafter, on April 11, 2007, she testified that she voluntarily went to the Richland County Sheriff's Department where she was interviewed by Investigator Isenhoward. (Tr. pp. 525-526). She testified that she was asked to return a few days later for another interview and she agreed. (Tr. p. 526). She testified that she voluntarily returned to the Sheriff's Department on April 17, 2007, where she was interviewed by several officers. Applicant disputed the officers' testimony and claimed the officers were aggressive, accusatory, forceful, threatening, and unwilling to accept her initial denial of responsibility. (Tr. pp. 530-531; p. 541). She testified the officers suggested scenarios about how Victim could have been killed before she eventually began to go along with their stories out of desperation to go home. (Tr. pp. 533-534; p. 539; p. 544). She attributed the inculpatory portions of her statements and apology letter to the officers and stated they were lying about the circumstances of the interview. (Tr. pp. 547-548; pp. 589-590). However, she admitted she was fully aware of her rights and knew she did not have to sign any statements and was allowed to leave at any time during the interview. (Tr. p. 543; pp. 568-569; p. 578). She offered no explanation as to why she did not leave the interview while armed with this knowledge. (Tr. p. 570).

Also testifying in Applicant's defense was Dr. Kim Collins, the former chief medical examiner of Charleston County and an expert in forensic pathology, who testified she reviewed all of the available information regarding Victim's death. (Tr. pp. 601-602; 605-606). Dr. Collins testified that excluding Applicant's statements and only considering the information available in 1998, she would have concurred in the original finding of pneumonia as the cause of

death. (Tr. p. 606; p. 608). She opined Victim's pneumonia, which she characterized as moderate, was significant enough to be the cause of death. (Tr. pp. 608-609; p. 618; pp. 621-622). Therefore, Dr. Collins testified there was not a sufficient basis in the autopsy information alone to change the diagnosis to one of asphyxiation. (Tr. p. 634). However, Dr. Collins conceded she had changed her opinion regarding a cause of death in the past after receiving additional information, and she acknowledged a forensic pathologist cannot exclude statements when determining the cause of death. (Tr. p. 641). Dr. Collins further acknowledged there were no signs of a serious case of pneumonia in the autopsy information. (Tr. p. 641). However, based solely on the autopsy findings, she testified she believed the cause of death to be pneumonia. (Tr. p. 652). However, based on her review of all the available information, Dr. Collins opined the cause of Victim's death was asphyxiation due to smothering based on Applicant's statements. (Tr. pp. 652-653).

After lengthy voir dire, both in camera and in front of the jury, and over objections from the State, Applicant presented testimony from Dr. Saul Kassin, a Distinguished Professor in Psychology at the John Jay College of Criminal Justice and a part time Professor of Psychology at Williams College. (Tr. pp. 812-812). He testified that he has focused his research and teachings on the field of false confessions and police interrogations. (Tr. 816-819). He testified as to what is a false confession and trademark characteristics of confessions that have been deemed "false." (Tr. p. 826-838; pp. 841-847). He testified of the importance of recordings of law enforcement interrogations when determining the likelihood of a confession being false, stating that it is sometimes "impossible" to determine whether a statement is credible without a recording<sup>4</sup>. (Tr. pp. 838-840). He testified regarding common police interrogation tactics and

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<sup>4</sup> It is undisputed that Applicant's interview with law enforcement was not recorded, as was the common practice of the Richland County Sheriff's Department at the time.

risk factors for false confessions. (p. 840-867). Finally, Dr. Kassin testified as to a three pronged approach for analyzing the reliability of confessions, including: 1) assessing the suspect, his vulnerabilities and the situation in which the suspect was placed; 2) whether the suspect gave a detailed narrative and whether the narrative was accurate; and 3) from where did the details of the narrative come. (Tr. pp. 868-871).

At the conclusion of the evidentiary phase of trial, Applicant renewed her motion for a directed verdict, and the motion was again denied. (Tr. pp. 875-876). At the conclusion of trial, the jury convicted Applicant of homicide by child abuse. (Tr. pp. 998-989). The trial court then sentenced Applicant to a term of imprisonment of twenty-two years. (Tr. p. 589).

#### **SUMMARY OF TESTIMONY PRESENTED**

At the evidentiary hearing, Applicant testified on her own behalf and presented testimony from Dr. Saul Kassin, Dr. Marc Harari, and trial counsel Douglas Strickler. Respondent presented testimony from trial counsel Elizabeth Fielding Pringle.

Dr. Saul Kassin (hereafter "Kassin") testified first for Applicant. He testified that he has been focusing his studies and research on the area of false confessions for the past twenty-five years and has authored or co-authored several books, chapter of books, and articles on the topic. He testified that the field of false confessions is a "very well developed field" with numerous published articles, books, chapters of books, and funded grants. Additionally, he testified that several amicus briefs on the topic have been submitted to the United States Supreme Court. He testified that he frequently presents at law schools, law groups, and conferences and has been admitted as an expert in both state and federal court. He testified that he has been admitted as an expert in South Carolina in four trials (including Applicant's trial), as well as one post-conviction relief action. Applicant offered Kassin as an expert in social psychology in the field

of false confessions. Kassin testified that he does not ever testify as to the ultimate conclusion and that he has no opinion as to whether Applicant's own confession is false. Following extensive voir dire and objection from the State<sup>5</sup>, this Court admitted Kassin as an expert, finding that as he was admitted as an expert at trial, he would therefore be allowed to testify as an expert during the post-conviction relief proceedings.

Kassin testified that there are three different types of false confessions: Voluntary, Compliant, and Internalized. He testified that Compliant and Internalized false confessions are both induced by coercion. He testified that he does not know the rate or scope of false confession, but could point to several prevalent examples in the American psyche, such as prisoners of war or the Salem Witch Trials. He testified that he thinks that Applicant's confession could possibly be a compliant false confession, where an innocent person knows they did not commit the alleged act, but becomes so "broken" that he or she confesses. He testified that it is always preferable to have a video recording of an interrogation when analyzing whether the confession could be false, but that an audio recording is also helpful. He acknowledged that Applicant's interview with law enforcement was not auditory or visually recorded, which makes it significantly harder – if not impossible – to determine if the confession could be false.

Kassin testified that there are common personality traits exhibited by those who are more likely to give false confession, including:

1. Age, with youths and juveniles being more likely to give false confessions;
2. Mental Acuity, with those who have a lower IQ being more likely to give a false confession;
3. Mental Illness, with those who suffer from more significant mental illness being more likely to give a false confession;
4. Anxiousness and/or Delusions; and
5. Suggestibility or Compliance.

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<sup>5</sup> The State objected to Kassin being admitted as an expert, citing a lack of empirical study in his field, a lack of error rate, and the strong reliance of anecdotal evidence and ad hoc case studies.

He testified that being innocent is another risk factor, as it makes a suspect more likely to waive his rights and "believe in justice and that innocence will prevail." Additionally, he testified that those without prior run-ins with law enforcement and those that "haven't been through the system before" are also at an increased risk to give a false confession. Kassin also testified that "high stress, grief, food or sleep deprivation" are also more likely to produce a false confession.

Kassin testified that in the present case, if he was called during the Jackson v. Denno hearing, he would have been able to testify as to the risk factors of false confessions and how they related to Applicant's specific case. He acknowledged that he was able to inform the jury of these risk factors during his trial testimony, but testified that he was not able to discuss Applicant's polygraph test, the length of time that she was interviewed, or the significance of the two other deceased children while he was before the jury. Additionally, he testified that he would have been able to testify regarding dispositional risk factors, such as Applicant's personality traits and how those would make her more or less likely to provide a false confession, though he readily admitted that he has never met Applicant and did not do a personality or any other assessment on her. However, he acknowledged that Applicant does not meet many of his risk factors, as she is a middle-aged, highly educated woman with a background in psychology, who has run her own business for several years and has no history of mental illness. Kassin recognized that he would have needed an audio or video recording to best analyze Applicant's confession and would have been significantly hampered since no recording was available for his review. Kassin testified that he would not have testified to an ultimate conclusion at the Jackson v. Denno hearing, but would have merely provided factors to make one more susceptible to false confession to the court to aid in its decision naming. He testified that he would have never opined that Applicant's confession was false and that this is something that

needs to be determined by the trier of fact. He testified that he could not recall if he was contacted by Applicant's trial counsel regarding possibly testifying at her Jackson v. Denno hearing. However, he readily acknowledged that he did not take notes when he discussed Applicant's case with her trial counsel.

Next, Applicant presented testimony from Dr. Marc Harari (hereafter "Harari"), a clinical psychologist licensed in South Carolina. He testified that he received his Bachelors of Arts in Psychology from Rutgers University in May, 1994 and his Ph.D. in Counseling Psychology from the University of Akron in August, 2002. He testified that he has been working in the psychology field since 1994 and his primary focus has been in counseling. He testified that he has no previous training or education involving coercion or false confessions and that he has never reviewed any articles or other materials on the topic of false confessions or coercion. He testified that he has been qualified as an expert in South Carolina state courts over 45 times, with nearly all cases involving family court actions involving juveniles. He testified that he has never been found unqualified as an expert. Following voir dire, this Court admitted Harari as an expert in the general field of psychology.<sup>6</sup>

Harari testified that he was contacted by Applicant's counsel on September 23, 2013 and asked if he could perform expedited psychological testing in anticipation of Applicant's post-conviction relief hearing the following week. He testified that he informed Applicant's counsel that he could do a psychological evaluation on interpersonal characteristics of Applicant. He testified that Applicant's counsel provided him with his only collateral information, including: that Applicant was diabetic, that three children had died in Applicant's care in situations that Applicant's counsel characterized as "classic SIDS and overheating," that Applicant was put

<sup>6</sup> Respondent had no objection to Harari's testimony as to the general field of psychology, but objected to any expert testimony regarding false confessions or coercion, as Harari himself testified during voir dire that he had absolutely no background whatsoever in the field.

through what Applicant's counsel described as a "lengthy interrogation" including a polygraph test, that Applicant was seeking to overturn her convictions on claims that she was coerced by law enforcement to make a false confession and that her trial counsel was ineffective for not having this testimony excluded from trial, and that Applicant had retained a false confession expert to testify at her post-conviction relief hearing and needed an expert to testify as to her susceptibility to coercion. He testified that he and Applicant's counsel "brainstormed" how to measure the likelihood of one being susceptible to coercion, as he has no background in the field. He testified that he and Applicant's counsel determined the Minnesota Multiphasic Personality Inventory - Two - Restructured form (MMPI-2-RF), the Paulhus Deception Survey (PDS), and the Personality Assessment Inventory (PAI) would be "good indicators" as to one's susceptibility to coercion. He testified that his hypothesis was that "individuals who tend to be overly passive or lack assertiveness may experience mistreatment or exploitation of others, or they may conform to others in an effort to avoid being the focus of attention." (Psychological Report of Applicant p. 9). He testified that although the only information he was provided came exclusively from Applicant's counsel, including the overall objective of his report, and that he was being paid by Applicant's counsel to generate such a report for use in this hearing, he tried to be "as objective as possible" and "not blindingly biased." A copy of Harari's CV and of his report was introduced into evidence as Applicant's Exhibits #1 and #2.

Harari testified that he interviewed Applicant on September 25, 2013 at the Leath Correctional Institute. He testified that he did not interview or speak with any members of Applicant's family and his total time spent with Applicant was very brief; both of which limit the results of his findings. He testified that he administered three psychological tests: the MMPI-2-RF, the PDS, and the PAI. He testified that he selected the MMPI-2-RF and PMI because these

inventories are peer reviewed. He testified that he performed these tests with the specific focus of determining Applicant's susceptibility to coercion. He testified that these tests measure current personality characteristics and are not retroactive. He testified that there were no significant or moderate findings of deception or malingering for any of the three tests administered, which he believes indicates that he was able to collect accurate data from Applicant. He testified that based on his interview and testing, Applicant experiences situational distress directly related to her incarceration, including missing her family. He testified that he found no evidence that she suffers from any type of major clinical symptoms, sociopathic personality tendencies, or any personality disorders. He testified that the psychological testing data derived from the PAI and the MMPI-2-RF resulted in moderate elevation in scales pertaining to interpersonal passivity, conforming tendencies, and meek characteristics that may show Applicant has difficulty standing up for herself. Harari testified that based on his hypothesis that "individuals who tend to be overly passive and lack assertiveness may experiment mistreatment or exploitation by other, or may conform to others in an effort to avoid being the focus of attention," the results of his psychological testing show that Applicant's passive-submissive interpersonal tendencies may make her more susceptible in coercive situations. However, he acknowledged that this is only a hypothesis and he has no training or background on false confessions or coercion.

Following Harari, Applicant testified on her own behalf. She testified that she is currently forty-six years old, has been married to her husband Rodney for twenty-four years, and has two children that are both college students. She testified that she met Rodney while attending the University of North Carolina at Chapel Hill on a full scholarship. She testified that she had a history of performing well academically and was majoring in psychology. She

testified that she left college with only a few credit hours still needed for her psychology degree so that she could get married. She testified that she has no history of mental health concerns and her only significant physical health problem is diabetes, which she monitors daily. She testified that she has been fully employed since college, working at a telephone bank, nursing home, and then eventually running an in-home day care since 1992.

Applicant testified that while operating her day care, three small children died over a nine year period from 1998 to 2007. She testified that at the time of the final infant's death in 2007, she was operating her day care without a license in clear violation of the Department of Social Services (DSS) and with more children than allowed by DSS. She testified that after the third death in 2007, law enforcement visited her home and asked her to come to the Richland County Sheriff's Department for an interview. She testified that she voluntarily came to the sheriff's department on April 11, 2007 for an interview and was allowed to leave after a few hours. She testified that she was asked to return for a subsequent interview and polygraph examination a few days later and she again voluntarily agreed to return.

Applicant testified that she voluntarily returned to the sheriff's department on April 17, 2007 around noon for the subsequent interview and polygraph examination. She testified that she is diabetic and had taken her insulin on that morning, but not her pills; she could not recall if she had eaten anything that morning. She testified that she was under financial pressures due to her loss of her DSS licensure for day care, but acknowledged that she had been illegally operating her day care without a license for some time when the final child passed. She testified that she was also under stress from learning that her husband may have fathered a child with her best friend. She testified that she signed a Waiver of Rights form and that she fully understood those rights and the implications of waiving those rights, which she had also testified to at trial.

She testified that she voluntarily took a polygraph test because she wanted to help law enforcement. She testified that she thought the interviews and polygraph would only involve the last child's death and was surprised when she was asked about Victim's death. She testified that the polygraph lasted less than three hours and she was informed that she did not "clear" the polygraph test at its conclusion. She testified that she became stressed, desperate to go home, and was intimidated by law enforcement officers who demanded to know what had happened to Victim. She testified that she was also feeling the effects of low blood sugar, was irritated, and had a headache. She testified that it was at this time, approximately three hours after the interview first began, when she gave her first verbal statement regarding Victim's death. She testified that she then repeated her statement to at least two more law enforcement officers. She testified that she then used the restroom, but that she was escorted to and from the restroom, which she found to be threatening. However, she acknowledged that this was after she had given multiple statements implicating herself in Victim's death.

Applicant testified that she then signed an additional Waiver of Rights form, which she testified at trial was signed voluntarily and knowingly. She testified that following the signing of a second Waiver of Rights form, she gave a written statement implicating herself in Victim's death. She testified that she also gave statements implicating herself in the death of the second infant who died while under her care. She testified that she was arrested that evening.

Applicant testified that Douglas Strickler and Elizabeth Fielding Pringle were appointed to represent her shortly after her arrest. She testified that she was incarcerated for seventeen months before she was released on bond. She testified that she met with her attorneys frequently and that the meeting frequency increased as the trial drew closer. She testified that members of her family also met with her attorneys. She testified that she was involved with her case and

discussed possible defenses to put forth at trial, witnesses that could or should be used at trial, as well as expert witnesses. She could not recall if her attorneys consulted with any outside polygraph examiners or experts. She testified that she knew her attorneys intended to call Dr. Collins as a witness and that she knew that Dr. Collins would testify that the physical condition of Victim supported death due to pneumonia.

She testified that her confession was always a primary focus in her case and that she discussed using Kassin as an expert witness regarding false confessions and police interrogations. She testified that she informed her attorneys that the confession was her own words, but that it was false and the result of coercion. She testified that she could not recall they discussed the possibility of him testifying at a Jackson v. Denno hearing. She testified that she discussed whether she should testify at the hearing with her attorneys and that all ever in agreement that she should not testify at this hearing. She testified all were also in agreement that they would not call her husband as a witness.

Applicant testified that she was indicted for three counts of Homicide by Child Abuse, one count for each infant that died while under her care. She testified that the State intended to try all three cases together, but that her counsel moved to sever the cases. She testified that she discussed this decision with her attorneys and that all agreed it would be best for her to have three independent trials. She testified that she wanted the cases severed so that the jury would not hear about the deaths of all three babies. She testified that because of this, the jury would not be able to hear how long her interviews with law enforcement were, as large portions of the interviews dealt with the other two deceased infants. She testified that her severance motion was successful and the State only called Victim's case to trial.

Following Applicant's testimony, Respondent called Elizabeth Fielding Pringle, Esquire (hereafter "Pringle") to testify. She testified that she has been practicing law since 1996 and is the Chief Public Defender for Richland County. She testified that before joining the Richland County Public Defender's Office, she was a staff attorney at the South Carolina Supreme Court. She testified that Douglas Strickler (hereafter "Strickler"), the Chief Public Defender for the Fifth Judicial Circuit, was appointed to represent Applicant in April, 2007 and that she joined the case a co-counsel in May, 2007. She testified that she met with Applicant "too many times to count," as well as meetings with members of Applicant's family with regularity. She testified that she also spoke to Applicant and Applicant's family by phone regularly as well. She testified that this was a "very complex" and "different kind of" case because it involved the deaths of three infants over a ten year period. She testified that the case involved extensive investigation, man-hours, and preparation due to the complexity. She testified that Applicant was "very helpful" and "very informed," as well as played an active role in her defense. She testified that Applicant is very intelligent and well-educated and understood what was occurring with her case. She testified that she filed and renewed all appropriate discovery materials and reviewed all discovery materials with Applicant multiple times.

She testified that the State wanted to call all three cases to trial at once and her and co-counsel's goal was to have the cases severed. She testified that it was "completely improper" to have joined the cases, as they involved different victims who died in different manners over a ten year period. She testified that the inflammatory nature to a jury of three deceased babies would be impossible to get beyond and that severance was crucial. She testified that she discussed severance with Applicant, who was very agreeable. She testified that Judge Lee granted their severance motion and the State ultimately called Victim's case to trial.

Pringle testified that Applicant voluntarily came to the Richland County Sheriff's Department on April 17, 2007 to be interviewed and submit herself for a polygraph examination. She testified that this was six days after Applicant had previously been interviewed at the sheriff's department and was allowed to leave following the interview. She testified that Applicant gave her conflicting information as to whether or not she had taken her diabetes medication or insulin that morning, and also could not recall if she had eaten prior to arriving at the sheriff's department. She testified that Applicant's inability to clearly remember the events on April 17, 2007 was a continuing issue during her representation and gave her concern regarding Applicant's ability to testify at trial. She testified that Applicant voluntarily signed a Waiver of Rights form before the polygraph examination and Applicant told her she understood the rights she was waiving. She testified that Applicant was told that she "did not clear" the polygraph test and at this point gave her first verbal statement implicating herself in the death of Victim.

She testified that she sought funding in 2008 to have an independent evaluation of the polygraph test and report. She testified that she retained John Hartley and Tom Williams, both who have extensive background regarding polygraph testing. She testified that both experts reviewed the polygraph report and informed her that Applicant's second polygraph test was invalid. She testified that both informed her that the second polygraph was invalid because Applicant was asked about multiple victims, but that it showed "marked deception." She testified that both experts reported that the results clearly showed deception on Applicant's part in both the first and second set of tests. She testified that Tom Williams informed her that Applicant was "totally deceptive" during the polygraph examination. She testified that she did not want to bring up the polygraph tests at the Jackson v. Denno hearing based on what her two

independent experts each reported. She testified that she is sure she discussed this with Applicant and Kassin.

Pringle testified that Applicant informed her that her confession was voluntarily, but false. Pringle testified that Applicant informed her that she felt threatened because the officers thrust their fists, put their hands on the table, and ran their hands through their hair. She testified that Applicant gave her statement multiple times to multiple different officers before memorializing the statement in writing. She testified that Applicant gave these statements after signing multiple Waiver of Rights forms, and that these forms were comprehensive, Applicant understood these forms and what her rights were. Additionally, Pringle testified that Applicant was properly given Miranda warnings before she gave her statement. She testified that although Applicant was at the sheriff's department for a total of approximately seven-and-a-half hours before she was arrested, Applicant had only been at the sheriff's department for approximately three hours when she first gave her statement. She testified that the voluntariness of the statements was never at issue. She testified that after giving her statement regarding Victim, she also made statements that implicated her in the deaths of the other two children in some form.

She testified that based on her discussion with Applicant regarding the confession, her and co-counsel Strickler sought out Kassin as a potential expert witness regarding false confessions "early on" in their representation of Applicant." She testified that she had tried to use Kassin as an expert before, but that he is "very selective" in which cases he becomes involved with and had decline her prior request. She testified that Kassin agreed to become involved in Applicant's case and that she communicated with him by email and phone. She testified that Kassin never evaluated Applicant, which is his common practice. She testified that Kassin would testify regarding the particular characteristics and traits that make one more likely

to give a false confession, which are very much like the factors analyzed at a Jackson v. Denno hearing, as well as explain the phenomena of false confessions to the jury. She testified that she is certain that she discussed the possibility of Kassin testifying at a Jackson v. Denno hearing with Kassin and Applicant, and she has specific notes in her file indicating that she discussed this with Kassin in August, 2008. She testified that she has participated in "dozens and dozens" of Jackson v. Denno hearings and that she has never won one. She testified that as Applicant freely admitted her confession was voluntary, albeit false, there was no significant benefit in presenting witnesses or making an argument at the Jackson v. Denno hearing. She testified that any benefit was also significantly hampered by Applicant's own inability to remember key aspects of the day of the interview and the interview itself, including whether she had eaten, whether she had taken her medicine, and specific things the officers did to intimidate her. Additionally, she testified that while there were some risk factors that would make Applicant susceptible, they were minimal and not enough to convince the court that her will was overborne to the extent that the statement would be excluded. Pringle testified that Applicant had extreme anxiety about testifying and also did not want the State to know this before her testimony at trial. Pringle testified that after fully discussing the issue with Strickler and Applicant, all were in agreement to not present any witnesses at the Jackson v. Denno hearing, especially Kassin and Applicant, as they did not want to give the State a preview of the testimony that would be presented at trial.

Pringle testified that she and Strickler discussed the possibility of having Applicant evaluated by a psychologist prior to trial. Pringle testified that she discussed mental illness with Applicant, and Applicant revealed that she has no history of mental illness personally or within her family. Pringle testified that she consulted with Dr. Geoffrey McKee, a psychologist in Columbia that she has frequently consulted with and has a good working relationship, regarding

Applicant's case. Pringle testified that Dr. McKee recommended that Applicant not be tested for suggestibility, because the psychological testing available, such as the MMPI-2-RF, the PDS, and the PAI, are not "normed" for this type of situation where one is being interrogated by law enforcement. Pringle elaborated that Dr. McKee did not think these tests would be useful and could possibly be harmful for Applicant, as Applicant did not fit many of the trademark characteristics of one who would be easily coerced, such as age and intelligence. Pringle testified that the main characteristics the defense wanted to show the jury were that Applicant was very naïve, passive, and sheltered, which she was able to show the jury through Applicant's own testimony and the testimony of her husband. Pringle testified that she thinks these qualities were exemplified to the jury during both Applicant and her husband's testimony at trial.

Pringle testified that she and Strickler discussed the need for an independent pathologist to testify on Applicant's behalf at trial. She testified that she knew Dr. Collins through her reputation, which she described as "outstanding," "exemplary," and "best in the area regarding children." She testified that Dr. Collins is the medical examiner for Charleston County and is known to be a very "even handed expert." She testified that she and Strickler discussed Dr. Collins' findings with her before trial and expected her testimony to be that Applicant had a more severe case of pneumonia than the State's experts had concluded. She testified that at trial, Dr. Collins presented the strongest testimony regarding the physical evidence that Victim had significant pneumonia when he died. Additionally, she knew Dr. Collins' testimony would be that vomiting was not consistent with suffocation and that possible signs of suffocation were not present on Victim. She testified that Dr. Collins would also testify that the blue fingernails and penial gland found on Victim were indicative of pneumonia, not asphyxiation. She testified that she was aware that Dr. Collins would testify that if you include the confession, then smothering

would be the likely cause of death. However, she testified that Dr. Collins' testimony was needed to show that absent the confession from Applicant, which they asserted was coerced, the physical evidence showed that Victim died of pneumonia.

Following Pringle's testimony, Applicant called Strickler in reply. During Strickler's testimony, Applicant entered Applicant's Exhibits #3-8, all memoranda or notes Strickler prepared and from his file, without objection from Respondent. Strickler testified that he and Pringle had discussed the possibility of having Applicant evaluated and retaining a psychologist, but that they ultimately decided against it for the reasons already testified to by Pringle. He testified that he, Pringle, and Applicant discussed the possibility of calling Kassin and Applicant as witnesses at the Jackson v. Denno hearing, but ultimately made a strategic decision not to do so after considering all factors. He testified that he was aware Kassin was controversial and did not want the State to have a chance to preview his testimony before trial. He elaborated that he did not want reveal such significant portions of Applicant's case weeks before trial, especially when there was very, very little chance that her statement would be excluded. In regards to Dr. Collins, he testified that he knew Dr. Collins by her outstanding reputation and that she had testified in countless homicide cases involving children. Strickler testified that he met with Dr. Collins in Charleston, as well as discussed the case with her by phone. He testified that she would provide the strongest testimony possible that Victim had died from a significant case of pneumonia based on the physical evidence. He testified that he was aware that she would testify that once the statement was taken into account, Dr. Collins would agree with the findings of suffocation, as a confession is often one of the only ways to determine suffocation. However, he testified that as Applicant's argument was that her confession was false and made due to coercive interrogation tactics, he needed strong testimony that the physical evidence pointed to death due

to pneumonia, which only Dr. Collins could provide to the jury. Strickler testified that he highlighted this to the jury during his closing argument. See Tr. p. 913. He testified that although he knew that Dr. Collins would ultimately conclude that Victim died by asphyxiation if she considered the confession, he was surprised by the way she said it during cross-examination.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

#### *Ineffective Assistance of Counsel*

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, the Applicant has failed to carry her burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Ineffective Assistance of Counsel during the Jackson v. Denno Hearing*

Applicant asserts that counsel was ineffective for during the Jackson v. Denno hearing, arguing that counsel failed to properly prepare for the hearing, failed to call witnesses or offer testimony at the hearing, failed to effectively cross-examine the State's witnesses, failed to make any sort of argument to the judge regarding the voluntariness of the statement, and failed to advise Applicant on the importance and implication of the hearing or her right to testify at it. This Court finds that Applicant has failed to meet her requisite burden of proof in regards to this allegation. First, the Court finds that Applicant has failed to establish any deficiencies in counsel's representation in regards to the Jackson v. Denno hearing. The uncontroverted testimony reveals that Applicant, Pringle, and Strickler discussed the Jackson v. Denno hearing numerous times and weighed benefits and risks of making an argument or calling witnesses at the hearing. Pringle and Strickler testified that they both had represented countless defendants in Jackson v. Denno hearings and that the success rate for exclusion of a statement was extremely

low, which they advised Applicant. Additionally, Pringle and Strickler testified that there was no valid ground on which to challenge the voluntariness of Applicant's statement, as Applicant readily admitted that she voluntarily and knowingly waived her rights multiple times and gave a voluntary statement which she insisted was false. Pringle and Strickler both testified that there was no reasonable chance of convincing the court that Applicant's will was so overborne that her statement should be excluded, especially when Applicant possessed so few of the risk factors that Kassin would testify regarding. Counsels testified that they considered calling Kassin as a witness at the hearing, and even discussed the matter with him, but ultimately decided it would be best to reserve his testimony for trial, as there was an extremely low likelihood that Applicant's statement would be suppressed and they did not want to give the State a preview of his controversial testimony weeks prior to trial. Additionally, Pringle testified that Applicant was extremely anxious and nervous about testifying and they also did not want the State to have notice of this before trial. Furthermore, counsels testified that they discussed having Applicant evaluated and consulted with a trusted psychologist, who advised against doing so as there was a significant likelihood it would not be in Applicant's best interest.

Based on the foregoing, this Court finds that counsel was well beyond prepared for the Jackson v. Denno hearing, had amply prepared Applicant for this hearing, and together, all three made a strategic decision that it was in Applicant's best interest not call witnesses or present an argument to avoid revealing their case to the State weeks before trial, particularly in light of Kassin's controversial and widely criticized methodology<sup>7</sup>. This Court finds that this strategy was valid and prudent based on all testimony presented, and therefore, counsels' performances were not deficient. See Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) ("[W]hen

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<sup>7</sup> This Court finds Kassin's methodology troubling but qualified him as an expert to align with Judge Lee's ruling at trial.

counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, we must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). This Court finds that counsels' performance went well beyond the standard of reasonableness according to professional norms, and therefore Applicant has failed to establish any deficiency regarding this allegation. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

*Ineffective Assistance of Counsel for calling Dr. Collins and/or properly preparing her*

Applicant asserts that counsels were ineffective for calling Dr. Collins as an expert witness and/or for failing to properly prepare Dr. Collins for her trial testimony. This Court finds that Applicant has failed to carry her necessary burden of proof in regards to this allegation. First, the Court finds that Applicant has failed to establish any deficiencies in counsels' representation in regards to the decision to call or prepare Dr. Collins for trial. Counsels testified that Dr. Collins has an exemplary reputation for her expertise in child homicide cases and that she was known for her "even handed" expert opinions. Strickler testified that Dr. Collins, the medical examiner for Charleston County, testifies frequently and he was very pleased that she agreed to take on this case as an expert on Applicant's behalf. Strickler testified that met with Dr. Collins in Charleston to review Applicant's case, as well as discussed the case with her by phone multiple times. Both counsels testified that they knew Dr. Collins would provide the

strongest testimony regarding Victim's pneumonia being significant and in better alignment with the physical symptoms than smothering. Additionally, both counsels testified that they were aware that Dr. Collins would testify that if provided with Applicant's confession, the medical opinion would likely be asphyxiation by smothering. However, both counsels testified that they were surprised with the manner in which she said this, but not the underlying proposition. Strickler testified that regardless of this, Dr. Collins testimony was still necessary, as she was the only witness who could provide the jury with expert testimony that Victim's pneumonia was pervasive and significant enough to be fatal and that the physical symptoms better coincided with death by pneumonia than by smothering. Additionally, Strickler testified that as Applicant's underlying defense was that the confession was false, he wanted to highlight to the jury that the medical expertise showed pneumonia was the cause of death absent this false and coerced confession. In his closing argument, Strickler did highlight to the jury that it was solely their role to determine whether Applicant's confession was false, not Dr. Collins, who was strictly there to provide expert testimony on the medical evidence surrounding Victim's death. Based on the aforementioned, this Court finds that Applicant has failed to meet her burden of establishing deficiency of counsels' performance in regards to Dr. Collins' testimony. This Court finds that counsels' decision to call Dr. Collins as an expert was of sound and reasonable strategy. See Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his

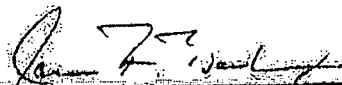
application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 22 day of JANUARY, 2014.

  
\_\_\_\_\_  
JAMES R. BARBER, III  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

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Case No. 2012-CP-40-4268

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Andrea Person, #00338104,.....Petitioner,

v.

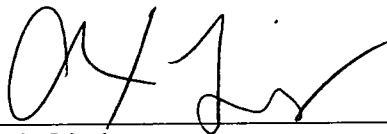
State of South Carolina.....Respondent.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Respondent State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on February 27, 2014, addressed to its attorney of record, Megan Harrigan, Esquire, Assistant Attorney General, Post Conviction Relief Section, S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211-1549.



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Alexis Lindsay  
Sowell Gray Stepp & Laffitte, LLC  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

Attorney for Petitioner

February 27, 2014

February 27, 2014

**VIA HAND-DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
1231 Gervais Street  
Columbia, South Carolina 29211

RE: Andrea Person #338104 v. State of South Carolina  
Civil Action No.: 2012-CP-40-4268  
Our File No.: 0998/1702

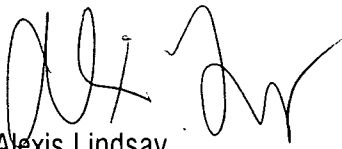
Dear Mr. Shearouse:

We represent Applicant/Petitioner Andrea Person #338104 in the above-referenced matter. Enclosed are the original and one copy of our Notice of Appeal and Proof of Service along with this Firm's check in the amount of One Hundred and 00/100 Dollars (\$100.00) representative of the filing fee. I would appreciate your filing the original and returning a filed-stamped copy via our courier.

By copy of this letter and as evidenced by the Proof of Service, I am serving a copy of same upon counsel for the Respondent.

Also enclosed is my correspondence to the Richland County Clerk of Court filing same. Please let me know should you have any questions.

Respectfully,



Alexis Lindsay

AKL:ksa

cc: Megan Harrigan, Assistant Attorney General (via U.S. Mail)

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FEB 26 2014

S.C. Supreme Court

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FEB 27 2014

S.C. Supreme Court



February 27, 2014

Page 2

Litigation is our Business.

Honorable Jeanette McBride, Clerk of Court, Richland County (via hand-delivery)  
Kimberly McCall, Administrative Coordinator, South Carolina Commission on Indigent  
Defense (via U.S. Mail)

February 27, 2014

RECEIVED

FEB 26 2014

S.C. Supreme Court

**VIA HAND-DELIVERY**

The Honorable Jeannette McBride  
Judicial Center  
1701 Main Street, Suite 205  
Columbia, South Carolina 29201

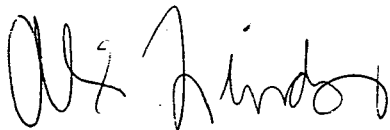
RE: Andrea Person #338104 v. State of South Carolina  
Civil Action No.: 2012-CP-40-4268  
Our File No.: 0998/1702

Dear Ms. McBride :

Enclosed please find two copies of a Notice of Appeal and Proof of Service, the originals of which are being filed in the South Carolina Supreme Court. I would appreciate your filing as appropriate and returning a filed-stamped copy to me via our courier.

Thank you for your assistance in this matter.

Respectfully,



Alexis Lindsay

AKL:ksa

cc: Megan Harrigan, Assistant Attorney General (via U.S. Mail)  
Honorable Daniel E. Shearouse, Clerk, South Carolina Supreme Court (via hand-delivery)  
Kimberly McCall, Administrative Coordinator, South Carolina Commission on Indigent  
Defense (via U.S. Mail)