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November 6, 2017

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

NOV 07 2017

The Honorable Clerk of Court
Chesterfield County
PO Box 529
Chesterfield, SC 29709

S.C. SUPREME COURT

**RE: Mitchell Rivers, #344799, v. State of South Carolina
2015-CP-13-108**

Dear Mr. Shearouse and Ms. Miles:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Rivers in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Rivers in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Johnny E. James, Jr., AAG
Loriene French, OAD
Mitchell Rivers, #344799

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NOV 07 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-13-108

Mitchell Rivers, #344799,Petitioner,

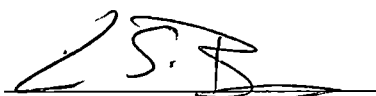
v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Roger E. Henderson's Order dated October 18, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on November 6, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
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November 6, 2017

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-13-108

Mitchell Rivers, #344799,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny E. James, Jr., P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 6th day of November, 2017.



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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHESTERFIELD) FOR THE FOURTH JUDICIAL CIRCUIT

Mitchell Rivers,) Case No.: 2015-CP-13-00108
S.C.D.C. No. 344799,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2017 OCT 19 PM 12: 53

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant on February 27, 2015. Respondent made its return on or about December 16, 2016. The Court convened an evidentiary hearing into the matter on July 16, 2017, at the Dillon County Judicial Center in Dillon, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsels, Matthew Swilley, Esq. ("Trial Counsel") and Tiffany Gibson, Esq.,¹ as well as Applicant's appellate counsel, Benjamin J. Tripp, Esq. ("Appellate Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Chesterfield County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings, and a "Memorandum Opposing Post-Conviction Relief" submitted by Respondent after the evidentiary hearing.

¹ Gibson testified that she could remember no part of the case and, as such, offered no testimony considered in this Court's order.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Applicant was indicted at the October 2010 term of the Chesterfield County Grand Jury for homicide by child abuse (2015-CP-13-00108). Matthew S. Swilley, Esq. and Tiffany Gibson, Esq. represented Applicant at trial. Laura Suzanne Mayes, of the South Carolina Commission on Prosecution Coordination, and Adam Foard, of the Fourth Circuit Solicitor's Office, prosecuted the case. On February 8, 2011, Applicant proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Applicant guilty as indicted on February 15, 2011. Judge Burch sentenced Applicant to imprisonment for a term of life.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Benjamin J. Tripp, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issues:

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

Anders Brief of Appellant at 4, State v. Rivers, App. Case No. 2011-186026. The Court denied the petition to be relieved as counsel and directed the parties to address the following issue and any other issues of arguable merit: "Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?" State v. Rivers, S.C. Ct. App. Order dated Sept. 5, 2013. The parties so briefed that issue and proceeded to oral arguments on January 8, 2015. By

opinion decided February 11, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions; in particular, the Court found that issue of whether "the trial court erred in admitting evidence of the victim's other injuries because no evidence connected [Applicant] to the injuries" was not preserved for appellate review. State v. Rivers, 411 S.C. 551, 553, 769 S.E.2d 263, 265 (Ct. App. 2015). The Remittitur was issued on February 27, 2015.

Present Application

In his post-conviction relief application, supplemented by amendment filed on June 2, 2017, Applicant alleges he is being held unlawfully for the following reasons:

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

Applicant requests relief as follows:

- "Vacation of judgments and sentences. Seek new trial.

During the evidentiary hearing, Applicant withdrew the allegation set forth in 1.b. above.

II. 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 has reviewed the records submitted to it by the parties and the



legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “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.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

IAC Allegation #1 – Failure to Object to Evidence of Victim's Injuries

Applicant alleges Counsel was ineffective by failing to object to evidence of the victim's prior injuries and neglect, and argue they were not connected to him in any way.² At the evidentiary hearing, Trial Counsel testified that he interpreted Judge Burch's statements in a pre-trial hearing to mean that his ruling was final and that the issue was thereby preserved for appeal. As a consequence, Trial Counsel believed further objections would be superfluous. Trial Counsel believed the evidence admitted negatively affected Applicant's chances at trial.

Though it is undeniable that Applicant's failure to object failed to preserve the issue for appellate review, the Court finds that Applicant suffered no prejudice because the evidence was properly admitted to the jury. In State v. Martucci, the South Carolina Court of Appeals found

² This summary encompasses both the allegations of ineffective assistance of counsel restated above as I.a. and I.d.



that evidence of prior abuse or neglect was admissible as proof of intent and the absence of accident. 380 S.C. 232, 252, 669 S.E.2d 598, 609 (Ct.App. 2008). “When a child is brought to an emergency room with injuries in various stages of healing, there is evidence of recurring child abuse. If the multiple, separately occurring injuries are not admissible in child abuse prosecutions, the crime would be virtually impossible to prove.” Id., 380 S.C. at 254, 669 S.E.2d at 609. “[W]here, as here, the perpetrator is the parent or a person with exclusive custody and control over the victim, proving the abuse becomes extremely difficult. As a result of the difficulties in proving child abuse, ‘evidence which shows a pattern of abuse becomes even more probative than it might otherwise be.’” Id., 380 S.C. at 256, 669 S.E.2d at 610-11. Additionally, under the *res gestae* theory, “evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.” Id. 380 S.C. at 257, 669 S.E.2d at 612 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001)). The record need not reflect the exact manner in which a collateral injury occurred. State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct.App. 2011), overturned on other grounds, 406 S.C. 215, 750 S.E.2d 612 (2013). “When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted the injuries.” Estelle v. McGuire, 502 U.S. 62, 68 (1991); see also State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991) (Permitting testimony of injuries to show battered child syndrome where given by a properly qualified expert).

The injuries at issue together established a pattern of abuse to Victim while Victim was in Applicant’s custody. Victim was placed with Applicant and his wife, Kimberly Quick Rivers, on April 22, 2005. Tr. 111, l. 20 – p. 112, l. 6. X-ray examination of Victim on June 20, 2005, did

not show any rib fractures. Tr. 158, l. 17 – p. 159, l. 2. Dr. Janice Ross testified that broken ribs, still in the process of healing, were discovered in the autopsy and that the injury was “[p]robably at least seven to fourteen days old” at the time of the Victim’s death.³ Tr. 157, l. 19 – p. 158, l. 1. Both Dr. Ross and Dr. Clay Nichols testified that mostly fresh bruises, atop some older bruises, and subdural hemorrhage indicated blunt force trauma from a knuckle or fist occurring contemporaneously with Victim’s death by asphyxiation. Tr. 148, ll.7 – p. 149, l. 15; p. 151, l. 7 – p. 152, l.7; p. 154, l. 3 – p. 155, l. 4; p. 183, l. 1 – p. 184, l. 3. Dr. Nichols, considering all of the injuries together, described Victim’s treatment as “a classic case of Battered Child Syndrome.” Tr. 186, ll. 15-19. Applicant testified at trial that either he or his wife was with the child at all times, but that he was never alone with his child.⁴ Tr. 288, ll. 9-10. Applicant testified that he was in immediate physical control of the child the night of August 6, 2005, until Victim was put to bed, and then again through the night. Tr. 265, l. 23 – p. 266, l. 9. Victim was pronounced dead at the hospital the morning of August 7, 2005. All of these injuries were highly probative to the question of whether or not the four-month-old’s death was an accident, as was and still is argued by Applicant. Accordingly, the evidence was admissible, and Applicant suffered no prejudice from its admission to the jury or the failure to preserve the issue of its admissibility for appeal.

Furthermore, the Court finds that the failure to object caused Applicant no prejudice because Applicant’s own statements and testimony established the extreme indifference necessary to convict him for homicide by child abuse. A person is guilty of homicide by child abuse if the person “causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference

³ Compare to the partially healed rib fractures found in Estelle, “which were approximately seven weeks old.” 502 U.S. at 65.

⁴ Despite, as noted below, also testifying that the child’s mother was still asleep when he awoke with the dead child.



to human life” S.C. Code Ann. § 16-3-85(A)(1). “For the purposes of the [homicide by child abuse] statute, ‘extreme indifference’ has been defined as ‘a mental state akin to intent characterized by a deliberate act culminating in death.’” McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 366-67 (Ct. App. 2002)).

Taking all facts as Applicant presents them at trial and this evidentiary hearing, and only those facts, Applicant left his helpless child alone immediately after reviving him by CPR. Applicant did not call for follow-up medical attention. Applicant did not wake his wife to monitor or attend to the child, who by his testimony slept through his performing CPR on Victim. Applicant went outside and stayed outside until his wife woke and found the child dead. The Court concurs in the trial court’s conclusion as to this point, offered during sentencing:

THE COURT: Anyone would know that if a child stopped breathing that you would go ahead and call for emergency help, no matter how you came out with resuscitation.

Tr. 381. Because of the testimony establishing Applicant’s extreme indifference, resulting in the victim’s death, any error in admitting evidence of collateral injuries was harmless.

Because Applicant can show no prejudice in light of the admissibility of the objectionable evidence and the overwhelming evidence of extreme indifference against him in the form of his own admissions, the Court finds that Applicant has failed to meet his burden under Strickland, and his request for relief by way of this allegation is **DENIED**.

IAC Allegation #2 – Failure to Object to Lesser-Included Jury Charge

Applicant originally alleged that Trial Counsel was deficient by failing to object to the Court’s jury charge on a lesser-included offense.⁵ However, as indicated above, Applicant

⁵ This summation encompasses the allegations of ineffective assistance of counsel restated above as 1.b. and 1.c.

affirmatively jettisoned this allegation on the record during his testimony. Accordingly, this allegation is deemed **WITHDRAWN**.

B. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .")).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).



LAAC Allegation #1 – Failure to Raise Court’s Denial of Directed Verdict on Appeal

Applicant alleges that Appellate Counsel was deficient by failing to argue the Court erred in denying his motion for a directed verdict at the close of the State’s case-in-chief. At the close of the prosecution’s case, Trial Counsel motioned for a directed verdict, arguing:

. . . in light of the fact that the evidence proffered by the State is not competent evidence to show that this death occurred under circumstances that manifest an extreme indifference to human life. Your Honor, also, the statute mandates the death has to result of – the death has to result from abuse or neglect. We believe that is proper. The State and the testimony of my client would indicate that death occurred or the injury occurred while he was asleep. Therefore, I make the motion for directed verdict on homicide by child abuse.

Tr. 256. At the evidentiary hearing, Appellate Counsel briefly testified that he initially submitted an Anders brief and that, upon direction by the Court of Appeals to brief a particular issue, would not endeavor to then brief a different issue.

The Court finds that Appellate Counsel’s decision to focus on the issue specifically identified by the Court in its denial of his Anders petition was the exercise of reasonable professional judgment and, as such, this Court will not second guess it. To the contrary, provided this Court’s finding that Applicant ensured his conviction by his own testimony, the only conclusion this Court can reach is that any further expenditure of appellate resources on the denial of the directed verdict would have been fruitless. The Court finds that Applicant has shown neither deficiency on the part of Appellate Counsel nor any prejudice therefrom and, accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

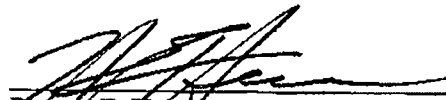
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 18th day of October, 2017.


ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2017 OCT 19 PM 12:53

Darlington, South Carolina



CHESTERFIELD COUNTY CLERK OF COURT

200 West Main Street • P. O. Box 529
Chesterfield, South Carolina 29709
Telephone (843) 623-2574

Court of General Sessions
Court of Common Pleas
Register of Deeds

NOTICE OF APPOINTMENT OF COUNSEL:

DATE: March 12, 2015

APPLICANTS NAME: Mitchell Rivers #344799

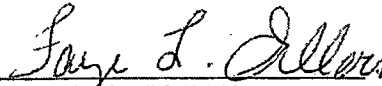
Lance Boozer OF THE LEXINGTON COUNTY BAR IS HERE BY

APPOINTED TO REPRESENT THE ABOVE NAMED APPLICANT IN THE FOLLOWING

COMMON PLEAS NON JURY POST CONVICTION RELIEF CASE, CASE NUMBER

2015CP-1300-108 THIS APPOINTMENT IS MADE PURSUANT TO A

STANDING ADMINISTRATIVE JUDGE FOR FOURTH JUDICIAL CIRCUIT.


CLERK OF COURT,
CHESTERFIELD COUNTY

ADDRESS OF APPOINTED ATTORNEY: Lance Boozer
803 Gervais Street Suite 203
Columbia S.C. 29201

ADDRESS OF APPLICANT: Mitchell Rivers 344799
Lee CI F6B2238
990 Wisacky Highway
Bishopville, SC 29010

FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2015 MAR 13 PM 3 37

CC: ATTORNEY GENERAL'S OFFICE APPLICANT

THE BOOZER LAW FIRM, LLC

1400 Laurel Street, Suite 4A
Columbia, SC 29201

COULUM
06 NOV



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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