

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Court of Common Pleas, Oconee County  
Honorable R. Lawton McIntosh

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Circuit Court Case No. 2014-CP-37-0133  
Appellate Case No. \_\_\_\_\_

**RECEIVED**

MAY 24 2016

**S.C. SUPREME COURT**

Matthew Hinton, 345044, ..... Appellant,

v.

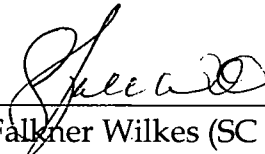
State of South Carolina, ..... Respondent.

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NOTICE OF APPEAL  
(PCR CASE)

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Appellant hereby appeals the judgment of the Court of Common Pleas dismissing his action for post conviction relief, **ORDER OF DISMISSAL** signed by the Honorable R. Lawton McIntosh, entered of record on March 22, 2016, and received by Appellant's counsel Robert C. Childs, III, on March 23, 2016. A motion for Reconsideration/Rule 59 was timely served and filed on March 30, 2016, by the Appellant seeking post trial relief. The Court denied the Appellant's post trial motion by **Form 4**, signed by the Honorable R. Lawton McIntosh, entered of record on April 21, 2016, and received by Appellant's counsel Robert C. Childs, III, on April 25, 2016. A copy of said order(s) is/are attached hereto and made a part hereof.



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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Honorable R. Lawton McIntosh

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Matthew Hinton, 345044, ..... Appellant,

v.

State of South Carolina, ..... Respondent.

CERTIFICATE OF SERVICE

I certify that on May 19, 2016, I served Appellant's notice of appeal and attached orders on the Respondent, and others if indicated, by placing a copy in the U.S. Mail, first class, postage prepaid, addressed as follows, and by electronic means if indicated:

Patrick L. Schmeckpeper, Esq.  
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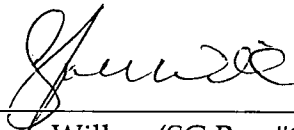
*Counsel for Respondent*

*Also to:*

Honorable Beverly H. Whitfield  
Clerk of Court  
PO Box 678  
Walhalla, SC 29691-0678

Hon. Daniel E. Shearouse, Clerk  
Supreme Court of South Carolina  
P.O. Box 11330  
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Respectfully submitted,



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*Counsel for Appellant*

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-37-0133

Matthew Taylor Hinton, #345044

State of South Carolina

FILED OCONEE COUNTY, SC  
BEVERLY H. WHITFIELD  
CLERK OF COURT

PLAINTIFF(S)

DEFENDANT(S)

2016 APR 21 A 11:01

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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.  See Page 2 for additional information.
- 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**

**APPLICANT'S MOTION FOR RECONSIDERATION DENIED; DETERMINED WITHOUT HEARING**

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT 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.

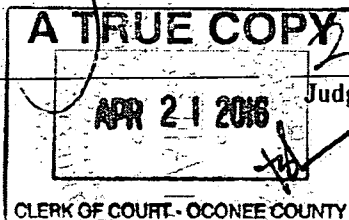
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

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

SCRPC Form 4C (03/2013)



Judge Code

Date

4-14-16



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Matthew Hinton,  
S.C.D.C. No. 345044,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS

) FOR THE TENTH JUDICIAL CIRCUIT

) C.A. No. 2014-CP-37-0133

ORDER OF DISMISSAL

FILED OCONEE COUNTY SC  
SERVING J. WHITFIELD  
CLERK OF COURT  
2015 MAR 22 A 11:54

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 4, 2014. Respondent made its Return on or about July 7, 2014. An evidentiary hearing into the matter was convened on February 9 and 10, 2015, at the Oconee County Courthouse. Applicant was present and was represented by Robert C. Childs, III, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsels, Gordon Senerius, Esquire and Brittany Senerius, Esquire, testified, as Lindsey did Simmons, Esquire, of the Tenth Circuit Solicitor's Office. Denise Richardson also testified. This Court had before it a copy of the trial transcript, the records of the Oconee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the December 2009 term of the Oconee County Grand Jury for homicide by child abuse (2009-GS-37-1347). He was represented by Gordon Senerius, Esquire, and Brittney Senerius, Esquire. On February 28, 2011, Applicant proceeded to trial before the Honorable Alexander S. Macaulay. On March 3, 2011, Applicant was convicted as charged. Judge Macaulay sentenced him to imprisonment for a period of forty-one (41) years.

A timely Notice of Appeal was filed on Applicant's behalf and perfected pursuant to Anders v. California<sup>1</sup> by Robert M. Dudek, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals dismissed the appeal in an unpublished opinion. State v. Hinton, Op. No. 2013-UP-104 (S.C. Ct. App. filed March 13, 2013).

### Allegations

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully due to over one hundred (100) violations of his right to the effective assistance of trial and appellate counsel. His specific allegations are addressed below.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, appellate records, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the

<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2016), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court has found that Applicant has not met his burden with respect to any of his roughly one hundred (100) allegations of ineffective assistance of counsel. This Court finds that the testimony of Applicant and Ms. Richardson was not credible. On the other hand, Mr. Senerius, Ms. Senerius, and Assistant Solicitor Simmons each provided credible and compelling testimony. In addition, this Court finds that a large number of Applicant's allegations are frivolous and facially deficient. Many misapprehend applicable law; some are too vague for this Court to form a definitive ruling on; and still others are supported by no credible evidence in the record or were not addressed at the evidentiary hearing. In summary, Applicant has used the post-conviction relief forum to attack and second-guess nearly every facet of his attorneys' performances in what this Court can only conclude arises out of a profound misunderstanding of Strickland<sup>2</sup> as it relates to the right to effective assistance of counsel.

#### **Summary of State's Evidence and Testimony from Applicant's Trial**

Ashley Bright testified to her relationship with Applicant after the child-victim was born. Tr. p. 70-80. Ms. Bright worked to support the five month old child-victim while Applicant cared for the 5 month old. She was of the impression that her relationship with Applicant was souring. Ms. Bright testified that Applicant hid his relationship with her and the paternity of the child-victim from his family. When Applicant's mother visited, he told her that Ms. Bright was his "roommate." Applicant stayed up the night before the incident playing video games. On August 16, 2009, Ms. Bright woke around 11:00 a.m. and soon left for her noon to five shift at

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<sup>2</sup> Strickland v. Washington, 466 U.S. 668 (1984).

the Seneca movie theatre. She noted that the child-victim appeared fussy due to the fact that she just started teething; otherwise the child-victim appeared normal. Tr. p.75. Ashely testified that text messaged Applicant to check on the child-victim throughout the day. Around 2:10 p.m., she received an unusual text from Applicant that "he did not want my mom coming over, and I didn't understand why because he never had a problem with her coming over." Tr. p. 77. She received a subsequent text messaged from Applicant that "If [Ms. Bright's mother] steps one foot in this apartment, he would leave." Tr. p. 77. Near the end of Ms. Bright's shift, Applicant texted messaged her "I can't hold my eyes open so [child-victim] and I are laying down... [child-victim] won't sleep unless I'm holding her, so we're both gonna be in the bed. Please try not to wake us." Tr. p. 77.

Ms. Bright testified that she returned to the apartment after 5:45 p.m. Throughout the afternoon, Ms. Bright periodically checked on Applicant and the child-victim. "I would check in probably every 45 minutes. And I wouldn't go in. I wouldn't turn the light on because I didn't want to wake anyone... I would walk in to make sure that no blankets were over her face or pillow or nothing like that and to make sure that they were covered and everything." Tr. p. 79. At one point, Ms. Bright entered the bedroom and noted that the child-victim's leg was cold; Ms. Bright repositioned the blanket over the leg; she also observed that the child-victim was breathing heavy. Tr. p. 84. Ashely testified that she performed the checks in between watching episodes of Law & Order, SVU, on Netflix. Tr. p. 83. Ms. Bright was instant that she followed Applicant's instructions and did not move child-victim from the bed. Tr. p. 84.

Around 11:00 p.m., Ms. Bright heard Applicant's outburst that child-victim was not breathing. He attempted C.P.R.; E.M.S. arrived almost right after she phone 911. Tr. p.85. The

child victim was first transported to Oconee Medical; however, she was later transported to Greenville Memorial Children's Hospital. Tr. p. 86. When speaking with Dr. Gwyn at the Greenville hospital, Applicant disclosed that the child-victim had recent problems with reflux. Ms. Bright testified that Applicant had changed his version his story hours later:

Q: Specifically what did [Applicant] tell you?

A: He told me he was giving her a shower and she slipped, and when she did, he grabbed her by one leg and one arm across her chest and pulled up into his chest and that her head hit his clavicle.

Q: Was it unusual that he would have showering with your five-month old?

A: It was, he had given her a bath, but never a shower.

Tr. p. 87. Ms. Bright testified that Applicant told her, "[i]n Greenville we were getting ready to leave, and he told me that if I would take the rap for this, that I wouldn't get very much jail time because I had no previous criminal history." Tr. p.89. The child-victim soon died as a result of suffering severe head trauma.

Paige Williams, Ashely's cousin, testified to driving Applicant and Ms. Bright to D.S.S. office the day after the incident. Tr. p. 155. She noted that Ms. Bright and Applicant were interviewed separately. Applicant made the following statement to Paige while he stood outside the office, smoking a cigarette waiting for Ms. Bright's interview to conclude and for his to begin: "He told me that he was giving her a bath in the bathtub and that when he was getting her out, she jerked and she started to slip and that she possibly hit her head on the sink." Tr. p. 156. Subsequently, Applicant approached Paige at a separate location and asked her, "If the police were gonna make an arrest, when would they make the arrest. And I told him that that would be after the autopsy, that that would determine if they had evidence or not as to what had happened." Tr. p. 156-57. Donna Bright, Ms. Bright's mother, testified that Applicant also made

a similar statement to her, "he said he dropped her in a the shower, and he said -- I mean giving her a bath. Those were his exact words to me. And he did say that she hit her mouth." Tr. p. 153.

Desmond Holland testified that he lived in the apartment below Applicant and Ms. Bright at the time of the incident in 2011. R. p. 107. He testified that on the day of the incident, about 2:45 p.m., he heard:

a boom and it sounded like a TV or something falling. That's when I turned around and walked upstairs, because usually they make noise but it wasn't that loud. So I walked upstairs and knocked on the door and nobody came, so I knocked again. I stayed there for about three minutes. All I heard was the dog scratching and the baby whimpering. So by this time I was, like, forget it. And I walked downstairs. I got back downstairs and I didn't even make it past the kitchen again where I heard it again. So this time I went back up there. I was a little aggravated because they didn't come to the door. So I knocked even harder, harder and harder, and this time all you heard was the dog, no baby, no nothing, nobody still came to the door.

Tr. p.200. He testified that he disclosed the account to police several days after the day of the incident with no suspicion of criminal activity from Applicant. Tr. p. 199.

Officers Roundy, Kelly, and Jones testified to their investigation on the case. Applicant gave a statement to his "bathtub version" to Officer Roundy at the Greenville Hospital. Tr. p. 117. Officer Kelly had already obtained a statement from Applicant that did not include the "bathtub version." Tr. p. 143.

The State presented 4 expert doctors in its case-in-chief, each of whom refuted Applicant's version of events and testified that the victim's injuries were inconsistent with accidental trauma.<sup>3</sup>

Applicant testified during the defense's case-in-chief to his version of the events on the day of the incident. Tr. p. 310-45. The Oconee County jury returned a guilty verdict after one

<sup>3</sup> Discussed infra, "Overwhelming Evidence of Guilt."

hour and six minutes of deliberations. Judge Macaulay commented the quality and professionalism of the attorneys involved with the trial. Tr. p. 406. Judge Macaulay also commented to the jury, after they reached a verdict, "that I'm satisfied that you gave both the State and the Defendant a fair and impartial trial." Tr. p. 408.

### **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), SCRCP; 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 (1985).

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 (1985). 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.

This Court would note that in the present case, Attorney Gordon Senerius was appointed to Applicant's case as substituted counsel after Attorney James H. "Chip" Price, retained counsel, was relieved on the matter. This posture affects the Strickland analysis. See Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) ("Alleged lack of investigation by the successor attorney was overcome by evidence that witness statements were made available by the first attorney"); U.S. v. Hall, 843 F.2d 408, 412 (10th Cir. 1988) (an alleged failure of the second counsel to confer with the defendant overcome by a showing that second counsel enjoyed complete cooperation with the first).

Also, in the present case, Attorney Gordon Senerius involved his entire firm on Applicant's case, retained a private investigator, sought out independent medical expert advice, and – most importantly – employed Attorney Britany Senerius for Applicant's case. The existence of co-counsel who can correct mistakes makes petitioner's claim tougher said U.S. v. Lloyd, 983 F.Supp. 738, 743 (N.D. Ill. 1997), *aff'd*. Lloyd v. U.S., 191 F.3d 456 (7th Cir. 1999). See also Bucklew v. Luebbers, 436 F.3d 1010, 1019 (8th Cir. 2006) (recognizing that it is not deficient for a team of attorneys to divide workload so that the failure of one attorney to interview was not deficient where another did).

### **Overwhelming Evidence of Guilt**

This Court finds the evidence of guilt against Applicant was overwhelming. Even if this Court were to assume Applicant's version of the events were true, the State still presented compelling and substantial evidence that he committed the offense of homicide by child abuse by

manifesting an extreme indifference to human life in neglecting to care for a critically injured child when he failed to act as a responsible parent and further acted to deliberately conceal the victim's injuries from others that could have acted to save the child's life. At trial, Applicant testified to his version of facts as follows: He was bathing the victim in the shower when she escaped his grasp and started to fall. Tr. p.320. During the victim's descent, Applicant testified he "grabbed her leg, grabbed her on her chest and just jerked up... which caused the victim to hit her head on Applicant's collarbone." Tr. p.320-21.

"S.C. Code Ann. § 16-3-85 (Supp.2001) defines the crime as follows: (A) A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002) (citing S.C. Code § 16-3-85)) (emphasis added). Despite Applicant testifying the incident caused him to experience "shock," the State presented compelling evidence that: (1) Applicant chose not to seek medical intervention; (2) he concealed victim's injuries from others, which thereby prevented the mother, grandmother, and concerned neighbor from having an opportunity to save the child's life; (3) his post-incident conduct created a compelling inference that he knew he had acted in a criminal manner.

The State presented evidence that Applicant initially attempted to hide the victim from her mother and grandmother, and keep anyone from discovering her injuries. Applicant sent inflammatory text messages to the child's mother where he demanded that Ms. Bright's mother not visit or enter the apartment on the afternoon of the incident. He even threatened to leave if Ms. Bright's mother entered the apartment. At the close of Ms. Bright's shift, Applicant sent her

a text message that said: "I can't hold my eyes open so [victim] and I are laying down... [victim] won't sleep unless I'm holding her, so we're both gonna be in the bed. Please try not to wake us." Tr. p.77 (emphasis added).

Applicant also ignored a concerned neighbor's attempts to talk with him. Applicant and Ms. Bright's downstairs neighbor, Desmond Holland, testified<sup>4</sup> that around 2:45 p.m. on the day of the incident he:

[heard] a boom and it sounded like a T.V. or something falling. That's when I turned around and walked upstairs, because usually they make noise but it wasn't that loud. So I walked upstairs and knocked on the door and nobody came, so I knocked again. I stayed there for about three minutes. All I heard was the dog scratching and the baby whimpering. So by this time I was, like, forget it. And I walked downstairs. I got back downstairs and I didn't even make it past the kitchen again where I heard it again. So this time I went back up there. I was a little aggravated because they didn't come to the door. So I knocked even harder, harder and harder, and this time all you heard was the dog, no baby, no nothing, nobody still came to the door.

Tr. p.200 (emphasis added).

Applicant's post-incident conduct further gives rise to a substantial inference that he was attempting to conceal his conduct – or at least limit his criminal liability. Applicant conveniently forgot to disclose the shower incident to the initial physicians that were attempting to save the victim's life. He maintained this forgetful posture in his initial statement to police on the night of the incident. Hours later, after the severity of the victim's injuries became apparent, Applicant expanded upon his story to Ms. Bright to include the "shower incident." Ms. Bright also testified that Applicant asked her to "take the rap" for future criminal charges concerning the victim's death when Applicant had sole custody of the child. Tr. p.89; see State v. Crawford, 362 S.C. 627, 636, 608 S.E.2d 886, 891 (Ct. App. 2005) (it is sufficient that circumstances justify an

<sup>4</sup> Holland testified he had no knowledge that the police were conducting a criminal investigation concerning an incident that occurred several days prior in the upstairs apartment when he spoke to police.

inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose). Applicant also asked Paige Williams "If the police were gonna make an arrest, when would they make the arrest?" Tr. p.156.

Thus, even if the medical evidence had corroborated Applicant's account, the State presented substantial and compelling evidence that still would have cemented his conviction. But the medical evidence did not corroborate Applicant's story, and in light of the expert testimony from the initial emergency room physician who treated the victim, two pediatric neurologists, and the pathologist who all uniformly rejected Applicant's version of the facts, this Court finds that the evidence of Applicant's guilt was utterly overwhelming.

Dr. Troup testified to a reasonable degree of medical certainty that the victim's head injuries would not have likely been caused by a fall or accident in the shower, and that the child-victim suffered head trauma within a twenty-four hour period based upon the blood density in the brain, acute progression of edema, swelling, in the brain. Tr. p. 237. Dr. Troup found retinal hemorrhaging and occipital brain hematoma, consistent with severe whiplashesque head trauma consistent with "shaking baby syndrome" Tr. p. 234-36. Dr. Gwyn testified that scans revealed that the child "had diffuse cerebral edema, swelling of the brain; that she had left-sided subdural blood, retinal hemorrhages. She had a right rib fracture, she had a definite right tibial fracture, and a presumed right distal femur fracture." Tr. p. 253. She testified to the extent of shaking baby syndrome and noted that retinal hemorrhages are caused by "rotational force" and not blunt force trauma. The pathologist, Dr. Woodard, testified that the child's bruising and rib fractures were consistent with forceful gripping "by a right hand grabbing the left lower back and the

thumb being placed against the hip.” Tr. p. 274. He found that the bruising was inconsistent with an injury caused by C.P.R. and that the fractures were inconsistent to a fall in a bathtub. Tr. p. 275; 281.

The various medical experts all agreed that the child sustained the fatal constellation of injuries within a twenty-four period when Applicant was the sole custodian of the child. In particular, Dr. Woodard testified:

the head injuries, the internal head injuries and the rib fracture all occurred in a similar time period. The leg injury could have occurred before this time period. But at the time that the head injury was incurred, I don't know if it was before or after the rib fracture occurred. Once the head injury occurred, the child would go unconscious and would proceed from unconsciousness into coma and finally a respiratory failure and death.

Tr. p. 282-83. (emphasis added). Dr. Woodard testified that the head injury would have occurred eight hours or less from when EMS was contacted around 11 p.m. on the night of the incident.

Tr. p. 283.

Because Applicant's version of facts was thoroughly refuted by the medical evidence, the jury readily saw Applicant's ill-conceived design to escape culpability for what it really was: a manufactured fabrication. It is telling that the jury convicted Applicant in one hour and six minutes despite hearing medical testimony complex to the layperson, and despite the experienced defense team's diligent efforts in challenging the State's case. See Dugas v. Coplan, 428 F.3d 317, 335 n.28 (1st Cir. 2005) (The court has looked not only to the strength of inculpatory evidence, but also the brevity of the jury's deliberations). As a result, this Court finds the evidence presented by the State against Applicant was overwhelming.

#### **Failure to Investigate**

Applicant raises a number of allegations concerning counsel's purported failure to conduct a thorough investigation. Each of these is without merit. Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation." Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). Accordingly, the controlling standard for counsel's duty to investigate is *reasonableness*. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011). So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient. Id. at 457, 710 S.E.2d at 65.

5. "Trial counsel was ineffective and deficient in his investigation and preparation for trial, including but not limited to failure to interview witnesses of the Applicant, failure to fully review all discovery provided by the State, failure to request a review of the South Carolina DSS file, failure to thoroughly interview the Applicant, failure to prepare Applicant for his trial testimony and a general failure to develop a defense strategy for the case."

#### Failure to Review Discovery

Concerning counsel's purported failure to request a review of Applicant's DSS file related to the incident, this Court find Applicant has failed to show prejudice. Applicant did not produce his full DSS file at the evidentiary hearing or introduce it into evidence. In fact, the only DSS record entered into evidence was a DSS Form 3070 that found, in part, that the injuries to the victim were "determined to be caused by [Applicant]," and that there was "[n]o evidence of [the victim's mother] causing harm to [the victim]." (Exhibit 16). Therefore, it is "merely speculative that counsel's alleged deficient performance was prejudicial to [Applicant]." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Glover v. State, 318 S.C. 496, 498,

458 S.E.2d 538, 540 (1998) (noting mere speculation and conjecture on the part of Respondent is insufficient to substantiate allegation that counsel's deficient performance was prejudicial to respondent). This is particularly so in light of the overwhelming evidence of guilt against Applicant. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (finding no reasonable probability of a different result where there is overwhelming evidence of guilt). This allegation is therefore denied and dismissed.

*Failure to Thoroughly Interview Applicant*

Applicant has failed to meet his burden with respect to this allegation. Applicant has not presented any evidence that counsel's interview of Applicant was, in any way, deficient. This allegation is therefore denied and dismissed.

*Failure to Prepare Applicant for Trial Testimony*

Applicant's allegation that he was not sufficiently prepared by counsel to testify is entirely refuted by the counsel Gordon Senerius's credible testimony. Counsel Gordon Senerius stated at the evidentiary hearing that he went through Applicant's testimony with him, although he did not remember exactly how many hours. Counsel acknowledged that he did not go over specific questions with Applicant, but only because it would have sounded rehearsed. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel). This allegation is therefore denied and dismissed.

*General Failure to Develop a Trial Strategy*

Both of Applicant's trial counsels testified credibly on numerous occasions as to their general theory of the case, as well as trial strategy on specific issues. This allegation is therefore denied and dismissed.

30. "Trial counsel was ineffective and deficient in failing to adequately review Netflix account regarding episodes watched."

Counsel testified that he did not see any purpose in going over the Netflix records and that they did not corroborate or contradict anything. He testified he probably agreed to let the Netflix records in without objection because it was "not a germane issue" and there was no argument Ms. Bright was not in the house. This Court finds that this fit in with counsel's overarching strategic decision not to pursue a third-party guilt theory against Ms. Bright, discussed *infra*, as there was no direct or strong circumstantial evidence to support such a theory. Applicant's assertion that the Netflix records somehow change this equation is as utterly vague as it is unsupported by the record. This is particularly true in light of what this court has found was an overwhelming evidence against Applicant. See Harris, supra. This allegation is therefore denied and dismissed.

35. "Trial counsel was ineffective and deficient in failing to accurately determine what time EMS arrived."

Applicant did not present any evidence on this allegation at the evidentiary hearing. It is therefore denied and dismissed.

43. "Trial counsel was ineffective and deficient in failing to review the cell phone records concerning the 911 call, including but not limited to, the cell phone records concerning the 911 calls by the victim's mother were not reviewed."

Applicant failed to present any evidence on this allegation at the evidentiary hearing. Counsel Brittany Senerius said that there were no discrepancies or issues with the 911 calls. She said that Applicant told Ms. Bright to call 911, and did not alert her to anything at that time. Because Applicant has failed to meet his burden with respect to this allegation, it is denied and dismissed with prejudice.

44. "Trial counsel was ineffective and deficient in failing to follow up on how victim's mother arrived home on the day of the incident, including but not limited to, the victim's mother did not have a driver's license."

Applicant has failed to present any evidence with respect to this allegation. In any event, even if taken as true, this Court fails to see how counsel's purported failure to follow up on this information could have possibly prejudiced Applicant. Applicant never contested the underlying fact that the victim's mother was present in the house the night of the incident. Moreover, it was counsels' combined strategy not to appear hostile to what they characterized as a grieving and sympathetic mother. This allegation is therefore denied and dismissed with prejudice.

67. "Trial counsel was ineffective and deficient in failing to investigate the victim's grandmother's alleged injuries.

Applicant did not present any evidence on this allegation at the evidentiary hearing. It is therefore denied and dismissed with prejudice.

71. "Trial counsel was ineffective and deficient in failing to investigate and introduce the statements made to DSS and the DSS investigation."

Applicant did not present any evidence on this allegation at the evidentiary hearing. It is therefore denied and dismissed with prejudice.

84. "Trial counsel was ineffective and deficient in failing to properly investigate and interview Desmond Holland."

Applicant has failed to meet his burden here. Counsel Brittany Senerius testified credibly that she was prepared to cross-examine Mr. Holland. She said she used Mr. Holland's statement to police during her cross-examination. Counsel Brittany Senerius also testified – again, credibly – that the knowledge that Mr. Holland may have known Ms. Bright from high school would not have affected her cross-examination. She said that she was concerned with the noise he heard and why he did not follow up on it or call anyone if it was as bad as he said it was.

This Court finds that counsel's investigation in this matter was entirely reasonable. Counsel had Ms. Holland's statement to police and had a valid strategy in conducting her cross-examination. Applicant has therefore failed to meet his burden to show deficient performance.

Applicant has also failed to show prejudice. First, Applicant did not bring Mr. Holland in to provide the testimony counsel purportedly missed as a result of her investigation. To the extent Applicant is alleging some sort of foul play between Mr. Holland and Ms. Bright, he has not presented any supporting evidence to support such a claim. While it is certainly Applicant's prerogative to raise any issue he feels is meritorious, no matter how minor or inconsequential, this Court will not fill in the gaps of his case and assist him in meeting his burden with rampant speculation. See, e.g., Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result"); Lorenzen v. State, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (mere speculation insufficient to meet burden to establish that counsel was ineffective). Regardless, as the evidence against Applicant

was overwhelming, he has failed to meet his burden with respect to this allegation. It is therefore denied and dismissed.

88. "Trial counsel was ineffective and deficient in failing to investigate Desmond Holland's criminal record."

Applicant did not present any evidence on this allegation at the evidentiary hearing. It is therefore denied and dismissed with prejudice.

95. "Trial counsel was ineffective and deficient in failing to request or examine the x-rays showing the alleged injuries, including but not limited to, x-rays reflecting the injuries alleged being done on a portable unit of less accuracy."

Counsel testified that she was not sure whether the reliability of the portable x-rays was an issue. Applicant did not present any evidence – from an expert or otherwise – that was indicative of the relative reliability of a portable x-ray unit when compared to any other type of x-ray taking device. In any event, counsel testified that that the rib fractures reflected in the portable x-rays was confirmed by the autopsy. Because Applicant has failed to meet his burden to show either deficiency or prejudice with respect to this allegation, it is denied and dismissed.

#### **Failure to Request a Change in Venue**

6. "Trial counsel was ineffective and deficient in failing to request a change in venue due to pre-trial publicity."

This Court finds Applicant has failed to meet his burden with respect to this allegation. Under South Carolina law, the relevant question in determining whether a change of venue is required "is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." Sheppard v.

State, 357 S.C. 646, 655, 594 S.E.2d 462, 467 (2004). It is the defendant's burden to demonstrate actual juror prejudice resulted as a result of such publicity. Id.

Counsel Gordon Senerius testified that he was not concerned with the publicity in the case. Further, the trial court acknowledged to the jury that there had been publicity in the case, and gave them extensive instructions on it. Tr. p. 44-45; see also Foye v. State, 335 S.C. 586, 590 n. 1, 518 S.E.2d 265, 267 n. 1 (1999) (A jury is presumed to follow instructions). Counsel said that he was satisfied with the judge's instruction. Finally, Applicant has failed to present any evidence that he was prejudiced as a result of his trials' venue. In light of the judge's instruction and counsel's credible testimony on the matter, this Court finds Applicant has failed to show that a change in venue was necessary, or that failure to request a change in venue affected the fairness of Applicant's trial. This allegation is therefore denied and dismissed.

#### **Failure to Excuse Jurors for Cause**

Applicant's next allegations center around counsel's purported failure to excuse various jurors "for cause."

7. "Trial counsel was ineffective and deficient in failing to excuse Juror Makinson for cause, including but not limited to Juror Makinson's daughter was good friends with the victim's mother and Juror Makinson had read articles in the newspaper concerning the case and Makinson was not challenged for cause."

8. "Trial counsel was ineffective and deficient in failing to excuse Juror Todd for cause, including but not limited to, Juror Todd's daughter worked for the Solicitor's Office, was not challenged for cause, trial counsel failed to request additional voir dire of her and this resulted in a defense strike being used on this juror."

This Court finds Applicant has failed to meet his burden with respect to either of these allegations. While the Sixth and Fourteenth Amendments to the United States Constitution proved a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. State v. Stanko, 376 S.C. 571, 577, 658 S.E.2d 94, 96-97 (2008); see also State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (a defendant is not entitled to the jury of his or her choice); Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 765 (“a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury”). The Constitution, after all, “does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.” Stanko at 97, 658 S.E.2d at 576 (citing Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)).

The process of jury selection inherently falls within the expertise and experience of trial counsel. Magazine at 617, 606 S.E.2d at 764 (citing Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)). In a PCR proceeding, an applicant must provide credible evidence that the trial attorney’s refusal to strike a juror prejudice the defense.

Applicant has failed to present any credible evidence that his right to a trial by a competent and impartial jury was violated. Both Jurors Makinson and Todd were excused by the defense and did not participate in trial. Tr. p. 30. Applicant has not presented any evidence that counsel’s failure to strike either jury member “for cause” resulted in an unfair or impartial jury. This allegation is therefore denied and dismissed.

### **Failure to Raise Batson<sup>5</sup> Objection**

Applicant next alleges counsel was ineffective for failing to raise a Batson challenge to one of the State's juror strikes.

9-10. "Trial counsel was ineffective and deficient in challenging the strike of Juror Bonilla pursuant to Batson v. Kentucky, including but not limited to, by failing to consult with the Applicant on individual juror selections and in general failing to properly exercise challenges, strikes, additional voir dire and Batson v. Kentucky challenges."

Applicant did not present any evidence on this allegation at the evidentiary hearing. It is therefore denied and dismissed with prejudice.

### **Failure to Object to State's Opening Statement**

Applicant raised several allegations related to his counsels' purported failures to object to comments made by the State during opening statements:

11. "Trial counsel was ineffective and deficient in failing to object to prosecutor's injection of her personality into the case during the opening statements."

12. "Trial counsel was ineffective and deficient in failing to object to the prosecutor's testimony on evidence in opening statement."

Applicant has failed to meet his burden with respect to these allegations. Opening statements serve to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented. State v. Kornahrens, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1983). "The solicitor is permitted in opening statement to outline the facts the

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<sup>5</sup> Batson v. Kentucky, 476 U.S. 79 (1986).

state intends to prove. Id. "As long as the State introduces evidence to reasonably support the stated facts, there is no error." Id.

Applicant has not presented any evidence that the solicitor failed to introduce evidence to reasonably support the facts put forth in the opening statements. Applicant has also failed to raise any applicable case or law forbidding a solicitor from "inject[ing]... her personality into [a] case during opening statements." From a strategic perspective, trial lawyers may refrain from objecting to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality. See U.S. v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991); Julius v. Johnson, 840 F.2d 1533, 1538-39 (11th Cir. 1988) (recognizing counsel's tactical decision not to make an objection that would cause undue focus on an issue by the jury). Counsel testified credibly that, in his experience, jurors do not like interruptions, and that he wanted the jury to be sympathetic to his client. See also Julius v. Johnson, 840 F.2d 1533, 1538-39 (11th Cir. 1988) (That an objection would cause undue focus by the jury was another tactical reason).

This Court also finds Applicant has not met his burden to show any resulting prejudice from these purported deficiencies. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. Moreover, this Court finds the comments were not prejudicial in light of the overwhelming evidence of guilt. See Harris, supra.

### **Failure to Call Witnesses**

Applicant brought forward one claim that counsel was ineffective in failing to call specific witnesses.

81. "Trial counsel was ineffective and deficient in failing to call Melinda Nicholson, who collected the wet towel."

87. "Trial counsel was ineffective and deficient in failing to call Desmond Holland's fiancé to the stand, including but not limited to, in that Desmond Holland's fiancé may have contradicted his testimony."

This Court finds Applicant has failed to meet his burden with respect to this allegation. An Applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence. Dempsy v. State, 363 S.C. 365, 369, 310 S.E.2d 812, 814 (2005). Applicant did not call Melinda Nicholson or Desmond Holland's fiancé as a witness at the evidentiary hearing or otherwise offer either of their testimony in accordance with the rules of evidence. These allegations are therefore denied and dismissed with prejudice.

### **Failure to Assert Third Party Guilt**

Applicant's next allegation involves counsel's purported failure to assert third party guilt at trial:

97. "Trial counsel was ineffective and deficient in failing to show the victim's mother was at fault in the injuries and trial counsel was ineffective and deficient in failing to even raise the possibility at trial."

Applicant has also failed to meet his burden with respect to this allegation. While a party may, under certain circumstances, introduce evidence at trial that the crime they are charged with

was committed by another person, this Court finds counsels' decisions not to pursue a third party guilt defense was motivated by a valid trial strategy. See Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Counsel Brittany Senerius testified that Ms. Bright appeared to be a "grieving mother" on the witness stand, and that their trial strategy – based on the sensitivity of the case – was to poke holes in the State's case through other witnesses rather than "hound" her. Further, both of Applicant's also explained that there was no evidence of third party guilt. Counsel Brittany Senerius said that, in her discussions with Applicant, he never indicated third party guilt or that anyone else may have been responsible, but only that he could not explain the situation. Counsel Gordon Senerius testified that third party guilt is "a difficult road to hoe." He said that he had pursued it in the past when he had direct evidence, but that in Applicant's case, there was not even any strong circumstantial evidence that anyone else had committed the crime. He said there were no leads on third party guilt.

Because counsels' decisions not to pursue third party guilt at trial was part of a valid trial strategy, this Court finds Applicant has failed to meet his burden to show deficient performance. Applicant has also failed to show prejudice. Applicant did not present any evidence or credible testimony at the evidentiary hearing that would lead this Court to question the outcome of his proceeding, or to conclude that Ms. Bright was anything more than a grieving mother. This allegation is therefore denied and dismissed.

#### **Counsel's Opening Statement**

Applicant next challenges his counsel's opening statement at trial.

13. "Trial counsel was ineffective and deficient in failing to introduce his client to the jury in the opening statement."

103. "Trial counsel was ineffective and deficient in failing to present proper background information on the plaintiff to the jury, including but not limited to, in that the Applicant served in the military, graduated from T.R. High School, grew up in an area similar to Oconee and had steady employment history."

This Court finds Applicant has also failed to meet his burden to prove these allegations. There is no Constitutional right to give an opening statement or oral argument except the right to provide a closing argument. Herring v. New York, 422 U.S. 853, 863 n.13 (1975). Challenges to the timing of opening statements, including the decision whether to make one at all, are resolved as a matter of trial tactics. U.S. v. Rodriguez-Ramirez, 777 F.2d 454, 458 (9th Cir. 1985).

Counsel also testified at the evidentiary hearing that Applicant's character was not an issue at in the case. This Court finds that testimony credible and compelling. Still, counsel was able to elicit beneficial testimony from Applicant about his military service during the trial, Tr. p. 325-26, and got Applicant to testify that he graduated high school in Greenville, South Carolina, and was employed up until around the victim's birth. Tr. p. 311-312. Counsel informed the jury during closing argument that Applicant was medically discharged from the military. Tr. p. 415. Practically all of the information Applicant alleged his attorneys were constitutionally deficient for failing to put before the jury actually ended up before the jury. Accordingly, Applicant has not met his burden to show deficiency or prejudice. This allegation is therefore without merit and dismissed.

#### **Failure to Object to Leading Questions**

Applicant alleges his counsels were ineffective in failing to object to a number of leading questions.

26. "Trial counsel was ineffective and deficient in failing to object to leading question that Plaintiff's behavior was "odd" on multiple occasions."

28. "Trial counsel was ineffective and deficient in failing to object to leading questions about the child's sleeping behavior."

29. "Trial counsel was ineffective and deficient in failing to object to leading question that child's breathing was "odd."

32. "Trial counsel was ineffective and deficient in failing to object to leading question regarding victim's breathing."

33. "Trial counsel was ineffective and deficient in failing to object to victim's mother's statement saying that the Plaintiff woke up and the child was not breathing."

34. "Trial counsel was ineffective and deficient in failing to object to leading questions about CPR on the child."

37. "Trial counsel was ineffective and deficient in failing to leading and inflammatory question ("what point did the shower story emerge")

38. "Trial counsel was ineffective and deficient in failing to object to leading question using the term "odd."

41. "Trial counsel was ineffective and deficient in failing to object to continued leading questions by the prosecution."

47. "Trial counsel was ineffective and deficient in failing to object to hearsay and leading question, "Did you investigation reveal that the child had been in

Oconee County during the days and hours surrounding 8/16.”

53. “Trial counsel was ineffective and deficient in failing to object prosecutor’s characterization of this statement as “Story one, story two and story three.” ”

60. “Trial counsel was ineffective and deficient in failing to object to the continued leading questions that plaintiff’s behavior was “odd.” ”

83. “Trial counsel was ineffective and deficient in failing to object to the continued leading of witness by the prosecution.”

93. “Trial counsel was ineffective and deficient in failing to object to prosecution leading, the examining physician “that would be the kind of injury were talking about.”

This Court finds Applicant has failed to meet her burden with respect to the above allegations, as well. Similarly, failure to object to leading questions has been resolved as trial strategy not to be second-guessed by the courts. Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993). The Ninth Circuit has rejected claims of ineffective assistance of counsel for failure to object to these types of rules violations, noting that the appellant made no claim that the evidence was inadmissible without leading questions so the attorney could allow the leading questions without objecting. U.S. v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990); Bonin v. Vasquez, 794 F.Supp. 957, 969 (C.D. Cal. 1992), aff’d. 59 F.3d 815 (9th Cir. 1995).

Counsel Brittany Senerius said that she tried to watch for the solicitor testifying through leading, and would have objected if the leading was information that was important. Counsel Gordon Senerius testified that he does not object to every technical violation of the rules because juries may think he’s trying to hide something. Because these decisions were made pursuant to a

valid trial strategy – with counsels' respective credibility with the jury in mind – this Court finds Applicant has failed to show any deficiency with regard to these allegations.

This Court also finds that Applicant has also failed to show prejudice resulting from any of these purported deficiencies. Even if counsel was deficient, the alleged rule violations referenced above are each so miniscule as to preclude a finding of deficiency. They are therefore denied and dismissed.

#### **Failure to Object to Irrelevant Testimony**

In a number of allegations, Applicant states that counsel was ineffective for failing to object to irrelevant information.

16. Trial counsel was ineffective and deficient in failing to object to the relevance of Plaintiff's employment status.

17. Trial counsel was ineffective and deficient in failing to object to the relevance of the victim's mother's family helping the couple's financial condition and the Plaintiff's family not helping with that condition.

66. "Trial counsel was ineffective and deficient in failing to object to the relevance of the Plaintiff being unemployed and the victim's grandmother helping with the couples bills."

90. "Trial counsel was ineffective and deficient in failing to object to Desmond Holland's irrelevant testimony.

Applicant has failed to meet his burden on any of the above allegations. "Relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. As a general rule, evidence which is relevant is

admissible, and evidence which is not relevant is not admissible. Rule 402, SCRE. Applicant had the burden to prove that counsel was deficient in failing to object to the above statements – that they were irrelevant and that counsel did not have a valid trial strategy in choosing not to object – and that the deficiency prejudiced him. This Court finds Applicant has shown neither. As stated previously, counsel testified credibly that he does not typically object to every technical violation of the rules of evidence so that the jury does not think he is trying to hide something. Regardless, Applicant has failed to meet his burden to show prejudice. This is especially true in light of the overwhelming evidence of guilt in this case. Accordingly, these allegations are denied and dismissed.

#### **Failure to Object to Hearsay**

Applicant has raised a number of allegations concerning counsels' failures to object to hearsay. Hearsay is an out of court statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Hearsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examine the declarant. State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971). However, reversal is not required unless appellant was prejudiced by the error. State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985). State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150-51 (1985).

15. "Trial counsel was ineffective and deficient in failing to object to the testimony of the victim's mother as to her opinion concerning the guilt of the Plaintiff and the impact of the hearsay autopsy report on her."

This Court finds Applicant has also failed to meet his burden with respect to this allegation. Ms. Bright testified that she believed Applicant, despite his changing stories, until the

autopsy report came out. Tr. p. 69. Ms. Bright does not say what the autopsy report said, but simply that once she read it she “knew that there was no way that a baby could get those injuries accidentally.” Counsel Brittany Senerius’s testimony that the knowledge that experts would be testifying later in the trial affected the trial strategy also precludes a finding of deficiency here. Dr. Woodard conducted the autopsy on the victim and testified as to its results. Tr. p. 271. There was also substantial expert testimony that the victim’s injuries were not consistent with accidental trauma. Tr. p. 237; 253; 260; 274; 281. In light of this testimony and the overwhelming evidence of guilt, Applicant has also failed to meet his burden to show prejudice as a result of this allegation. It is therefore denied and dismissed.

18. “Trial counsel was ineffective and deficient in failing to object to the hearsay testimony of the victim’s mother that “the plaintiff’s family did not know,” about the baby.

Applicant has failed to meet his burden with respect to this allegation. This Court finds counsel was not deficient in failing to make a hearsay objection because the testimony was not hearsay. Clearly the victim’s mother was competent to testify – from her own personal knowledge – that she and Applicant had not told his family about the victim’s birth. To the extent that she referenced statements made by Applicant at any point, such testimony was by definition not hearsay. Rule 801(d)(2)(A) SCRE (“A statement is not hearsay if [t]he statement is offered against a party and is the party’s own statement. . . .”). Even assuming it were hearsay, however, it’s clearly not prejudicial where Applicant also testified that his family did not know about the birth of the victim, Tr. p. 314-15, and the state presented overwhelming evidence of Applicant’s guilt. This allegation is therefore denied and dismissed.

19. "Trial counsel was ineffective and deficient in failing to object to the hearsay testimony of the victim's mother regarding what the Plaintiff's family believed their relationship to be."

This allegation is also without merit. Once again, Applicant has failed to frame his allegation in a way that makes any actual hearsay readily discernable. Ms. Bright was asked on direct examination what Applicant's family believed her relationship to be. Tr. p. 71-72. Ms. Bright simply responded "Roommate." This testimony does not contain any hearsay. See Allegation 18, supra.

23. "Trial counsel was ineffective and deficient in failing to object to the introduction of the Verizon records without a foundation."

This Court finds Applicant has not met his burden of proof here. Failure to object to alleged defects in the chain of custody was not ineffectiveness in where there was no showing the chain could not have been met anyway. Prvor v. Norris, 103 F.3d 710, 713 (8th Cir. 1997). Counsel testified that she may have told the solicitor that she would not require custodians for the Verizon records. Applicant has not presented any evidence that these records would have been otherwise inadmissible or that the State would not have been able to produce appropriate witnesses to introduce the records absent counsel's consent. This allegation is therefore denied and dismissed.

31. "Trial counsel was ineffective and deficient in failing to object to hearsay 'Netflix records indicate that you watched all the shows.'"

Applicant has failed to meet his burden with respect to this allegation, as well. Counsel Gordon Senerius testified that he would have agreed to let the Netflix records into evidence without a custodian because it was not a germane issue. He further testified, as this Court has

repeatedly emphasized, that his practice is not to object to every technical violation of the rules so the jury would not think he was trying to hide anything. Taking into account the overwhelming evidence of Applicant's guilt – as well as counsel's testimony, which indicated the Netflix records had little to do with the strategy and theory of the case he developed – this Court finds Applicant has failed to meet his burden. This allegation is therefore denied and dismissed.

36. "Trial counsel was ineffective and deficient in failing to object to hearsay testimony about what Dr. Gwyn asked them." / 39. "Trial counsel was ineffective and deficient in failing to object to hearsay testimony of the victim's mother regarding what Dr. Gwyn told her." / 48. "Trial counsel was ineffective and deficient in failing to object to hearsay regarding information given by medical personal."

The purported hearsay testimony about "what Dr. Gwyn asked them" is not actually hearsay. In the relevant portion of the transcript, there is no "statement" by Dr. Gwyn being testified to. Tr. p. 87.<sup>6</sup> Ms. Bright, the victim's mother, simply told the solicitor that she was asked a number of questions regarding events in the previous few days. Tr. p. 86-87. The only statement she testifies to at that time comes from Applicant. Such a statement is, by definition, not hearsay. See Rule 801(d)(2). Concerning what Dr. Gwyn "told" Ms. Bright – about the extent of the injuries – this Court finds this is also not hearsay. Tr. p. 88. Ms. Bright did not testify as to anything Dr. Gwyn told her. In addition, to the extent that is even remotely possible to construe Ms. Bright's testimony here as containing a statement by Dr. Gwyn, this Court finds it is not presented for the truth of the matter asserted. Dr. Gwyn "told" Ms. Bright "the extent of

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<sup>6</sup> It is entirely possible that Applicant is referring to a different portion of the transcript. This allegation – like many other allegations in Applicant's scattershot approach to pleading – is so vague that it makes it difficult to track down just what, exactly, he is referring to.

[the victim's] injuries." Tr. p. 88. Instead, the statement is presented to establish a timeline for Applicant's first "updated" account of his interactions with the victim the day of the incident. Ms. Bright's testimony indicates that Applicant changed or modified his story after hearing the extent of the victim's injuries from Dr. Gwyn. Because there is no hearsay in the contested testimony, this Court finds Applicant has failed to meet his burden to show deficient performance. Further, in light of the overwhelming evidence of his guilt and the fact that Dr. Gwyn ultimately testified in Applicant's trial as to the extent of the victim's injuries, Tr. p. 252-55, this Court finds no prejudice from the purported deficiency. This allegation is therefore denied and dismissed.

50. "Trial counsel was ineffective and deficient in failing to object to hearsay testimony regarding a time line of the incident."

This allegation does not highlight any specific testimony that purportedly violates the general prohibition against hearsay. After reviewing the transcript, this Court finds Applicant has failed to meet his burden. Even if every statement by law enforcement that referred to a timeline of the incident were, in fact, hearsay, this Court finds the lack of any objection was based on a valid trial strategy – counsel was well aware that this information would come out later in the trial from the State's expert witnesses. The fact that the expert witnesses also testified to the time frame of the victim's death also precludes a finding of prejudice – the "time line" came out anyway. Tr. p. 276-77). This allegation is therefore denied and dismissed.

51. "Trial counsel was ineffective and deficient in failing to object to hearsay statement by the officer "He was alone with the child."

Officer Rounder's testimony that he learned Applicant was alone with the child on the day of the incident is not hearsay, but rather information he learned throughout the course of his investigation. It was not offered to prove the truth of the matter asserted,<sup>7</sup> but to explain how his investigation developed. See Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000)(testimony that is offered for the limited purpose of explaining why a government investigation was undertaken is not hearsay). In any event, Officer Roundy's testimony was clearly not prejudicial where it was undisputed that Applicant was at home alone with the child for most of August 16th. This allegation is therefore denied and dismissed.

52. "Trial counsel was ineffective and deficient in failing to object to opinion of the officer "Fall, drop or accidental mishap none of those scenarios fit."

This Court finds Applicant has failed to show deficiency or prejudice. Counsel Brittany Senerius testified credibly that she knew experts would be testifying later, and that knowledge affected her trial strategy in terms of deciding not to object to evidence that would obviously come in later. In addition, the experts testified at length that the victim's injuries were not consistent with an accident. This allegation is therefore denied and dismissed.

54. "Trial counsel was ineffective and deficient in failing to object to hearsay testimony of statements made to officers, including but not limited to, by permitting officers and witnesses to testify about statements made to them by others and the content of records of others all without a proper foundation."

This allegation is too vague to rule on. Further, there was no evidence specifically presented to support this allegation at the evidentiary hearing. It is therefore denied and dismissed.

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<sup>7</sup> This Court notes that the matter asserted in the statement – that Applicant, for most of the day in question, at home alone with the victim – was never in dispute at the trial and was in fact testified to by Applicant.

56. "Trial counsel was ineffective in failing to object to hearsay testimony of the third statement allegedly provided to police, and generally failing to cross-examine the police officers about the number of statements given to the police."

This is not hearsay. Rule 801(d)(2)(A) SCRE ("A statement is not hearsay if [t]he statement is offered against a party and is the party's own statement. . . ."). Moreover, this Court finds Applicant has failed to meet his burden with respect to counsel's failure to cross-examine police officers. See "Failure to Properly Cross-Examine Witnesses," Infra. Applicant has failed to meet his burden with respect to this allegation. It is therefore denied and dismissed.

57. "Trial counsel was ineffective and deficient in failing to object to the opinion by officer that what happened day before incident wasn't relevant"

Applicant has failed to meet his burden here, as well. This Court finds counsel's decision not to object to the above referenced statement was made pursuant to his overarching strategy not to object to every technical rule violation to avoid losing the jury. Applicant has also failed to show prejudice in light of the overwhelming evidence of guilt.

58. "Trial counsel was ineffective and deficient in failing to object to hearsay testimony by officer who testified that the mother-in-law didn't sleep over night before the incident."

This testimony is not hearsay. Officer Roundy stated that he "found out that nobody had been to the house" the night of August 15<sup>th</sup>. Tr. p. 121. His testimony does not contain an out of court statement. See Rule 801(c), SCRE ("Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). This Court therefore finds Applicant has failed to meet his burden with respect to this allegation. Accordingly, it is denied and dismissed.

59. "Trial counsel was ineffective and deficient in failing to object to the hearsay and opinion testimony that the Plaintiff was "fully aware of the severity of her injuries at this point? He was by this time."

This testimony does not constitute improper hearsay. Officer Roundy was asked whether, at the time of his third discussion with Applicant, Applicant was aware of the severity of the victim's injuries. There is no out of court statement here for the purposes of determining hearsay, and any information presumably came from Applicant during the course of the discussion. In any event, by this point in time Officer Roundy also testified that the victim had died, so clearly it was inferable that Applicant was aware of the extent of her injuries. Tr. p. 121.

61. "Trial counsel was ineffective and deficient in failing to properly object to improper bolstering of the basis for Plaintiff's arrest, including but not limited to, as forth on page 179 l. 19- 180, l. 11 of the transcript the prosecution without objection bolstered the decision to arrest Applicant."

After reviewing the offending passage, this Court is unable to find any improper bolstering. To the extent that bolstering a "decision to arrest" a criminal defendant is grounds for a claim of ineffective assistance of counsel, the offer properly testified as to what information he used in his investigation. To the extent – if any – his comments on what determinations the "experts" made as far as the injury occurring on the 16th was inappropriate, this Court finds neither deficiency nor prejudice in failing to object. Counsel Brittany Senerius testified credibly that her knowledge that the experts were going to be testifying later affected her trial strategy in not making some objections to information that would come out anyway. Dr. Kathryn Barden, an emergency physician and a qualified expert in emergency medicine, testified that she believed the fatal injury occurred on the 16th. Tr. p. 218. Dr. Brett Woodard, a forensic pathologist and

expert in forensic pathology, also testified that the fatal injury was consistent with being inflicted on the afternoon of the 16th. Tr. p. 283. Because counsel's decision not to object was made pursuant to a valid trial strategy, and because the information ultimately came out anyway, Applicant's claim of ineffective assistance is without merit. This allegation is therefore denied and dismissed.

63. "Trial counsel was ineffective and deficient in failing to object to re-direct examination that allowed hearsay to correct mother's "odd" behavior"

This Court is unable to determine which portion of which witness's testimony Applicant is referring to in this vague allegation. Applicant presented no evidence or clarification in the evidentiary hearing. It is therefore denied and dismissed.

64. "Trial counsel was ineffective and deficient in failing to object to hearsay that the victim had been moved."

This Court is unable to determine which portion of which witness's testimony Applicant is referring to in this vague allegation. It appears that Applicant is referring to Officer Kelly's statement that when "he arrived, the child had been moved." Tr. p. 137. However, that testimony is not hearsay, and this Court is unable to find any hearsay testimony in its general vicinity. Regardless, it is Applicant's responsibility to plead his allegations specifically. See S.C. Code § 17-27-50 (2016). As Applicant has failed to meet his burden, this allegation is denied and dismissed.

65. "Trial counsel was ineffective and deficient in failing to object to hearsay and irrelevant and inflammatory testimony describing to the jury the happiness of the victim". 14. "Trial counsel was ineffective and deficient in failing to object to hearsay

testimony of the victim's mother that the victim was a  
"Happy baby, loved everyone."

This Court finds Applicant has failed to meet his burden with respect to this allegation, as well. The decision not to object here falls in line with counsel's strategy of not objecting to every technical violation of the rules of evidence to avoid losing the jury. Further, the testimony was clearly not prejudicial. Applicant presented nearly identical testimony at trial, saying that "she was happy," and "she loved everybody, everybody loved her." Tr. p. 316. Applicant said that he and Ms. Bright "had one person [tell them they] should put her in a magazine." Id. Applicant said that "[s]he was a happy baby constantly." Id. Applicant has therefore failed to meet his burden with respect to this allegation. Accordingly, it is denied and dismissed.

73. "Trial counsel was ineffective and deficient in failing to object to hearsay concerning the investigation determination, including but not limited to, as set forth on page 165, l. 5-8 of the trial transcript.

This Court finds the testimony in question is not hearsay. Officer Jones merely stated that his investigation revealed that the victim had been in the city limits of Seneca in the weeks prior to her death. There is no statement. In any event, it is clearly not prejudicial. There was never any question at trial that the victim lived with Applicant and Ms. Bright in their apartment in Oconee County. Applicant did not present any evidence at the evidentiary hearing that the incident did not occur in Oconee County. This matter is therefore denied and dismissed.

74. "Trial counsel was ineffective and deficient in failing to object to the hearsay statement "I was advised by Hospital Staff that she was brain dead"

This Court finds Applicant has failed to meet his burden with respect to this allegation, as well. While this may, technically constitute hearsay, as stated previously, Attorney Gordon

Senerius testified that he does not typically object to every technical violation of the rules of evidence because it makes the jury think he is hiding something, and counsel Brittany Senerius testified that they knew the expert testimony would come in later and altered their trial strategy accordingly. This Court therefore finds counsel was not deficient in failing to make an objection to this comment. Nevertheless, Applicant has failed to show any conceivable prejudice that could have resulted from this testimony, especially where – as here – there was overwhelming evidence of Applicant’s guilt and there was never any question that the victim suffered severe head trauma and ultimately died as a result.

75. “Trial counsel was ineffective and deficient in failing to object to hearsay regarding the Officer corroborating victim’s mother’s story.”

This allegation is also exceedingly vague. The Court is not entirely sure which portion of which witness’s testimony Applicant is referring to. As no evidence was presented at the evidentiary hearing on this allegation, it is denied and dismissed.

77. “Trial counsel was ineffective and deficient in failing to object to speculation and lack of foundation that two people could not get into the nursery room bed.”

Applicant failed to present any evidence in support of this allegation at the evidentiary hearing. In any event, having found counsel’s trial strategy not to object to every technical objection to be valid, this Court finds Applicant has failed to meet his burden to show deficiency. In addition, due to the overwhelming evidence and the fact that this did not touch on any relevant aspect of the State’s or Applicant’s case at trial (or his theory at the evidentiary hearing), this Court finds Applicant has failed to show any prejudice. This allegation is therefore denied and dismissed.

78. Trial counsel was ineffective and deficient in failing to object to the hearsay of corroborating the time frames given by Mr. Holland.

This allegation is also exceedingly vague. The Court is not entirely sure which portion of which witness's testimony Applicant is referring to. As no evidence was presented at the evidentiary hearing on this allegation, it is denied and dismissed.

79. "Trial counsel was ineffective and deficient in failing to object to hearsay regarding determining the timing of injuries from the Doctors and the Medical Reports without a proper foundation."

Applicant has also failed to meet his burden with respect to this allegation. It is true that several experts testified as to the timing of the victim's injuries. This testimony did not constitute hearsay, but instead proper opinion testimony presented by experts pursuant to Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"); see also State v. Hutto, 325 S.C. 221, 481 S.E.2d 432, 436 (1997) ("Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony"). Moreover, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Rule 703, SCRE. Accordingly, Applicant has not convinced this Court that any non-frivolous objection to the above referenced testimony actually existed or would have been otherwise sustained. This allegation is therefore denied and dismissed.

80. "Trial counsel was ineffective and deficient in failing to object to testimony concerning the officer's basis for Plaintiff's arrest."

Applicant has failed to meet his burden with respect to this allegation, as well. Officer Roundy testified that he arrested Applicant "based on the pathologist's statement and report to [law enforcement] on the injuries and manner and cause of death." Tr. p. 123. Officer Roundy said that he also considered the time line. Tr. p. 124. Applicant did not present any additional evidence on this allegation at the evidentiary hearing, and this Court finds nothing objectionable about the statement. To the extent Applicant is attacking the time line the solicitor was referring to, this Court has already addressed that issue. See Allegation 61, supra.

82. "Trial counsel was ineffective and deficient in failing to object to the investigator opinion and speculative testimony that it was impossible to remove the child from the bed."

Applicant has failed to meet his burden here, as well. While Officer Jones testified that he felt it would be impossible for someone to have removed the child from the bed," Tr. p. 186, counsel opened the door to this testimony. Tr. p. 185. In any event, this Court finds the testimony was not objectionable. A lay witness may give testimony in the form of opinions or inferences provided those opinions or inferences (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training. Rule 701, SCRE. Officer Roundy testified, on cross-examination, that he did not believe someone could have moved the victim from the bed while Applicant was still sleeping in it based on "the bedroom, the way it was laid out, the clutter, the size of the bed," and the size of Applicant. The Officer physically saw the bed room, and his opinion on whether someone could have entered

the room and removed from the bed she and Applicant were sleeping in was helpful to the determination of whether Applicant had full and uninterrupted control over the victim during a substantial portion of the day of the incident. Finally, sleep and waking up is obviously within the everyday knowledge of most people. Officer Roundy did not testify that it would have been physically impossible to a reasonable degree of scientific certainty to remove the victim from the bed without waking up. Instead, he said that he did believe it would have been possible based on his perceptions. In any event, Applicant has also failed to show he was prejudiced by counsel's failure to object to these statements in light of the fact that there was no direct or circumstantial evidence of third party guilt, and the overwhelming evidence against Applicant. This allegation is therefore denied and dismissed.

89. "Trial counsel was ineffective and deficient in failing to object to Desmond Holland's statement regarding baby's location."

This Court is unable to determine which portion of which witness's testimony Applicant is referring to. Applicant failed to present any testimony or evidence with respect to this allegation at his evidentiary hearing. It is therefore denied and dismissed.

#### **Failure to Object to the Criminal History**

Applicant's next allegation deal with his criminal history.

40. "Trial counsel was ineffective and deficient in failing to object to the interjection of the Plaintiff's criminal record on direct testimony."

This court finds Applicant has failed to meet his burden with respect to this allegation. To the extent Applicant is alleging counsel should have objected to Applicant's testimony as he was being directed by counsel, this Court finds no deficiency or prejudice. This Court also notes

that there does not appear to be an actual reference to Applicant's criminal record during his testimony. This allegation is therefore denied and dismissed.

### **Failure to Properly Cross-Examine Witnesses**

Applicant alleges counsel was ineffective for failing to properly cross-examine a number of witnesses.

20. "Trial counsel was ineffective and deficient in cross-examining the victim's mother. Including but not limited to, by failing to establish the third party guilt of this witness, failing to cross-exam her about her journal entries indicating anger over birth of child interfering with her relationship with Applicant, failing to cross-exam her about her visit to Walgreens, failing to cross-exam her about who brought her home, failing to cross-exam her about how she was with Brianna, failing to cross-exam her about the reasons Brianna's mother was not permitted to care for the child, failure to cross-exam her about her refusal to speak with the police without an attorney, failing to cross-exam her about her opportunity to pick the child up while the Applicant slept nor the frequency of her doing so, failing to cross-exam her about the alleged timing of the incident, failing to cross-exam her about her change in beliefs about the Applicant's guilt, failing to cross-examine her about the coroner's report, failing to cross-exam her about not going into the room on the day of the incident, failing to cross-exam her about the Netflix account not being hers, failing to cross-exam her about her inconsistent statements and generally failing to establish or even attempting that she had motive and opportunity to commit the crime Applicant was accused of."

21. "Trial counsel was ineffective and deficient in failing to effectively cross-examine the victim's mother about her scenario of the events surrounding the child's death."

22. "Trial counsel was ineffective and deficient in failing to thoroughly cross-examine the victim's mother

about getting up at 11:15 and the victim being fine and not having injuries.”

24. “Trial counsel was ineffective and deficient in failing to object to testimony of Plaintiff texting victim’s mother regarding Plaintiff not wanting victim’s grandmother to come over without a proper foundation and failing to cross-examine victim’s mother on that issue.”

25. “Trial counsel was ineffective and deficient in failing to dispute the Plaintiff was laying down and that he said “try not to wake us.”

42. “Trial counsel was ineffective and deficient in failing to follow up on how victim’s mother left for work when there was no mention of her driving and failing to cross-examine her about lack of a driver’s license.”

45. “Trial counsel was ineffective and deficient in failing to introduce [Ms. Bright’s] statement into evidence, including but not limited to, [Ms. Bright’s]’s statement contradicted her testimony and it would have impeached her credibility.”

46. “Trial counsel was ineffective and deficient in failing to properly cross examine [Ms. Bright].”

62. “Trial counsel was ineffective and deficient in failing to properly cross examine the investigating officer, including but not limited to, as set forth on page 124, 1.6-129 1.18 of the transcript.”

68. “Trial counsel was ineffective and deficient in failing to review the cell phone records regarding the phone call to the victim’s grandmother and not cross-examining [Ms. Bright] about the alleged phone call, including but not limited to, as set forth on page 152, 1.17 – 20 the timing and duration of the call to Donna Eller was a relevant point of investigation by the trial attorney.”

69. "Trial counsel was ineffective and deficient in failing to cross-examine Grandmother about he told the victim's Grandmother about the shower incident."
70. "Trial counsel was ineffective and deficient in failing to cross-examine Paige Williams concerning the shower incident statement and her statement to the police."
72. "Trial counsel was ineffective and deficient in failing to use Paige Williams' statement to police for cross-examination."
85. "Trial counsel was ineffective and deficient in failing to properly cross-examine the investigator"
86. "Trial counsel was ineffective and deficient in failing to properly question the witness regarding the timing of noise from the apartment."
92. "Trial counsel was ineffective and deficient in failing to properly effectively cross examine the Doctors"
94. "Trial counsel was ineffective and deficient in failing to question the doctor about alleged rib bruises."
98. "Trial counsel was ineffective and deficient in failing to dispute in Desmond Holland's testimony in cross-examination of the doctors."
99. "Trial counsel was ineffective and deficient in failing to question the doctors about the leg injury occurring before the incident and mother's frequent checking of the child."
100. "Trial counsel was ineffective and deficient in failing to question the doctors about the leg injury occurring before the incident and mother's frequent checking on the child."
101. "Trial counsel was ineffective and deficient in failing to point out that victim's mother testified she

moved the child around and she should have noticed something was wrong with the victim.”

102. “Trial counsel was ineffective and deficient in failing in failing to cross-examine or question the size, width and length of the fingerprints allegedly detected on the victim.”

104. “Trial counsel was ineffective and deficient in failing to challenge the victim’s mother’s testimony.”

This Court finds Applicant has also failed to meet his burden of proof with respect to each of the above allegations concerning his attorneys’ cross-examination of various witnesses. The right to cross-examination is guaranteed by Davis v. Alaska, 415 U.S. 308, 316 (1974). Cross examination must be objectively reasonable and not flawless. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). An attorney’s decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. Id.; see also Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (the manner and extent of cross-examination should not be second-guessed).

Many of these allegations involve counsel’s purported failure to challenge information that was either confirmed by Applicant during his testimony or not contested at the evidentiary hearing. Applicant alleges, for example, that counsel was ineffective for failing to dispute that he was lying down and said “try not to wake us.” But Applicant testified on direct examination that he “texted [Ms. Bright] to say, hey, me and [victim] were going to lay down, you know, try not to wake us.” Tr. p. 323. Some of his allegations are too vague to be a serious basis for relief.<sup>8</sup> Others are entirely irrelevant to the theory Applicant’s attorneys argued at trial or the

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<sup>8</sup> “Trial counsel was ineffective and deficient in failing to properly cross-examine [Ms. Bright].”

evidence Applicant presented at the evidentiary hearing.<sup>9</sup> Applicant's allegation that counsel was ineffective for failing to cross-examine Paige Williams concerning the shower incident statement and her statement to police is a **complete misrepresentation of the record**. See Tr. p. 159-161.

This Court finds that both of Applicant's attorneys competently cross-examined the State's witnesses in accordance with their trial strategy. As this Court has already discussed in detail, Applicants attorneys had valid strategic reasons not to pursue a third party guilt theory against the victim's mother. Concerning Mr. Holland, counsel Brittany Senerius said that she was most concerned with the noise he heard and why he did not follow up on it if it was a bad as he said it was. Applicant is certainly free to disagree with his attorneys' strategic decisions. However, this Court will not engage in a hindsight evaluation of every single one of those tactical decisions. To do so would demonstrate a profound misunderstanding of the Strickland standard of professional reasonableness.

This Court will not do Applicant's job for him and speculate on whether a "better" cross-examination would have helped at trial. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) (finding that where there was no evidence or testimony about what information a more extensive cross examination might have revealed, Applicant unable to show prejudice). Applicant has failed to present any evidence that he was prejudiced by counsels' purportedly deficient cross-examinations. This allegation is therefore denied and dismissed.

#### **Failure to Challenge Voluntariness of Applicant's Statements**

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<sup>9</sup> "Trial counsel ineffective and deficient in . . . failing to cross-examine [Ms. Bright] about lack of a driver's license."

Applicant alleges counsel was ineffective in failing to challenge the validity of his statements to police.

55. "Trial counsel was ineffective and deficient in failing to challenge the statements made by Plaintiff to the police, including but not limited to, failing to request a determination as to the voluntariness of statements made by the Applicant to police."

Applicant has entirely failed to meet his burden to prove this allegation. "A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 377 (1964)), *cert. denied*, 552 U.S. 1314 (2008). In State v. Miller, this court instructed:

The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt. State v. Washington, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988).

Miller, 375 S.C. at 380, 652 S.E.2d at 448.

In the context of a Strickland analysis, failure to move to suppress a confession was not ineffective where counsel did not think the motion would succeed. U.S. v. Nguyen, 997 F.Supp. 1281, 1290 (C.D. Cal. 1998).

Applicant has not presented any evidence that his statements to police were not voluntary. See Nickel v. Hannigan, 97 F.3d 403 (10th Cir. 1996) (finding failure to object to an allegedly involuntary confession failed the prejudice prong where there was no evidence

presented of any police coercion). Applicant did not say during the evidentiary hearing that any of his statements to police were involuntary. This allegation is therefore denied and dismissed.

#### **Failure to Challenge Search Warrants**

Applicant also alleges counsel was ineffective for failing to challenge the validity of the search warrants the State obtained.

27. "Trial counsel was ineffective and deficient in failing to object to the validity of the search warrants and allowing all photographs into evidence with objection or foundation, including but not limited to, in that the probable cause for the search warrants had expired, was not current, was insufficient and generally subject to a motion to quash along with the photographs that were introduced without a proper foundation"

76. "Trial counsel was ineffective and deficient in failing to challenge the probable cause for the two searches."

This Court finds Applicant has failed to meet his burden here, as well. The Second Circuit has expressed understandable reluctance to require defense counsel to file boilerplate motions merely to vindicate professional competence without regard to the grounds for the motion. U.S. v. Ditommaso, 817 F.2d 201, 215 (2d Cir. 1987). A motion to suppress is not required simply because a defendant has nothing to lose; counsel has credibility to lose with the judge. Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). In the present case, Applicant has not presented any evidence whatsoever that the warrants were, in any way, deficient or that a challenge by counsel would have been successful. This allegation is therefore denied and dismissed.

#### **Failure *Voir Dire* Witnesses**

Applicant alleged counsel was ineffective for failing to *voir dire* witnesses.

91. "Trial counsel was ineffective and deficient in failing to object to witness being allowed to render an opinion on child abuse trauma without proper foundation."

Applicant has failed to present any evidence in support of this allegation. It is therefore denied and dismissed.

96. "Trial counsel was ineffective and deficient in failing to question Dr. Woodard's qualifications" by trial counsel essentially vouching for the credibility of Dr. Woodard as shown on p. 269, l. 5-9 of transcript."

This Court finds this allegation to be wholly without merit. Reviewing the specified portion of the transcript, counsel's stipulation to Dr. Woodard's qualifications as an expert does not rise to the level of deficient performance or vouching for the witness's credibility. Counsel's stipulation did not constitute an improper comment on the expert's credibility – he merely stated that "the defense is prepared to stipulate to his qualifications as an expert witness." Tr. p. 269.<sup>10</sup> In any event, the judge instructed the jury immediately afterwards that "the value of his testimony [was] for [their] determination." *Id.* Regardless, this Court is unable to find prejudice where Applicant has failed to present any evidence that Dr. Woodard was not, in fact, sufficiently qualified in his field to be considered an expert at the time of the trial. Because Applicant has failed to meet his burden, this allegation is denied and dismissed.

#### **Failure to Object to Closing Argument**

Applicant further alleges counsel was ineffective for failing to object to an improper "Golden Rule" –type argument during the State's closing argument.

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<sup>10</sup> Applicant's argument takes the concept of impermissible vouching well past its outer limit. Obviously a solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. See *Matthews v. State*, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). Extending that prohibition to include a stipulation by defense counsel as to an expert's credentials strikes this Court as a bit of a stretch.

105. Counsel was ineffective and deficient in failing to object to the prosecution's closing statement that "Today is the day to speak up for [Ms. Bright]."

This Court finds Applicant has failed to meet his burden. While this Court finds that the testimony in question may have constituted a technical "Golden Rule" violation, it was clearly not prejudicial. The Supreme Court of South Carolina has outlined the proper framework in determining whether an improper argument warrants the reversal of a conviction:

On appeal, the solicitor's argument will be reviewed in the context of the entire record. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). Once the trial judge has allowed the argument to stand, the accused has the burden of proving that the argument denied him a fair determination of guilt or innocence. *Id.* In order to constitute reversible error, it must be shown that the argument so infected the trial with unfairness as to make the resulting conviction a denial of due process.

State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901-02 (2006) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (emphasis added). The Reese Court cited to the arduous Donnelly v. DeChristoforo standard where the United States Supreme Court has made clear, that a petitioner is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The Donnelly standard is very difficult for a defendant to meet. "[I]t is not enough that the remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1986).<sup>11</sup> See also Parker v. Matthews, 132 S.Ct. 2148, 2155

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<sup>11</sup> In the course of rejecting a capital defendant's claim that the state prosecutor's argument entitled him to a new sentencing hearing, the Fourth Circuit Court of Appeals stated in Bates v. Leg, 308 F.3d 411, 422 (4th Cir. 2002), that:

we first recognize that prosecutors enjoy considerable latitude in presenting arguments to a jury, Sizemore v. Fletcher, 921 F.2d 667, 670 (6th Cir. 1990), because "the adversary system permits the prosecutor to 'prosecute with earnestness and vigor.'" United States v. Young, 470 U.S. 1, 7, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629,

(2012)<sup>12</sup> (“even if the comment is understood as directing the jury's attention to inappropriate considerations, that would not establish that the Kentucky Supreme Court's rejection of the Darden prosecutorial misconduct claim ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement’”); State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996) (ruling test of granting new trial for alleged improper closing argument of counsel is whether defendant was prejudiced to extent that he was denied a fair trial).

Von Dohlen v. State is dispositive where the Court addressed whether a PCR Applicant was entitled to relief as a result of his attorney's failure to object to the solicitor's improper comments that constituted a golden rule violation. 360 S.C. 598, 613, 602 S.E.2d 738, 746

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79 L.Ed. 1314 (1935)). Committed advocates do not always present antiseptic closing statements, and the jury is entrusted within reason to resolve such heated clashes of competing views. Moreover, the scope of our review is narrow, because “not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a ‘failure to observe that fundamental fairness essential to the very concept of justice.’” Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (quoting Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941)). Thus, our review is limited to whether the comments rendered the proceeding so fundamentally unfair as to constitute a denial of due process. Donnelly, 416 U.S. at 643, 94 S.Ct. 1868. This determination requires us to look at “the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated.” Boyd v. French, 147 F.3d 319, 329 (4th Cir.1998) (internal quotation marks omitted).

<sup>12</sup> Likewise, in State v. Durden, 264 S.C. 86, 212 S.E.2d 587, 590 (1975), our Supreme Court set forth examples of permissible closing arguments by prosecutors:

So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and it may employ any legitimate means for impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and for enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider. (Citation omitted) (emphasis added).

(2004). The Von Dohlen Court held that "Petitioner has shown error under the Strickland standard. His attorney erred in failing to object to the solicitor's explicit call for jurors to put yourself in Margaret's shoes, size six." Id. (internal quotations omitted). However and importantly, the Von Dohlen Court also held "Petitioner has not shown there is a reasonable probability that, but for counsel's error, the result of the trial's penalty phase would have been different." Id. This case is also distinguishable from Reese, in that there was only one inappropriate "Golden Rule" violation here, while in Reese the violations were frequent and pervasive. In addition, in this case there was overwhelming evidence of Applicant's guilt. In Reese, there was not. The above referenced cases preclude a finding of prejudice on these facts. This allegation therefore is denied and dismissed.

#### **Cumulative Error**

Applicant also alleges he was prejudiced by the cumulative effect of counsels' purported errors:

106. Counsel was ineffective and deficient in failing to generally, adequately and reasonably prepare for the trial, prepare the Plaintiff to testify, interview witnesses, and challenge the improper and irrelevant testimony, as reflected by the trial testimony.

107. Counsels for the Plaintiff failed to render adequate assistance and to exercise reasonable professional judgment in making all significant decisions in his case, as reflected by the trial testimony and allegations of Applicant's application.

108. Trial counsel for Plaintiff failed to interview potential witnesses and make an independent investigation of the facts and circumstances of the case, as reflected by the trial testimony and Applicant's allegations and the failure to call or even interview witnesses on Applicant's behalf.

109. There is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.

This Court finds Applicant has failed to meet his burden. In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the Supreme Court of South Carolina expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson, 367 S.C. at 604, 627 S.E.2d at 710 (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis").

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland v. Washington. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related, such as the failure to request a jury charge and the failure to introduce certain testimony. This is especially true where, as in this case, counsel's performance was

determined not to be deficient on most of the individual claims that Applicant wishes to aggregate, and there was no prejudice on any Ground. To hold otherwise is to conclude that even non-deficient performance under Strickland might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in Strickland. See Strickland, 466 U.S. at 687 (“Unless a defendant makes both showings [i.e., both deficient performance and prejudice –] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”). A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

#### **Ineffective Assistance of Appellate Counsel**

Applicant also raised a single allegation of ineffective assistance of appellate counsel.

49. “Appellate counsel was ineffective and deficient in failing to challenge the trial court’s ruling allowing investigating officers to testify about what they were told by medical personnel.”

Applicant failed to present any evidence with respect to this allegation. It is therefore denied and dismissed.

#### **ALL OTHER ALLEGATIONS**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

*[Signature follows]*

CONCLUSION

Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR, Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

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

AND IT IS SO ORDERED this 16 day of March, 2016.  
*(note: ORDER received 3-16-16.)*

*(RLL)*

*[Signature]*  
 R. DAWTON MCINTOSH  
 Presiding Judge  
 Tenth Judicial Circuit

*[Signature]*, South Carolina

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

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MATTHEW HINTON, #345044

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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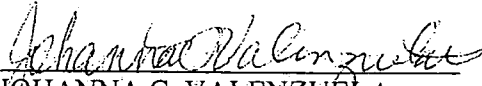
**CERTIFICATE OF SERVICE**

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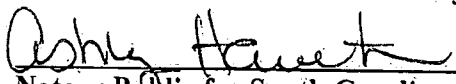
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Robert Clyde Childs, III, Esquire  
Childs Law Firm  
2100 Poinsett Hwy., Ste. E  
Greenville, SC 29609**

This 28<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
JOHANNA C. VALENZUELA  
Attorney for Respondent

SWORN to before me this 28<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 3-18-23



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**Daniel E. Shearouse**

Clerk of Court

Supreme Court

P.O. Box 11330

Columbia, SC 29211

