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May 14, 2012

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330

Re: *Jeffrey T. Haselden v. State*, 2005-CP-32-267-Death Penalty Matter

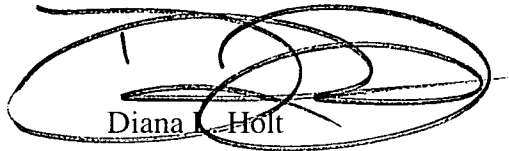
Dear Mr. Shearous:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the redacted orders and judgment which are to be challenged on appeal.
- (3) A filing fee is not enclosed because this is capital PCR case and the Appellant is indigent.

Because the Appellant is indigent, I am hereby notifying SC Commission on Indigent Defense, Appellate Division, of this filing. I request to continue as counsel for Mr. Haselden, as I am also appointed to represent him for his re-sentencing trial, which has been held in abeyance pending the outcome of this matter, because Mr. Haselden's unique legal interests will be better served if he has continuity of counsel, and because Mr. Haselden has requested that I remain. He would like Mr. Jeffrey Bloom to remain as counsel as well, but Mr. Haselden also understands that the Court will not appoint two counsel for this review process. I notified him that it would be altogether the Supreme Court's decision to make regarding appointment of counsel.

Sincerely yours,



Diana L. Holt

Encl.

CC: Honorable Beth Carrigg, w/o Enclosures
S. Creighton Waters, Senior Assistant Attorney General (enclosures electronically only)
Alphonso Simon, Jr., Assistant Attorney General (enclosures electronically only)
Robert Dudek, Chief Appellate Defender (enclosures electronically only)
Jeffrey P. Bloom, Esq. (enclosures electronically only)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 05-CP-32-267

RECEIVED

MAY 18 2012

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA Respondent,

v.

JEFFREY T. HASELDEN..... Petitioner.

NOTICE OF APPEAL

Jeffrey T. Haselden hereby appeals the orders of the Honorable William P. Keesley, dated September 23, 2010, Order of Dismissal with Prejudice, and the April 12, 2012 Order Denying Motion to Alter or Amend the Judgment April 12, 2012. Appellant received written notice of entry of this order on April 27, 2012.

May 14, 2012


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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 05-CP-32-267

STATE OF SOUTH CAROLINA Respondent,

v.

JEFFREY T. HASELDEN..... Appellant.

Certificate of Service

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on May 14, 2012, addressed to its attorney of record, S. Creighton Waters, Esq., Post Office Box 11549, Columbia, South Carolina 29211.

May 14, 2012



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Counsel for Mr. Haselden

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Jeffrey T. Haselden,

Applicant,

v.

JON E. OZMINT, Director,
S.C. Department of Corrections,

Respondent.

ORIGINAL

FILED
) IN THE COURT OF COMMON PLEAS
) ELEVENTH JUDICIAL CIRCUIT
2010 SEP 23 P 4:05
) 05-CP-32-0267

BETH A. CARRIGG
CLERK OF COURT

**ORDER OF DISMISSAL
WITH PREJUDICE**

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MAY 18 2012

S.C. SUPREME COURT

This matter is before this Court on the application for post-conviction relief ("APCR") filed by Jeffrey T. Haselden ("Applicant"), who was convicted of murder. For the following reasons, this Court denies and dismisses the application with prejudice.

I.

Procedural History

Applicant, Jeffrey Haselden, is presently confined to the Lexington County Detention Center following conviction in Lexington County. During the July 1999 term, the Lexington County Grand Jury indicted Applicant for murder (99-GS-32-3064). **{R. 2457-58}**. The state subsequently gave notice of intent to seek the death penalty.

The case was called for trial before the Honorable Gary E. Clary on February 5th, 2001. Attorneys Cameron B. Littlejohn and Kenneth E. Gaines represented Applicant at his jury trial. Eleventh Circuit Solicitor Donald V. Myers, Deputy Solicitor Dayton Riddle, and Assistant Solicitors Tracey Carroll and

Shawn Graham were the prosecutors representing the state at trial. On February 10th, 2001, Applicant's jury convicted him of all three charges. **{R. 1986-88}**.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. **{R. 1989-90}**. The sentencing phase of his trial began on February 11th, 2001. Judge Clary submitted the following aggravating factors to the jury:

- (1) The murder was committed while in the commission of physical torture; and
- (2) The murder of a child eleven years of age or under.

The following mitigating factors were submitted to the jury:

- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person; and
- (2) Any non-statutory mitigating circumstance.

{R. 2253-55; 2258-59}.

On February 13th, 2001, Applicant's jury found the existence of both aggravating factors and recommended a sentence of death. That same day, Judge Clary sentenced Applicant to death for murder. **{R. 2274-74; 2278-79}**.

On February 14th, 2001, a hearing was held into comments made by a theater manager to some of the jurors while they were out on a supervised trip to view a movie. Judge Clary sentenced the manager to one day in jail for contempt of court. **{R. 2307}**.

Subsequently, Applicant filed a motion for a new sentencing proceeding based on the then-recent decision of the United States Supreme Court in Shafer

v. South Carolina, 532 U.S. 36 (2001). David Bruck, Esquire, appeared with trial counsel and argued the motion on behalf of Applicant. {R. 2308-2345}.

A timely Notice of Appeal was filed and served on April 5th, 2001. Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during the direct appeal. On September 16th, 2002, Dudek filed a Final Brief of Appellant, in which he raised the following issues on behalf of Applicant:

(1) Whether the court erred by allowing the state to elicit from Robin Lucas, appellant's ex-wife, testimony that appellant was fishing or golfing with his friends or at his mother's house when not working since this evidence was irrelevant, and it was prejudicial since it constituted an impermissible attack on appellant's character?

(2) Whether the court erred by refusing to instruct the jury that S.C. Code §16-3-20(A)§ provided appellant was not eligible for parole if sentenced to life imprisonment since the state offered evidence of future dangerousness, the solicitor argued future dangerousness, appellant's request to charge was a correct statement of South Carolina law, and it was mandated by Simmons v. South Carolina?

(3) Whether the court erred by denying appellant's motion for a new sentencing hearing based on the refusal to give the parole ineligibility instruction, since Shafer v. South Carolina was decided by the United States Supreme Court between appellant's trial and the motion hearing, it reaffirmed the applicability of Simmons, and therefore also held the judge's reason for refusing to give the instruction here was erroneous where the state made future dangerousness an issue?

(4) Whether the court erred by admitting State's Exhibits ##23-26, #29, and ##31-33 since these were gory autopsy photographs intended to inflame the passions of the jury, most particularly state's exhibit #29, a photograph of the child's enlarged anus that the state used to attempt an inflammatory insinuation that appellant sexually abused the child?

The State filed a Final Brief of Respondent on September 16th, 2002.

Oral argument was held before the South Carolina Supreme Court on December 5th, 2002, and that Court by opinion dated February 18th, 2003 affirmed the convictions but reversed the death sentence and remanded for a new sentencing proceeding. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003).

Applicant then filed the instant Application for Post-Conviction Relief ("APCR") in January of 2005. Following a number of pretrial proceedings and motions, Applicant eventually filed his Third Amended Application for Post-Conviction Relief, which was the subject of the evidentiary hearing in this case that took place on September 21-23, 2009, and November 23-24, 2009. Applicant was present at all hearings and represented by Jeffrey Bloom, Esquire, and Diana Holt, Esquire. The State was represented by Senior Assistant Attorney General S. Creighton Waters and Assistant Attorney General Alphonso Simon. Both sides called witnesses and introduced exhibits.

This Court has heard the testimony and reviewed the record and now rules as follows.

II.

Grounds for Relief

As will be seen, none of Applicant's grounds for relief are sufficient for relief. Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and

counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to deficient performance, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992).

Ground A: Ineffective Assistance of Counsel

(1) Allegation #1: Dismissal of Juror Graham

Ground 10(a)(1) of Applicant's PCR Application is denied. Applicant failed to show that counsel was ineffective. Counsel's testimony indicates his decision not to object to the dismissal of the juror was a reasonable tactical decision. Further, Applicant cannot establish that counsel was deficient. Finally, Applicant failed to establish that he was prejudiced: the allegedly similarly situated juror also did not sit on Applicant's jury.

In Ground 10(a)(1), Applicant asserts trial counsel was ineffective in failing to object to the trial court's sua sponte excusal of African American veniremember, Audrey Graham. Applicant asserts that Graham made no request to be excused, and the juror was otherwise qualified to serve. Applicant also contends that the trial court did not dismiss a similarly situated white female veniremember, who was seated on the jury and whose husband was a SLED agent. At the PCR hearing, Applicant indicated the similarly situated white female veniremember was juror Leigh Hiatt.

At the PCR hearing, Petitioner's trial counsel Cam Littlejohn testified that he hired Jeff Bloom (Applicant's PCR counsel) as a jury consultant. {Tr. 67}. Bloom assisted in preparing for voir dire and with the selection of the jury. {Tr. 67-8}. Bloom was present during the voir dire and jury selection. {Tr. 68}.

Littlejohn testified that when Graham was testifying during voir dire, she indicated she had small children and that she was concerned they would have a problem with her not being home for them. {Tr. 70, 146}.

If I recall from memory and from reading the transcript, this lady had small children. She was concerned that her small children would have a problem with her not being there in the home, compounded by the fact that the jury was going to be sequestered. And I have always -- in selecting jurors, I've always attempted to excuse mothers with small children if that is a factor that's going to weigh on their ability to concentrate on the trial and to weigh the evidence and to figure out what's going on. If they're going to be distracted by their children situation, then I don't think they should be serving on the jury.

{Tr. 70-1}. On cross examination, Littlejohn further expounded that he found it was better to go ahead and have her excused during her individual voir dire than wait and have to address the issue two days later when she likely would have been excused. {Tr. 146}.

Littlejohn testified that when juror Hiatt testified in her voir dire, she indicated she had no qualms about her children's well-being. {Tr. 72, 147}. Littlejohn also noted that she worked at a law firm, and she seemed very open-minded from the standpoint of listening to mitigation testimony if it came to that. Id. Littlejohn also pointed out that during jury selection, he struck juror Hiatt. {Tr. 73, 148-9, see R. 1230, II 23-4}.

Applicant failed to show that trial counsel was ineffective for not objecting to the court's dismissal of juror Graham. First, Applicant failed to show that counsel was deficient. At the time of Applicant's trial, S.C. Code Ann. § 14-7-860 stated, "[t]he presiding judge for cause shown may excuse anyone from jury duty at any term of court if he considers it advisable."

Section 14-7-860 provides the presiding judge with the authority to excuse women with "childcare" responsibilities when (1) the woman desires to be excused from jury duty; (2) she has a child under the age of seven; (3) she has legal custody of the child and the duty to care for the child; and (4) she presents the court with facts warranting her excusal.

State v. George, 323 S.C. 496, 502, 476 S.E.2d 903, 907 (1996). It was clear on the record that juror Graham had a four year old, and she indicated during her individual voir dire that she had concerns about her four year old's well-being if she was to serve on the jury. {R. 894-95}. Specifically, juror Graham noted she did not know if her four year old could handle her being gone for ten days. {R. 894}. Clearly, the court's dismissal of juror Graham was well within its discretion under S.C. Code Ann. § 14-7-860. As a result, counsel could not have been deficient in not objecting to the court's excusal of juror Graham.

Furthermore, counsel's testimony on this issue clearly reflects that he had a valid strategic reason for not objecting to the excusal. Counsel indicated that he always attempted to excuse mothers with small children when it appeared it could affect the juror's ability to concentrate on the trial. Applicant has failed to present any probative evidence that establishes this was not a reasonable strategic decision. As a result, Applicant failed to establish that counsel was deficient in this regard. Thus, he cannot establish counsel was ineffective, and this claim for relief should be dismissed.

Finally, Applicant failed to show that he was prejudiced by the fact trial counsel did not object to the excusal of Juror Graham. First, Applicant failed to establish that juror Hiatt was similarly situated with juror Graham. As noted by counsel's testimony, the record clearly reflects that juror Graham had concerns

about leaving her small children during the course of Applicant's trial, whereas juror Hiatt did not express any concerns about leaving her small children.

The trial court did dismiss other veniremembers who were actually similarly situated to juror Graham. Specifically, the trial court dismissed Juror James White, a white male. Juror White was initially qualified. {R. 306}. However, he was later excused before jury selection when he could not find someone suitable to care for his father while the trial was set to go. {R. 470}.

Similarly, Juror Lisa Minges, a white female, was also initially qualified. {R. 484}. However, Juror Minges was later excused before jury selection because she had two young children at home (1 ½ and 4) and she was upset about being separated from them. {R. 1098}.

Also, Juror Kathy Faust, a white female, was initially qualified. {R. 730}. However, she was later excused before jury selection because her child suffered from Turrette's Syndrome, and a doctor advised her that the separation from her child would have been harmful. {R. 1097}. The child started to panic when Faust started packing for jury duty. Id.

Clearly, the trial court did not treat Juror Graham any different from similarly situated jurors. Furthermore, Juror Hiatt was struck by the defense during jury selection. {R. 1230}. Thus, even if Hiatt was similarly situated, she did not sit on Applicant's jury. In all, Applicant failed to establish how he was prejudiced by counsel not objecting to the dismissal of Juror Graham. The trial court acted well within its discretion in dismissing her from serving in his case. As a result, Applicant's first claim in Ground A is denied.

(2) Allegation #2: Pathology Testimony as to Time of Death

Applicant next contends that counsel were ineffective in failing to introduce evidence that would establish the time of Josh's death was closer to 8:00 p.m. He asserts the State's pathologist, Dr. Sexton, had concluded the time of death was closer to 8:00 p.m. but counsel failed to elicit this. He also asserts that counsel were ineffective in failing to present their own evidence that Josh was killed closer to 8:00 p.m. rather than later.¹

The reason why this is significant from Applicant's viewpoint is that he asserts evidence of a time of death on the earlier end of the spectrum would impeach Tindal's testimony and establish that Josh was killed while Applicant was gone and Tindal was alone with the children. The trial evidence shows Josh ate dinner at roughly 8:00 p.m. Summer testified she left Applicant's house around 9:20 p.m. It took her around 15 minutes to get home as she went the "long way." While Tindal and the children remained at his house, Applicant went to Summer's home to pick up Tindal's clothes and the lotion. Summer stated she was going to bed at about 10:15 p.m. when Applicant arrived to pick up the lotion and clothes. {R. 1366-70; 1504-13}. Tindal described the final attack as taking place sometime after the Simpsons ended at 11:00 p.m. and 911 was not called until 12:33 a.m. {R. 1263; 1389-1405}. Josh arrived at the hospital at 1:27 a.m., and was pronounced dead at 1:40 a.m. {R. 1275; 1303}.

A. Failure to present evidence Dr. Sexton concluded the time of death was closest to 8:00 p.m.

¹ A portion of this claim involves a claim counsel did not present evidence that Tindal uses straws for her drinks, but this ground has been expressly withdrawn by Applicant.

The first claim is that counsel was ineffective in failing to present evidence that Dr. Sexton had concluded the time of death was closer to 8:00 p.m. He bases this conclusion on a filing by DSS in which the person who drafted that document stated such was the case.

At trial, Dr. Sexton testified that determining time of death from stomach contents was "too fraught with error" to attempt a reliable judgment. He stated the average person empties his stomach from between one and six hours, but fear and stress can slow or stop digestion. Dr. Sexton pointed out that the rectal temperature of 87 degrees taken in the ER might not be accurate as a true reading of core temperature, as the most reliable way to assess core temperature would be to make an incision in the liver. Dr. Sexton also noted that given the anus was abnormally large and dilated, this also could affect the accuracy of a rectal temperature. Dr. Sexton testified that the general rule of thumb for cooling of a body after death was not accepted by many pathologists, and pointed out that various environmental factors as well as Josh's small size could increase cooling. {R. 1638-45}.

At PCR, Dr. Sexton – who has performed 7000 to 8000 autopsies and qualified in for testimony in court over 700 times – similarly gave lengthy and credible testimony as to why methods of determining time of death are too fraught with variables and conditions for one to be established with any certainty among the range of time that Josh was last seen alive by Summer and 911 was called. He went into all the issues with regard to the accuracy of the rectal temperature as a true measure of core temperature, as well as all of the

environmental and biological factors that could cause variance from the rule of thumb as to the hourly rate of cooling – a rule of thumb which Dr. Sexton testified he would never rely on to give a precise time of death. {Tr. 446-47; 462-67; 481}.

Dr. Sexton also explained the variables and factors that complicate an assessment of time of death from stomach contents, pointing out that stomach emptying and digestion time were tied to proteins and fats, not starches and carbohydrates (like the relatively undigested peas and rice observed in the stomach), which are either digested in the mouth or in the intestine. Dr. Sexton credibly noted that the items from Josh's stomach that looked undigested were of the category that would not be digested in the stomach anyway, and pointed out that the proteins on the other hand – which would be digested in the stomach – were well-digested. {Tr. 467-75}.

Dr. Sexton was adamant that he could not recall ever giving a precise time of death close to 8:00 p.m., and stated that perhaps the claim came from someone at the autopsy who overheard someone say that the food looked like it had just been put in the stomach. However, he noted that such an interpretation would have been erroneous as carbohydrates digest differently as explained earlier. He concluded that giving a time of death as "roughly 8:00 p.m." would be inconsistent with his general practice during 41 years of being a pathologist, and he stated that a time of death could not be provided to a reasonable degree of medical certainty. {Tr. 478-81}.

This testimony is also consistent with the credible testimony of defense counsel Cam Littlejohn, who noted that he talked with Dr. Sexton prior to trial, and Dr. Sexton similarly told him that he could not give a time of death given all the variables that were involved. Littlejohn stated that Dr. Sexton was vague on the issue when they talked, and was vague on it at trial as well. Littlejohn testified that the DSS pleading putting the time of death at 8:00 p.m. would not have made a difference to him "because the attorney who made out the pleading wasn't Dr. Sexton," and he had nothing from Dr. Sexton putting the time of death at 8:00 p.m. {Tr. 76-77}.

This credible testimony from Dr. Sexton and Mr. Littlejohn leads to two conclusions on the part of the Court. The first is that Applicant has simply not established that Dr. Sexton at any time opined that the time of death was closer to 8:00 p.m. The allegations in the DSS filing {Applicant's 8} do not change this conclusion, as the source of those allegations was never established. Perhaps, as Dr. Sexton speculated, someone at the autopsy heard the pathologists talking and thinking out loud as they conducted it and came to an erroneous interpretation that was not shared by Dr. Sexton when he came to his official conclusions. The fact remains, though, that Applicant has provided nothing to establish that Dr. Sexton at any time opined the time of death was closer to 8:00 p.m., and that somehow "better" cross-examination of him on the subject would get him to admit to the contrary.

Accordingly, this leads to the second conclusion – that Applicant has not shown ineffective assistance. This is because he cannot show in the first place

deficient performance, given that Littlejohn did talk to Dr. Sexton and was given no information on time of death that would be helpful, and he cannot show in the second place prejudice, given that he has not established that Dr. Sexton ever actually opined a time of death closer to 8:00 p.m. . Counsel's investigation of Dr. Sexton was sufficient, and regardless there was nothing more that could have been elicited – particularly, as will be seen below, counsel did his own investigation and found nothing to challenge Dr. Sexton on these points.²

B. Deficiency as to presentation of a defense pathologist

The second part of this issue is whether counsel was ineffective for not presenting his own testimony on time of death, like that Applicant presented from Dr. Arden at the PCR hearing.

This Court cannot find counsel to have been deficient. Mr. Littlejohn testified that he was familiar with Dr. Sexton and had dealt with him in the past. Littlejohn talked with Dr. Sexton before trial, and Dr. Sexton was also “vague” then as to the time of death “because of all the variables that were involved in trying to make that determination.” Counsel also talked to pathologist Dr. Conradi, and while he did not remember the specific conversation, he testified he knew of no other issue he would have discussed with her. Aside from talking to Drs. Sexton and Conradi, counsel also conducted his own investigation, going to the MUSC library and reviewing publications on the time of death issue. Although he could not be sure, counsel believed he got the name of a Georgia

² Similarly, inasmuch as Robin Mazingo may at one point stated the police told her the time of death was around 8:00 p.m., Applicant never linked this information to Dr. Sexton, and as counsel noted, he could not cross Dr. Sexton about what Robin said on the issue. {Tr. 153}.

pathologist named Dr. Dunton from one of the publications on the issue he found during his research. Counsel contacted Dr. Dunton and discussed the issue with him on more than one occasion, but like the other doctors Dr. Dunton “couldn’t give [counsel] anything specific enough that would have been helpful,” or counsel would have called the doctor at trial. Finally, counsel pointed out that any efforts in trying to establish an earlier time of death would be muted by the fact that Applicant had told various people he had checked on Josh at 11:30 p.m. and Josh was fine. {Tr. 150-58; State’s 9}.

This credible testimony from counsel precludes a finding of deficiency. It is a cardinal rule that counsel is entitled to rely on qualified experts he consults in the appropriate field, and it is not a valid claim of ineffective assistance if the expert fails to advise counsel of every possible opinion – even if the expert himself is ultimately negligent or deficient. The failing must be one of counsel for relief to be possible in PCR. From the Fourth Circuit:

The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. . . . “[I]t will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect from the second prospective witness. To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require.

Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) (emphasis added) Cf. generally Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998).

However, it can be a valid claim for ineffective assistance that a expert's substandard performance was due to some constitutionally deficient performance by counsel, "in obtaining the psychiatric examinations or presenting the evidence at trial for example, **not that of the psychiatrist or psychologist in failing to identify every possible malady or argument, no matter how tenuous.**" Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (emphasis added).

Regardless, in obtaining the expert opinion, counsel does not have to "expert-shop" until he can find one who will testify favorably, see Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992), and counsel is not constitutionally required to "second-guess" the opinions he gets from the expert he does engage. Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998). "If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous." Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995). Otherwise, the Sixth Amendment hurdle would be raised well above a mere reasonable level of competence, and attorneys in a case such as this would need a M.D. in addition to their J.D.

Here, counsel did his own research on the subject, and discussed the issue with the State's expert and two other pathologists. The fact that none of these pathologists offered an opinion like the one given by Dr. Arden at PCR is not counsel's fault. Counsel was not required to continue to speak to more experts other than the three with whom he talked until he could find one who would testify favorably. Since counsel's investigation of the issue was

reasonable and nothing about that investigation generated favorable information for trial or further investigation, counsel was not deficient. See Wiggins v. Smith, 123 S.Ct. 2527 (2003) (“In assessing the reasonableness of an attorney’s presentation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”).

C. Prejudice

However, regardless of the deficiency prong, this Court also cannot find prejudice – that there is a reasonable probability of a different result if testimony like Dr. Arden’s on such a vague issue as time of death had been presented at trial. As set forth above, Dr. Sexton credibly testified as to how imprecise and conditional time of death is – at least for how Applicant wishes to use it here, which is to nail down a time on the earlier end of a small window that is three hours or less.

Indeed, even Applicant’s expert Dr. Arden conceded that in cases like this, time of death is merely an estimate that cannot be determined with mathematical precision, and that there could be factors or variables that are either unknown or were not noted in the records which could throw off the estimates arrived at by the general rules. Dr. Arden stated that despite this, he saw some consistency which led him to center on a time of death around 9 p.m. {299-300}. First, Dr. Arden relied on the state of digestion of the food contents. However, he

conceded that he did not personally observe the food contents, and that stress and abdominal injuries could slow or stop digestion.³

Second, he relied on and accepted as accurate the rectal temperature of 87 degrees taken at 1:40 a.m – even though he conceded that the dilation of the anus and the length of the thermometer possibly could cause the 87 degrees to not have been an accurate core temperature, and even though ^{HE} agreed that under the general rule of thumb a reading of 87 degrees would put the time of death nearly eight hours earlier – which is clearly impossible. {Tr. 305-06; 313-16}. He also admitted that a small child such as Josh would lose body temperature more quickly than an adult, and this could be hastened by being in wet clothing or in a cool environment. Moreover, he conceded cooling could begin prior to death when a person has suffered traumatic injuries, and the cooling could progress faster in the first couple of hours after death. {Tr. 300-312}.

Moreover, aside from these variables and contingencies with the two methods on which Dr. Arden relied, Dr. Arden's claim of consistency overlooks other methods of determining time of death which are inconsistent with an earlier time. Indeed, this highlights the lack of probative value as to estimates of time of death in this case, when the time range at issue is a mere three hours or less, and the only conclusion that really helps Applicant is to place the time definitively on the early end of that scale. Here, Dr. Arden discounted two other methods of estimating time of death that would support a later time of death – rigor mortis

³ Of course, as noted earlier, Dr. Sexton credibly testified that one who relied on the condition of the rice and peas "wouldn't be thinking clearly" as those are digested in the mouth and intestine, not the stomach. {Tr. 467-69; 479-80}.

and lividity, even though both of those methods also have issues with precision that the other methods have. Regardless, there were no signs of rigor noticed by ER personnel, which would be inconsistent with an earlier time of death, given that rigor is typically evident within three to four hours, and can be evident within an earlier time. {Tr. 331- 34}. Similarly, the ER personnel found signs of "early lividity" at 1:40 am, which Dr. Arden conceded typically starts within 30 to 120 minutes of death. Again, this is more consistent with a later time of death. {R. 1303}. {Tr. 325-29;

Interestingly, Dr. Arden accepted the ER personnel's rectal temperature of 87 degrees as accurate by stating that he trusted them to know how to do their jobs, despite concerns of dilation of the anus or use of a long thermometer to get a proper core temperature. On the other hand, he discounted these same ER personnel's observation of early lividity as beyond their normal expertise, even though doctors, particularly in the ER's trauma setting, would presumably look at lividity when determining whether resuscitation efforts were warranted. At trial, the ER doctor described "a little bit of liver mortis on the back" – which seems a pretty basic and specific observation which should be reliable. {R. 1303}. Dr.

Arden's opinion ^{DOES NOT ESTABLISH} ~~seems too cherry-picked, in an area where every method is filled~~
~~with variables, to give rise to~~ Strickland prejudice.

Similar issues exist with the time it took for Josh to die from the point he was assaulted, which also is important in Applicant's attempt to prove that Josh had to have been attacked on the earlier end of the scale. Dr. Arden centered on one hour as the time it took for Josh to die after he had been assaulted – but he

agreed it could have taken as little as a half an hour or as long as two hours. {Tr. 299}. This finding coupled with Dr. Arden's center estimate of the time of death highlights the inability of the experts to determine time of death to an early point with sufficient definitiveness to rise to Strickland prejudice. This is because undoubtedly one or both of the actual times these events occurred has to be somewhat significantly different from Dr. Arden's center estimate, because if Josh died at 9 p.m. and it took an hour to die, that would put the assault happening at 8 p.m., when by all accounts Josh was alive and Applicant was present. {Tr. 324-25}.

The bottom line is that time of death cannot be estimated with any certainty, particularly over such a small window of time – which really encompasses as late as 9:30 or 10:00 through shortly after midnight. Accordingly, there is no reasonable probability that testimony fraught with so many contingencies would have a reasonable probability of convincing a jury that Josh must have been killed closer to dinner and thus Tindal managed to do it while Applicant was briefly gone – and after that Applicant never checked on his son or noticed him lying unconscious on the floor of his room. Indeed, there was ample evidence that Applicant told multiple people with no reason to lie that he checked on Josh late in the evening and he was fine.⁴ This is simply too tenuous to meet the prejudice standard.

The issue is denied.

⁴ See {R. 1270-72; 1304; 1315}. {Tr. 157-58}.

(3) Allegation #3: Alcohol Ingestion Incident

Ground 10(a)(3) of Applicant's PCR Application is denied. Counsel's decision not to present evidence regarding ingestion of alcohol by Joshua H [REDACTED] was the result of a reasonable strategic decision made by trial counsel.

In Ground 10(a)(3), Applicant asserts trial counsel was ineffective in presenting testimony and/or evidence to show that Rebecca Tindal "forcibly administered a lethal dose of drinking alcohol to Joshua on December 12, 1998." In support of this argument, Applicant relies upon a few of the statements found in Joshua's medical records and a Report submitted by Dr. Tracey Corey, M.D. from the University of Louisville. **{Applicant's 9 and 11}**.

A. What Occurred At Trial

At trial, Littlejohn initially attempted to ask Tindal questions regarding the alcohol ingestion incident during cross-examination. **{R. 1425-26}**. After Littlejohn asked Tindal if she had ever had an alcoholic drink in Applicant's trailer, the solicitor objected and asked to take up the matter with the court. **{R. 1426}**. After both the jury and Tindal were excused from the courtroom, The deputy solicitor argued that Littlejohn was getting ready to attempt to impeach Tindal with specific acts of conduct in an effort to show she acted in conformity therewith in violation of the Rules of Evidence. **{R. 1427}**. He argued it was collateral, irrelevant, and it was far more prejudicial than probative. **{R. 1427}**.

Littlejohn argued that there were only two adults at the house of the night of the murder, and it could have been either Tindal or Applicant who committed the crime. **{R. 1428}**. He contended that Rule 404(b), SCRE, allows evidence of

other wrongs in this case because it shows the existence of a common scheme or plan, the absence of mistake or accident, or intent. {R. 1428}. Littlejohn proffered that he thought the testimony would show that Applicant went to work early on December 12, 1998, and Tindal was left in charge of Applicant's children and her grandson, Dustin. During that time, Joshua got into a mixed drink that was left on the counter, and he suffered an alcohol overdose. Applicant was at work at the time. He then went on to discuss the leg fracture incident.

The deputy solicitor initially responded to the fractured leg incident first. He argued that Applicant's position was basically that since Joshua suffered injuries in two prior incidents, therefore Tindal intentionally beat the child to death. {R. 1430-31}. The deputy solicitor further noted that these incidents did not fall within Rule 608 because they were not convictions. {R. 1431}. The deputy solicitor also stated he did not think that Applicant could show by clear and convincing evidence that the incidents should come in because the only evidence he could present would show that they were accidental injuries, with the alcohol ingestion incident being caused by Applicant leaving a drink out. {R. 1431}.

Littlejohn responded by arguing that he thought the alcohol ingestion incident and the fractured leg incident show a pattern of abuse by Tindal against the decedent. {R. 1432}. He noted that the evidence of the alcohol ingestion incident comes from Tindal's statement to police at the time and from the fact Joshua was taken to the hospital and stayed there for three days. {R. 1432}. After hearing the incident occurred in December, and not a few days before

Joshua's death, the trial court found the introduction of the evidence would be improper under Rule 404. {R. 1433}.

There was further discussion about what would be included in the proffer. He informed the court they would have sought to introduce a statement from Tindal that she was there at the house when Joshua ingested the alcohol. {R. 1433}. Littlejohn would not concede that Applicant left out the alcohol. {R. 1434}. He further proffered that Joshua was rushed to the hospital, and it was determined that he had a .417 blood alcohol level. {R. 1434}. Littlejohn's proffer also noted that Joshua was taken to the intensive care unit pediatric section of Richland Memorial Hospital, and he was treated for three days. {R. 1434}. He then proffered the information in regards to the fractured leg incident. {R. 1434}.

In response to the alcohol ingestion incident, the deputy solicitor noted that the State would reply with evidence from Barbara Keadle from DSS, who interviewed Applicant. According to Keadle, Applicant told her that he left the drink beside a table and the ingestion was accidental. {R. 1435}. Further, doctors at the hospital would have testified that they received the same history from Applicant. {R. 1435}. The deputy solicitor also stated that Chris Kitchens of the Lexington County Sheriff's Office and other DSS workers also received the same history from Applicant. {R. 1435}. The deputy solicitor also addressed the fractured leg incident.

The trial court asked Littlejohn if he realized going into this evidence would open the door for the State to rebut the accusations. {R. 1435-36}. The court also noted that it could always change its ruling. {R. 1436}. Littlejohn requested

some time to discuss with Applicant and co-counsel whether they would choose to present the testimony and evidence of the alcohol ingestion incident and the fractured leg incident. {R. 1436-37}. The defense later decided to withdraw the proffer. {R. 1442}.

B. Relevant Testimony and Evidence From the Evidentiary Hearing

During his direct testimony at the evidentiary hearing, Littlejohn was asked about his thought process in reference to the discussion during trial as reflected in the Record from pages 1425 to 1441. {Tr. 91}. He testified that he initially tried to get some sort of admission from Tindal that she was involved in the alcohol ingestion incident. {Tr. 92; R. 1425}. Before he could get into that line of questioning, the solicitor objected. {Tr. 92, R. 1426}. Judge Clary would not allow the testimony in the record. {Tr. 92, R. 1433, R. 1436}. Littlejohn noted that going into the alcohol ingestion incident was:

fraught with pitfalls by virtue of the fact that, as you can see from the statements of Dr. Donato, that there were some admission of – on Jeffrey's part that he was there or that he had left the drink out or something and so it was kind of a two-edged sword that could not only reflect badly on Rebecca, but it could have reflected badly on Jeffrey had we explored it.

{Tr. 92}.

Littlejohn further testified that Applicant was at work when the alcohol ingestion occurred. {Tr. 93}. Tindal was there with Joshua, and Tindal was the only one who could say exactly what happened because she was the only adult present. {Tr. 93}. She would not admit to forcing Joshua to drink the alcohol. {Tr. 93}. Littlejohn also indicated that the Lexington Medical Center and

Richland Memorial Hospital records for the alcohol ingestion incident indicated that Joshua had some bruising to his gum or lip area. {Tr. 94}.

Littlejohn noted that it was initially his intention to cross Tindal on the alcohol ingestion incident. {Tr. 97}. He wanted to point out that Tindal completely overlooked the alcohol ingestion incident and the fractured leg incident when she gave the impression during direct that she was very caring and nurturing for all of the children. {Tr. 97}. Littlejohn also indicated that he did not know if Judge Clary's decision on the admissibility of the testimony was a final decision. {Tr. 98}. To the extent that the defense could present the evidence (with the understanding that the state could present evidence to rebut the allegation), Littlejohn decided not to go down that route. {Tr. 98}. Littlejohn testified that the problem with continuing with that line of questioning was that there was evidence showing Applicant was culpable for the incident. {Tr. 98}. Littlejohn indicated that at first, Applicant stated Tindal was the one who had the drink. {Tr. 98}. However, Applicant later said that he had left the drink out, and he had told others ⁵ at the time that he left the drink out. {Tr. 98-99; 162; 217}.

In all, Littlejohn testified that he straightening out who was responsible for the alcohol ingestion incident without making Applicant look bad was going to be extremely difficult. {Tr. 99, 162}. "It wasn't clearcut that Rebecca was responsible for the alcohol incident." {Tr. 162}. Further, they knew Applicant was going to testify, and he was concerned that getting into either the alcohol ingestion incident or the leg fracture incident would have reflected badly upon Applicant and done more harm than good. {Tr. 163-4}. Littlejohn was

concerned, in part, that the jury could find that Applicant was irresponsible in leaving the child with Tindal, or that the jury would believe that Applicant should have done more to protect the child. {Tr. 216}.

After consulting with Applicant, and co-counsel Gaines, they decided the pitfalls did not outweigh the potential benefits of going into that line of questioning. {Tr. 99, 162}. They instead decided to follow the old maxim of keeping it simple, rather than bringing up prior injuries that might do more harm to the jury's view of Applicant than good. {Tr. 163}. Their plan was to keep Applicant's image as clean as possible so he could get up and refute Tindal's testimony. {Tr. 164}. They hoped that Applicant's image would be clean enough that the jury would believe him and not believe Tindal. {Tr. 164}.

Littlejohn also noted that it would have been difficult without clear and convincing evidence to present to Judge Clary. {Tr. 99}. Littlejohn stated Judge Clary was not inclined to allow the evidence regarding alcohol ingestion into evidence. {Tr. 161-2}. While the defense had evidence from medical records and the independent Dr. Corey report indicating the alcohol ingestion might have been consistent with forced ingestion, the issue remained a double edged sword. {Tr. 219}. Applicant had taken responsibility for leaving ^{the wine} drink out, and raising the issue could have caused the jury to believe he was responsible for the forced ingestion or the laceration on the lip. {Tr. 219}. Since the situation was just too "messy," counsel decided to avoid it altogether. {Tr. 219}. That, along with the fact that Tindal was not on good terms with Applicant, were reasons ^{why} ~~why~~ counsel gave for not pursuing that line of questioning. {Tr. 219}.

Dr. Arden also testified about this issue. He indicated that the .417 blood alcohol concentration was significant because it was extremely high for any person under any circumstances. {Tr. 249}. He also noted that one of the hospital records specifically mentioned there was a half-centimeter laceration related to the upper lip. {Tr. 250}. He stated that the use of the term laceration indicated that it could be a blunt impact injury. {Tr. 250}. He also noted that lacerations to either the lips or frenulum are sometimes seen in some episodes of forced ingestion. {Tr. 251}. Arden stated there was a discrepancy between the blood alcohol concentration and the explanation as to how much alcohol was consumed by Joshua. {Tr. 253-54}. During cross-examination, Arden noted that if liquor was mixed with something sweet or fruity, that would increase the likelihood that a child would drink it. {Tr. 293}. As for the lip injury, Dr. Arden could not say specifically that it occurred at the same time Josh ingested the alcohol. {Tr. 294}. The injury could have occurred one to two hours before the ingestion; it could have occurred after the ingestion; or the doctors may not have noted evidence of healing since that was not their focus. {Tr. 295}.

Given this testimony, counsel's testimony clearly reflects the reasonable strategic bases for counsel's decision not to delve into the alcohol ingestion incident. The evidence presented at the evidentiary hearing supported counsel's decision, inasmuch as there was ample evidence the State could have used to show Applicant was responsible for the alcohol incident if Applicant opened the door. For example, in a handwritten statement Applicant gave Detective Chris Kitchens on December 15, 1998, he stated that he made and left out a mixed

drink that contained two ounces of Seagram's Seven and twelve ounces of 7-Up. **{State's 11, Tr. 164-6}**. Also, in that handwritten statement, there was evidence that Applicant was not truthful to police because he indicated that Tindal was just a babysitter, and did not state that she was also his girlfriend at the time. **{State's 11}**. In another statement given by Applicant, he indicated the drink consisted of approximately 1.5 to 2 ounces of Seagram's Seven mixed with 7-Up. **{State's 12, Tr. 167-8}**. Joshua's medical records also contained statements that indicated Applicant had informed medical personnel that he had made the alcoholic drink the night before. **{State's 14, State's 16, Tr. 169-74}**. There were also DSS records that indicated Applicant told DSS caseworkers that he had left out the alcoholic drink the night before. **{See State's 38}**. In all, the issue of who was responsible for leaving the drink out was very much in dispute, and counsel could not have been unreasonable in deciding that bringing up prior instances of alleged poor parenting or abuse could as quickly condemn Applicant as help him.

Moreover, Applicant failed to show that the alcohol ingestion incident was admissible anyway. Under Rule 404(b), SCORE,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if

its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364, cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008).

Here, Applicant first cannot establish by clear and convincing evidence that Tindal was responsible for the alcohol ingestion incident, or that Tindal forced Joshua to drink the alcohol. As already noted, there was significant evidence that indicated Applicant was responsible for leaving out the alcoholic drink. Further, there was evidence indicating that the alcohol ingestion incident was nothing more than an accident. Thus, counsel could not show with clear and convincing evidence that Tindal had forced Joshua to drink the alcohol on December 12, 1998. As a result, Applicant failed to show that counsel was deficient in not presenting evidence relating to the alcohol ingestion incident at trial.

Moreover, Applicant cannot show that the evidence was admissible under Rule 404, SCRE, anyway. The event was not temporally connected with Josh's death, and even assuming abuse, it was not so similar as to constitute common scheme or plan. Moreover, there was no claim by Tindal that she accidentally killed Josh while doing something innocent, so the "absence of mistake or accident" exception would not apply. The bottom line is counsel would have

been trying to do what Rule 404 expressly prohibits – showing “action in conformity therewith.”

Further, Applicant has failed to establish he was prejudiced by counsel's decision not to present evidence regarding the alcohol ingestion incident. As already noted, there was substantial evidence indicating Applicant was the one who left the alcoholic beverage that was ingested by Joshua out on the nightstand. Applicant also failed to prove that the result at trial would have been different but for counsel's decision not to present the evidence regarding the alcohol ingestion incident, especially in light of the other evidence presented at trial. Joshua's abdomen had been struck with such force that twenty-one inches of Joshua's intestines had been torn away in three areas from the mesentery, or fan-shaped structure that holds the intestines in place. Some of Joshua's mesentery was split in two by the compression of the blows against his spine. ^{WPA} He also noted that Josh's bladder was empty. {R. 1617-25, 1629-32}. Dr. Sexton found one external and seven internal bruises on Josh's head. The external one was consistent with a blow from a golf ball keychain like Applicant carried. {R. 1614-16}. There was significant testimony presented at trial that Applicant tried to keep the adults who saw Joshua on the night of his death from talking to police, saying they were trying to trick them. {R. 1414-16, 1519-24, 1541-43}. Applicant told one witness he was thinking about running because the police did not believe his story. {R. 1588-89}. Applicant came up with various innocent reasons for Josh's death, including that he “pigged out” at dinner or had fallen at day care. {R. 1556-59; 1548-52; 1822-23}. He also told an inmate he had done

something "very wrong" and that it was going to take a long time to get it straightened out. {R. 1901-05}. Finally, an attendee of Josh's funeral testified she heard Appellant stand over Josh's casket and say, "I'm so sorry, Joshy, I'm so sorry." {R. 1907-14}. It simply cannot be said that this "messy" evidence would create a reasonable probability of a different result.

Altogether, Applicant has failed to establish that counsel's strategic reasons for not presenting evidence regarding the alcohol incident was unreasonable. Thus, Applicant has failed to establish that counsel was ineffective in this regard. As a result, this claim of ineffective assistance of counsel is denied with prejudice.

(4) Allegation # 4: Felicia as Cause of Joshua's Spiral Fracture

Ground 10(a)(4) of Applicant's PCR Application is denied. Counsel's decision not to present evidence about Joshua's spiral fracture was the result of a reasonable strategic decision made by trial counsel. Further, Applicant has failed to establish by a preponderance of the evidence that Tindal was the source of the story.

In Ground 10(a)(4), Applicant asserts that trial counsel was ineffective because they failed to investigate, develop, and present evidence that Rebecca Tindal was the source of the story that Felicia H [REDACTED] broke Joshua's leg by stomping on it while she was wearing boots. In support of this allegation, Applicant points to Tindal's statement to police on May 15, 1999 at 4:20 p.m. In the statement, Tindal stated as follows:

Phillips: Uh, you know I'm curious as to how this incident could have happened from the way which it has been described from the

doctors and this force that was necessary and the number of times this child was struck how anybody could be in that (interrupted by Tindal)

Tindal: And not hear it.

Phillips: mobile home near it and not hear anything?

Tindal: I thought the same thing. I have thought the same exact same thing. I I don't know, I don't know and I wished I did but I don't. I do know Josh didn't cry out loud. Josh when Felicia was stomping on his leg that time

Phillips: Uh umm.

Tindal: tears were streaming down his face but he wasn't crying out loud. Felicia whaled you know. Josh doesn't. He fell off the bed and hit his head one time you know when he was smaller didn't make no sound at all but tears were just streaming down that little face. I mean it doesn't surprise me that I didn't hear him necessarily [what it says].

{Applicant's 73, at p. 17}.

At Applicant's trial, this issue was handled during the same argument regarding the alcohol ingestion incident. Littlejohn indicated, ^{was} during his argument for permission to present the alcohol ingestion evidence, ^{was} that in late February 1999, Joshua suffered a fractured leg at a time during which Applicant was not present. **{R. 1428-9}**. It was Applicant's understanding that the injury occurred while Tindal was watching the children. Littlejohn indicated that the story that was relayed to Applicant from Tindal was that Joshua was injured as the result of being kicked by Felicia. **{R. 1429}**. Littlejohn asserted that the evidence was admissible under SCRE 404(b). **{R. 1429}**.

In response to Littlejohn's argument, the deputy solicitor argued that no evidence had been presented to show that Tindal said she saw Felicia kicking

Joshua and that was how he got the leg fracture. He further contended the evidence that had to be presented must be clear and convincing, and at that time, there was no evidence on the record. {R. 1429}. The deputy solicitor also argued it was not common scheme or plan, and the incidents were not similar. {R. 1429}. In reply at trial, Littlejohn cited to the statement given by Tindal at 4:20 p.m. on May 15, 1999 (i.e. the excerpt from Applicant's 73). {R. 1430}. That led the deputy solicitor to assert that the impeachment testimony that was being offered was not admissible under SCRE 608 because it did not involve acts of untruthfulness. {R. 1431}. The deputy solicitor noted that he had statements from Applicant to the doctor indicating that Applicant was the one who witnessed Felicia kicking Joshua. {R. 1431}. In all, the deputy solicitor asserted that he did not see how Applicant could prove by clear and convincing evidence that the two incidents were admissible, when the evidence available indicated the two incidents were accidental. {R. 1431}.

Littlejohn later argued that the evidence that would be presented on the fractured leg incident would include Tindal's statement to police on May 15, 1999; testimony of Dr. Dacus, the family physician who discovered the fracture after two x-rays; and testimony from Dr. Green, who treated Joshua for the fractured leg. {R. 1434}. Riddle responded that there was testimony from the doctors that indicated Applicant was the one who was watching the children when Felicia allegedly kicked Joshua when the leg was broken. {R. 1435}. He noted that if Applicant was going to present the evidence he had regarding the incident, the State would also have to be allowed to respond by putting in

evidence that Applicant was the one watching the children and that the children were in Applicant's custody. {R. 1435}. In the end, the trial court intimated it would reconsider its earlier ruling if both sides were willing to present the evidence in camera. {R. 1436-7}. Littlejohn requested some time to consider whether or not to pursue the line of inquiry further. {R. 1436-37}. Littlejohn later indicated to the court that Applicant decided to withdraw his proffer. {R. 1442-43}.

A. Relevant Testimony at Evidentiary Hearing

At the evidentiary hearing, Littlejohn testified that the statement Tindal made to police was part of the evidence they had that she witnessed Felicia stomping on Joshua's leg. {Tr. 96}. He could not recall whether his investigation indicated that the spiral fracture could have been caused by a four-year old child's stomp. {Tr. 96-7}. Littlejohn noted that he did not know if it was ever established with any finality what was the actual cause of the spiral fracture. {Tr. 97-8}.

In terms of evidence for the spiral fracture incident, Littlejohn noted that the only proof of what happened was Tindal's statement to police about how the leg was fractured. {Tr. 99}. He noted that it was another situation that was going to be extremely difficult to prove. {Tr. 99}. After consulting with Applicant and co-counsel, they decided the pitfalls of presenting the evidence did not outweigh the potential benefit. {Tr. 99}.

During cross, Littlejohn noted that the defense was concerned the State might attempt to call Felicia to testify. {Tr. 176}. As for the leg injury, he recalled

that Joshua had sustained a spiral fracture. {Tr. 176}. The story from the Haselden family was that Tindal was the only one there with the children at the time, and Tindal said was that Felicia had stomped on Joshua's leg and caused the fracture. {Tr. 176}. Littlejohn also testified that they had a copy of the SLED interview with Dr. Dacus, which indicated that Applicant's mother was the one who told Dacus that Joshua had been kicked by another child. {Tr. 176-78, State's 17}. Dr. Dacus' medical records on the incident also supported this. {Tr. 178-9, State's 18}. Furthermore, Littlejohn testified the defense also had a medical history from Dr. Green's records that indicated Green's understanding was that the fracture was the result of Joshua playing with his sister. {Tr. 181}. The note indicated they were kicking each other, and she had boots on at the time. {Tr. 181}. According to Dr. Green's interview with SLED the fracture could have happened from the sister kicking Joshua, especially if there was some uneven weight transfer. {Tr. 181, State's 20}. Green opined the injury could have been the result of an accident. {Tr. 181, State's 20}.

Littlejohn did not specifically recall receiving the statements from the Mozingos, but was sure they were in the discovery. {Tr. 182}. He also did not recall if those statements reflected the Mozingos' statements that Applicant was the one who told them Joshua's leg was broken as the result of Felicia kicking him while wearing boots. {Tr. 182}. In all, Littlejohn noted that there were extensive records that would have made a very complicated scenario on the fractured leg incident. {Tr. 182}. It was potentially very messy to the detriment of Applicant. {Tr. 182}. A lot of the information could have cast aspersions on

Applicant, like the spiral fracture. {Tr. 182}. There was no way to prove Tindal was responsible for the fracture. {Tr. 182}. At trial, Littlejohn's hope was to get whatever he could out of the questions and then move on. {Tr. 183}. When the State made a big issue out of it, the defense decided the risks outweighed the potential benefits and moved on. {Tr. 183}.

Dr. Arden testified that he also reviewed Dr. Dacus' and Dr. Greene's records regarding the spiral fracture. {Tr. 255-9}. He noted that the fracture Joshua suffered could have been a toddler's fracture. {Tr. 257-8}. Arden noted that if it was a toddler fracture, it would not have resulted from infliction or abuse. {Tr. 257}. He also noted that a spiral fracture can be done by hand twisting. {Tr. 258}. Arden noted that Josh's fracture could have been accidental or intentional. {Tr. 259}. However, it could not have been caused by a kick from a four year old wearing cowboy boots. {Tr. 259}. He stated that it was inconsistent with the application of force with a twisting mechanism. {Tr. 259}.

During cross-examination, Arden noted that it was possible that Joshua's injury was a toddler's fracture and that others incorrectly attributed it to the kicking incident. {Tr. 297-8}. He further indicated that others could have been mistaken in assuming the fracture was the result of Felicia kicking Joshua in the leg. {Tr. 297-8}.

This claim is denied because counsel's credible testimony clearly reflects that counsel decision (to not) introduce evidence to establish Tindal was the source of the story that Felicia broke Joshua's leg was the result of reasonable trial strategy. After some consideration at trial, counsel (with input from co-

counsel and Applicant) decided it would be best to forego the potential risks of that line of questioning. There was ample evidence that indicated that Applicant was the one who told others that Felicia was the one who broke Joshua's leg. In light of the conflicting evidence and testimony regarding who was the source of the story that Felicia stomped on Joshua's leg and the abundance of evidence that indicated Applicant was the source of the story, counsel's reasoning for not presenting the evidence was clearly reasonable.

Indeed, like the discussion of Rule 404, SCRE in the previous ground, Applicant cannot establish by clear and convincing evidence that Tindal was the source of the story that Felicia broke Joshua's leg. Several witnesses, including Jimmy M [REDACTED], Summer J [REDACTED], Charles Langenburg, and Barbara Keadle all stated that Applicant said he was the one who saw that Joshua suffered his leg injury as a result of being kicked by Felicia. {Tr. 622-3, 638, 711; State's 37}. Furthermore, statements available to counsel at the time of trial also indicated that it was not clear-cut from where this allegation arose. {See State's 17, 18, 19, Tr. 182}. Since it was not clear who was responsible for the story that Felicia was the one who broke Joshua's leg, Applicant has failed to establish counsel was deficient in this regard.

Moreover, like the previous ground, Applicant ~~can not~~ ^{CANNOT} establish admissibility under Rule 404. The incident was not temporally connected with Josh's death, and was not so similar as to be common scheme or plan. Further, there was no claim by Tindal regarding Josh's death that would make relevant absence of mistake or accident.

Furthermore, Applicant has not presented any testimony or probative evidence that establishes that he was prejudiced. As already noted, it could not be concretely established that Tindal was the source of this story, and there was ample evidence that Applicant witnessed the kicking incident. Even if Tindal was the source of the story, Applicant was not prejudiced because there was no probative evidence presented at trial that established how Joshua suffered the injury. Both Dr. Green's statements and Dr. Arden's testimony indicate that the fracture may not have been the result of abuse. {State's 20, Tr. 257-58, 296-98}. In all, Applicant fails to show that the result at trial would have been different had counsel presented evidence that Tindal was the source of the story that Felicia broke Joshua's leg. In light of the other testimony presented at trial, discussed in the preceding ground, Applicant has failed to establish that there is a reasonable probability the result of his trial would have been different but for counsel not presenting evidence regarding Joshua's leg fracture. As a result, this claim of ineffective assistance of counsel is denied.

(5) Allegation # 5: Evidence of Upper Lip/Gum Injury from April 8, 1999

Ground 10(a)(5) of Applicant's PCR Application is denied. Applicant failed to establish by a preponderance of the evidence that counsel was ineffective for not presenting evidence of an injury to the upper lip and gum that Applicant alleges was incurred while Joshua was in Tindal's care on April 8, 1999.

In Ground 10(a)(5), Applicant asserts trial counsel was ineffective for not investigating, developing, and presenting evidence to establish Tindal was the lone adult present when Joshua suffered an injury to his upper lip and gum area

on April 8, 1999. In the Application, Applicant alleged that he left for work for a weekly Thursday morning training session before Joshua or Felicia would have been awake that morning. He further asserted that Tindal would have woken the children and got them ready for the day. He also claimed that Tindal would have then taken the children to meet Applicant in a bank parking lot, and Applicant would have then taken the children to his regular Thursday babysitter.

Applicant failed to establish a factual basis for this claim. He presented no evidence of any injury to Joshua H [REDACTED] on April 8, 1999. Further, counsel provided a reasonable strategic reason for not presenting any alleged evidence of the April 8, 1999 gum injury. During cross-examination by the State, counsel reviewed medical records that were related to the April 8, 1999 injury. **{Tr. 183-4, State's 21}**. Littlejohn testified that he would not have tried to present evidence regarding the April 8, 1999 gum injury because the injury was not the result of any sort of assault. **{Tr. 184, State's 21}**. Littlejohn noted that the medical records indicated the injury was the result of gingivitis. **{Tr. 184}**. Littlejohn also noted that Applicant did not say anything to him that would indicate the April 8, 1999 injury was a potential issue. **{Tr. 184}**. Littlejohn also noted that he did not recall there being any information that indicated Tindal kept the children during the weekdays. **{Tr. 185}**. He knew Applicant's regular babysitter was Ms. Garner, and that Applicant's mother also babysat for him. **{Tr. 185}**. In all, there was no probative evidence or testimony that indicated that Tindal was the one caring for Joshua when the alleged April 8, 1999 gum injury occurred. Further, there was no probative evidence even to establish that Joshua suffered

an injury to his gum. As noted by Littlejohn, the only evidence presented indicated Joshua had gingivitis. Thus, Applicant has failed to establish a factual basis for the underlying claim.

Even if there was an underlying factual basis, Applicant still failed to establish counsel was ineffective in handling this issue. Counsel gave a clear strategic reason for not presenting evidence regarding an alleged gum injury on April 8, 1999. He noted that he would not have presented the evidence regarding the April 8 gum injury because it was not the result of an assault. Furthermore, Applicant did not present any probative evidence establishing that the injury to Joshua's gum on April 8, 1999 was the result of any action by Tindal. The medical records clearly indicate that Joshua was diagnosed with gingivitis. **{State's 21}**. There was no probative evidence introduced to refute that medical finding. Further, Applicant has not proven that Joshua was in Tindal's care when this injury was discovered. Applicant presented no probative evidence to establish that Tindal was taking care of the children, that Applicant had a training session that morning, or that Tindal was responsible for meeting Applicant with the children on April 8.

Applicant also failed to present any evidence to establish he was prejudiced as a result of trial counsel not presenting evidence of the April 8, 1999 gum injury. Again, the medical records indicate there was no injury: Joshua merely suffered from gingivitis. Since it could not be established that the April 8, 1999 injury was the result of some sort of negligence or abuse by Tindal, it would have had no evidentiary value for Applicant's defense.

Indeed, in light of the other evidence presented at trial, discussed in issue three, *supra*, Applicant has failed to establish that there is a reasonable probability the result at trial would have been different but for counsel not presenting the evidence regarding the gum injury. Since Applicant has not shown that counsel was deficient or that he was prejudiced by the handling of the alleged gum injury, this claim of ineffective assistance of counsel is denied.

(6) Allegation # 6: Fingernail Issue

Ground 10(a)(6) lacks merit. In Ground 10(a)(6), Applicant asserts trial counsel was ineffective because they failed to investigate, develop, and present evidence to show that Rebecca Tindal was wearing acrylic fingernails when her hands were photographed by law enforcement officers two days after Joshua's death. Applicant argues that the photographs clearly show that Tindal was wearing fake fingernails at the time of the incident. He asserts that fake fingernails were stronger than regular fingernails, and the photographs indicated at least two of Tindal's nails had been damaged and showed evidence of recent repair. He further argues that pointing out these facts would have impeached Tindal's testimony and provided additional inculpatory evidence against Tindal.

At trial, the State presented photographs of Tindal's hands that were taken May 14, 1999. {R. 1899-1900}. Detective Jim Hickman, who took the photographs, testified that he found no marks, bruises, or cuts on Tindal's hands that day. {R. 1900}. He also testified that all of her fingernails were intact. {R. 1900}.

At the evidentiary hearing, trial counsel testified that he recalled the introduction of the pictures of Tindal's hands at trial. {Tr. 100}. Littlejohn recalled that the photographs were introduced to show there was no bruising on Tindal's knuckles. {Tr. 100}. He further indicated that the defense was not concerned with the fingernails because the victim had suffered no lacerations or cuts. {Tr. 100}. Counsel noted that they did not investigate whether Tindal had acrylic nails because they did not see the relevance of the issue. {Tr. 101}. During cross-examination, Littlejohn reiterated that there was no injury to Joshua in the pathologist's report and other records that could have been caused by fingernails. {Tr. 186}.

Applicant also presented the testimony of Michelle Pham. {Tr. 518-43}. Pham is a nail technician at Fancy Nails. {Tr. 518}. She testified that she had been a licensed technician for fifteen years, and she had been licensed in California, Maryland, and South Carolina. {Tr. 520-21}. She also indicated she had no forensic training and had never been asked before to analyze the age of fake nails and fake nail repairs; she was only trained to fix and do nails. {Tr. 522}. Pham reviewed the photographs of Tindal's hands at the hearing. {Tr. 525-37}. She indicated that the nails on Tindal's right hand were acrylic or gels. {Tr. 526}. They had grown out in two weeks. {Tr. 526}. She further indicated that in Applicant's 46, there was some indication of a repair to the right pinky nail, but the repair was not recent. {Tr. 527}. Pham could not say how recent the repairs were from the photo. {Tr. 532-35, see Applicant's 26}. She also indicated that the ring finger on the left hand had been repaired at some point in

time. {Tr. 530-31}. Pham could not state why the nails on the right pinky and on the left ring fingers were damaged. {Tr. 539-40}. She also indicated that nails can break during the course of everyday life. {Tr. 539-40}. Pham also indicated that based on the length of Tindal's nails, she could not see how Tindal could roll her fingers into a fist. {Tr. 541-43}.

Applicant has failed to establish his claim of ineffective assistance of counsel in this regard. First, Applicant has not shown that counsel was deficient in presenting evidence regarding Tindal's fingernails, even assuming the qualifications and validity of the opinions of the "nail expert" Applicant presented at trial. As noted by trial counsel, the condition of Tindal's fingernails was clearly irrelevant. A review of the pathologist report and Dr. Sexton's testimony at trial indicates there were no injuries that could have been caused by fingernails. {State's 10, R. 1612-32}. Further, the photographs of Tindal's hands taken two days after Joshua's death show no indication of bruising either to the knuckles or to the palms. {Applicant's 43-49, R. 1898-1900}. Applicant presented no evidence that established the fingernails were damaged as a result of Tindal punching Joshua in the stomach on the night of his death. In fact, Applicant's "expert" clearly cast doubt on the notion that Tindal could even make a fist because of the length of her fingernails. Since this line of evidence was not relevant, counsel was not deficient in not presenting evidence that Tindal wore acrylic fingernails.

Further, Applicant failed to show prejudice. Again, Pham clearly indicated that it would be difficult for someone with fingernails of Tindal's length to make a

fist. Applicant did not establish how this testimony would have impeached Tindal. There was no testimony or evidence to explain why two of her nails necessitated repair, or what caused the damage. Furthermore, Tindal did not make any statements regarding her fingernails at trial.

Also, Applicant fails to prove how testimony establishing Tindal wore acrylic fingernails would have inculpated her in Joshua's murder. As noted by Detective Hickman, there was no evidence of bruising, cuts, or marks on Tindal's hands the day after Joshua's death.

In all, Applicant has failed to establish that there is a reasonable probability the result of his trial would have been different had they presented testimony indicating Tindal was wearing acrylic fingernails when her hands were photographed by police. Joshua's abdomen had been struck with such force that twenty-one inches of Joshua's intestines had been torn away in three areas from the mesentery, or fan-shaped structure that holds the intestines in place. Some of Joshua's mesentery was split in two by the compression of the blows against his spine. {R. 1617-25, 1629-32}. Dr. Sexton found one external and seven internal bruises on Josh's head. The external one was consistent with a blow from a golf ball keychain. {R. 1614-16}. There was testimony that Applicant routinely hit Joshua in the head with a golf ball keychain that night. {R. 1383-4}. Since Applicant has failed to show that counsel was deficient or that he was prejudiced as a result of counsel not presenting this evidence regarding Tindal's fingernails, this claim for post-conviction relief is denied with prejudice.

(7) Allegation # 7: Phone Records for May 9, 1999

Ground 10(a)(7) is denied. In Ground 10(a)(7), Applicant asserts that trial counsel was ineffective for failing to investigate, develop, and utilize records for Applicant's home phone. Specifically, Applicant argues that his phone records indicated that Rebecca Tindal was at Applicant's home on May 9, 1999. Applicant points to a phone call made to a Columbus, Georgia phone number at 10 a.m. Applicant argues that is objective proof that Tindal was at Applicant's home on the morning of May 9, 1999, and arguably on the night of May 8, 1999.

At Applicant's trial, Tindal testified during cross-examination that she did not go to Applicant's home on May 9, 1999. {R. 1443}. At the evidentiary hearing, Littlejohn testified he received some telephone records, but he did not recall what was on them. Applicant presented the phone records from Applicant's home for May 1999. {Tr. 101, Applicant's 12}. The records indicated that a call was made to a Columbus, Georgia number. {Tr. 103}. Littlejohn could not say he attempted to find out to whom the phone number belonged. {Tr. 103}. He noted that he could have used the phone records to show that Tindal was at Applicant's house on May 9, 1999. {Tr. 103-04}. However, he also asserted that he did not know what presenting that evidence could accomplish. {Tr. 103-04}.

Applicant has failed to show that counsel was deficient in not presenting these phone records at Applicant's trial. First, Applicant did not present any probative evidence establishing that the Columbus, Georgia number belonged to Tindal's mother. Since there was no testimony or probative evidence

establishing whose number was the Columbus, Georgia phone number, Applicant has failed to establish that counsel was deficient in this regard. The phone records could not be used to show that Tindal was at Applicant's home on May 9, 1999.

Furthermore, Applicant has failed to show how trial counsel not utilizing the phone records to impeach Tindal prejudiced him. Specifically, Applicant failed to establish the relevance of Tindal spending part of Mother's Day at Applicant's trailer. Applicant presented no probative evidence to establish what Tindal's alleged "designs desires relative to Applicant" were. Applicant also presented no probative evidence to show what Mother's Day had to do with the night of the murder. At best, all that could have been established by introducing the phone records was that Tindal was incorrect in forgetting that she was at Applicant's trailer on May 9, 1999. In light of the other evidence of Applicant's guilt that was presented at trial, this information would not create a reasonable probability of a different result at trial.

As a result, this claim of ineffective assistance of counsel should be denied.

(8) Allegation # 8: Statement from May 15, 1999 at 4:20 pm to show she did go to Applicant's house

Ground 10(A)(8) is denied because it is without merit. In Ground 10(A)(8), Applicant asserts trial counsel failed to investigate, develop, and utilize Tindal's statement to law enforcement on May 15, 1999 at 4:20 pm to impeach her testimony to the jury that she had not gone to Applicant's home on May 9, 1999.

At Applicant's trial, Tindal testified during cross-examination that she did not go to Applicant's home on May 9, 1999. {R. 1443}. In her statement to police on May 15, 1999, at 4:20 p.m. Tindal stated:

Tindal: Well I mean it doesn't bother me. I don't mind if you know cause I was gonna take see it was Mother's Day last Sunday.

Phillips: Uh umm.

Tindal: And I was planning on spending the day with my son and Jeff heard me talking to him about bowling and he said well what time are yall going bowling? And I said probably after we eat cause my son had saved up his money and wanted to take me out to eat urn he said well call me when yall get done and so when we got finished eating I beeped Jeff and of course he didn't call back so I told D[REDACTED] I said we were right up the road from Jeff's house, I said well we'll ride on up there real quick and see if he's there you know if he's back from eating with his mama and them. And he wasn't and the front door was unlocked so I went on in and I beeped him again and he called me and he had gone to Batesburg to see his I guess to see his brother and them or went back there with him or something you know. I told him we were going on bowling and he said well Josh has been showing his ass (spells ass out letter by letter) and I said what do you mean? He said the minute they walked in the restaurant Josh started throwing a temper tantrum. He said so I don't know if it would be a good idea to bring Josh. I said well you bring him on. I said I can handle Josh, Josh is a good boy me and um you know he finally said okay and they met us there and we bowled and D[REDACTED] and I were already there and bowling one game when they got there. So when it was all over we took all the shoes up there.

{Applicant's 73, at pp. 6-7}.

At the evidentiary hearing, Littlejohn testified that he did not know what would have been accomplished by impeaching Tindal on whether she was at Applicant's trailer on Mother's Day. {See Tr. 104}. He noted the effect of the impeachment would have been little because it was three days before the murder. {See Tr. 104}.

For Relief (WPA)
This claim¹ is denied because Applicant fails to establish counsel was ineffective in this regard. First, Applicant cannot establish that counsel was deficient in not utilizing the statement. At best, all counsel could establish with the statement was that Tindal had previously stated she did go by Applicant's trailer on Mother's Day. However, the statement also contained several facts that would not have been helpful to the defense's case, including statements indicating Applicant was partial to Felicia, Applicant had a quick temper, and Applicant had repeatedly said that he knew how to knock people out and kill them. It also showed Applicant's frustration with Josh and Tindal's good relationship with Josh. Had counsel utilized the statement, it was possible that he would have opened the door to some of the more damaging information contained in the statement ~~would come~~ *COMING (WPA)* into evidence.

Even if counsel was deficient, Applicant fails to establish how he was prejudiced. Applicant fails to show why it would have been significant that Tindal was at Applicant's trailer on Mother's Day. Contrary to Applicant's allegations in the PCR Application, there was no probative evidence or testimony that indicated Tindal had a "true and desperate desire for a permanent place in Applicant's life." In fact, according to the statement, it was Applicant's request that led Tindal to stop by his trailer. According to the statement, Tindal indicated that she was going bowling with her son on Mother's Day. Applicant requested that Tindal call him before she and her son went bowling so they could all go together. When Tindal did not receive a response to the page she sent Applicant, she and her son stopped by to see if Applicant and his kids were home, and if they still wanted

to go bowling. The statement also clearly reflected that Tindal had great affection and rapport with Josh. On the other hand, the statement also indicated that Applicant was not happy with Joshua's behavior that Sunday, and it further reflected that Applicant had a quick temper with his children.

Applicant also fails to show prejudice. As counsel noted, Tindal's visit on Mother's Day was three days before the murder. Applicant has not presented any probative evidence to prove that the activities from the Sunday prior to Joshua's death had any bearing on the murder on the night of May 12, 1999. In light of the other evidence of Applicant's guilt that was presented at trial, presentation of the evidence contained in the statement would not have created a reasonable probability of a different result at trial. Thus, this claim of ineffective assistance of counsel is denied.

(9) Allegation # 9: Applicant leaving courtroom for argument about cross-examination question

This ground has been expressly withdrawn by Applicant.

(10) Allegation #10: Breibart as a witness

Ground 10(a)(10) is denied. In Ground 10(a)(10), Applicant asserts trial counsel was ineffective in eliciting testimony from Applicant's prior counsel, Richard Breibart, regarding advice Breibart gave Applicant shortly after the murder. Counsel's decision to call Applicant's prior counsel was the result of a reasonable strategic decision.

At trial, Breibart testified that he met with Applicant twice on May 14, 1999. {R. 1657-58}. Breibart stated that he advised Applicant not to make any statements to law enforcement personnel or to anyone else about anything. {R.

1659}. Breibart explained to Applicant that was his general advice to anyone, at least until Breibart could get a handle on what was happening.

I told him it would be my opinion that nobody who is a potential suspect or even a witness in a criminal matter of a serious nature should ever talk to police officers without a lawyer being present or without having hired a lawyer. I also told him that it was my opinion that he should not talk with anybody who would be a potential witness in the case, and, again, that was advice that I give to all people who would come to me.

{R. 1659}. Breibart then noted he had discussions with Applicant and his family, but due to no fault of Applicant's, Breibart was not going to be able to represent him at trial. **{R. 1660}**.

At the evidentiary hearing, Littlejohn testified that the defense was confronted with the fact that Applicant had told witnesses not to talk with law enforcement. **{Tr. 136}**. In Littlejohn's opinion, the evidence was very incriminating. **{Tr. 136}**. Littlejohn believed the jury would look unfavorably upon evidence of that sort. **{Tr. 136}**. The explanation Applicant gave Littlejohn for his actions in this regard was that he took the advice from Breibart (i.e. no one should talk to police) as meaning that it would be a good idea for no one to talk. **{Tr. 136}**. He thought he should recommend or suggest to Tindal and Summer that they should not talk to police about what happened. **{Tr. 136}**.

Littlejohn felt they had to give the jury a reason why Applicant would do that. **{Tr. 136-37}**. Applicant owned the attorney-client privilege, but Applicant was on board with presenting the testimony. **{Tr. 137}**. Further, Breibart's testimony was admissible to respond to the allegations by Tindal and her daughter Summer J. [REDACTED], who testified that Applicant had instructed them not

to talk with law enforcement. {Tr. 136-38, 190-92, see R. 1414-1419, 1519-22}. Littlejohn also argued that presenting Breibart's testimony allowed the defense to show that Applicant was a novice to the criminal justice system, and Breibart's testimony corroborated Applicant's testimony as to why he told Johnston and Tindal not to talk with police. {Tr. 190-92}. Finally, Littlejohn admitted that the defense was also stuck with the explanation for Applicant's advice because he had indicated in his statement to police that was why he told the two witnesses not to talk with police. {Tr. 193-95, see State's 24, pg. 26}. In light of the circumstances, Littlejohn stated, it was the best way to legitimize Applicant's otherwise incriminating actions. {Tr. 194-95}. He noted that he consulted with Applicant about the plan of attack on this issue, explained the situation to him, and Applicant was on board with the strategy. {Tr. 193}.

Counsel's testimony clearly shows that the decision to present the testimony of Richard Breibart was part of counsel's trial strategy. It was clearly a reasonable strategic decision. Littlejohn clearly stated that they called Breibart because they needed to combat the accusations from both Tindal and Summer that Applicant told them not to talk to the police. He noted the testimony from Breibart was consistent with and corroborated Applicant's testimony regarding the advice he received. Counsel felt this was the most appropriate way to combat the negative inferences that were raised by the testimony regarding Applicant's attempts to quiet Tindal and Summer.

Further, Applicant fails to show that he was prejudiced by counsel presenting the testimony from Breibart. It simply cannot be said that the absence

of this evidence would create a reasonable probability of a different result at trial, particularly given all the other evidence in the case and Tindal and Summer's testimony as to what Applicant told them while talking to police. Since Petitioner has failed to establish trial counsel was ineffective in this regard, this claim for relief is denied.

(11) Allegation # 11: Jason Jenkins

Ground 10(a)(11) is denied. In this Ground, Applicant asserts that trial counsel was ineffective because they did not investigate, develop, or present information from Jason Jenkins. Specifically, Applicant asserts that Jenkins could have provided information concerning Applicant's interaction with his children. According to Applicant, Jenkins also could have refuted Tindal's testimony that Applicant threatened her or someone else. Applicant also asserts that Jenkins could have testified that Tindal was an uncontrollable and mean drunk. Finally, Applicant asserts Jenkins would have testified that Applicant's suggestion that he could use his military training to hurt people was not a real threat.

Counsel was not ineffective in this regard. First, counsel provided valid strategic reasons for not calling Jason Jenkins. Second, counsel was not deficient in not calling Jenkins. Finally, Applicant fails to establish that he was prejudiced by counsel not calling Jason Jenkins to testify. His testimony was of very limited benefit to Applicant, and Jenkins' testimony likely would have damaged Applicant's case more than help it.

At the evidentiary hearing, Littlejohn testified that the defense did look into calling Jason Jenkins. Littlejohn testified that his investigator Thomas Davis interviewed Jenkins. {Tr. 197}. Jenkins was not called because the defense did not believe that he would be helpful. {Tr. 197-99}. Littlejohn noted that Jenkins' statements to police also indicated that he would not be a helpful witness for the defense at trial. {Tr. 197-99}. He noted that one of Jenkins' statements to police on May 18, 1999 (State's 25) would not have been helpful in showing Applicant's good parenting skills because it indicated that Applicant's family was partial to Felicia. {Tr. 197-98, see State's 25}. The statement also indicated that Applicant did not have any patience with anybody. {Tr. 198}. It also indicated that co-workers noted the difference between how Applicant treated Josh versus how he treated Felicia. {Tr. 198}. Littlejohn also recalled seeing something in the discovery regarding an incident between Jenkins and Applicant in which Jenkins beat up Applicant. {Tr. 198}. Littlejohn testified that Jenkins was so aligned with Summer and Tindal that he believed Jenkins would have been extremely hostile to the defense. {Tr. 199}. As a result, the defense made a strategic decision not to call Jenkins at trial. {Tr. 199}.

Jason Jenkins also testified at the evidentiary hearing. {Tr. 605-18}. He testified that he met Applicant through Tindal. {Tr. 605-06}. Jenkins did not like Applicant at first. {Tr. 607}. He also recalled a dust up between the two at Summer J. [REDACTED] birthday party. {Tr. 608}. At the party, Applicant and Tindal got into an argument. {Tr. 608}. After the argument, Tindal left the party and walked away in the dark. {Tr. 608-09}. Jenkins and Applicant then got into an

argument after Jenkins requested Applicant go after her (Jenkins was concerned for her safety). {Tr. 609}. After some pushing and shoving, Applicant hit the ground and broke his arm. {Tr. 609}.

Jenkins also testified that Applicant talked a lot of "smack" and would tell others that he could kill because of his military background. {Tr. 609-10}. During cross-examination, Jenkins also noted that Applicant loved to talk about his time in the Special Forces. {Tr. 616}. He indicated that he was not impressed by Applicant's claims, and their physical confrontation was due, in part, to Jenkins not backing down until someone backs up his claims. {Tr. 616}.

Jenkins indicated that he did not witness a lot of interaction between Applicant and his children. {Tr. 613}. He recalled that he never went to Applicant's house for dinner, and he never went along as part of the group when Summer and Tindal would go over to Applicant's house. {Tr. 613}. Jenkins also indicated that when he was around Applicant and his children, Jenkins was never there for a long visit. {Tr. 613}. During cross-examination, he did recall that he never saw Applicant punish his children. {Tr. 615}. However, he also noted that Applicant had very little patience with them, and that Applicant had a very short temper. {Tr. 615-16}. After reviewing his statement on May 18, 1999, he also recalled that Applicant did seem to favor his daughter over his son. {Tr. 615}.

Jenkins testified that he had been a part of Tindal's family group since he was ten years old. {Tr. 610}. He had seen Tindal drunk before. {Tr. 611-12}. He noted that some times she can be as happy as a person can be. {Tr. 612}. He also testified that he had never seen her become physically violent with

anyone, but noted she could be verbally abusive in certain circumstances. {Tr. 612}. In his entire time of knowing Tindal, he never saw her become violent with any one. ^{WAS} {Tr. 612}. He also indicated that she was good with children, and that her grandchildren – Jason's kids – loved their grandmother. {Tr. 617}.

Applicant fails to meet his burden of establishing trial counsel was ineffective in not investigating and presenting testimony from Jason Jenkins. First, Applicant fails to show that trial counsel was deficient in this regard. Trial counsel clearly indicated that they looked into calling Jason Jenkins, but after their investigation, they determined that it would not have been helpful to the defense's case. Counsel's decision not to call Jenkins was clearly the result of reasonable trial strategy. Counsel's decision is supported by Jenkins' testimony at trial. Jenkins clearly indicated that he did not have a lot of interaction with Applicant when Applicant was with his children. Thus, any positive testimony in that regard would have been limited. Further, Jenkins also indicated that Applicant had little patience and a short temper with his children, which would have been negative testimony against Petitioner. Jenkins indicated that he never saw Tindal be physically violent towards anyone. There was also no testimony that supported Applicant's assertion that she had a reputation for binge drinking, that she was an uncontrollable drunk, or that she was a ^{VIOLENT} ~~mean~~ ^{WAS} drunk. Finally, Jenkins did confirm that Applicant did like to tell others about his time in the Special Forces and that he stated on occasion that he was trained to kill. In light of all of this damaging testimony that could have been elicited from Jenkins, and the limited positive testimony that could have been offered by Jenkins to the

defense, trial counsel was clearly not deficient in not calling Jenkins to the stand.

Applicant also fails to show that he was prejudiced by the defense not calling Jenkins to the stand.

Furthermore, there was no probative evidence that established Tindal would not have been afraid of Applicant as a result of the fact Jenkins had broken Applicant's arm. Tindal's testimony at Applicant's trial clearly indicated that the threat she feared was made by Applicant and his brother, and Jenkins was not around at the time. {R. 1410-11}. Also, her statement to police indicated that even though she knew Jenkins had broken Applicant's arm in a fight one night, she still feared for her safety and the safety of her younger son and her grandson. {See Applicant's 73, at pp. 15-16}. Jenkins' testimony was of very limited value to Applicant. In light of the potential damage that could have resulted from Jenkins' testimony, Applicant fails to show he was prejudiced.

Applicant also fails to establish how this testimony could have been introduced at trial inasmuch as he asserts it could be used to show Tindal was a "mean drunk." Under Rule 608(a) of the South Carolina Rules of Evidence,

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Any testimony regarding the reputation of Tindal's demeanor while she was intoxicated would clearly be inadmissible because it would not have been in reference to her character for truthfulness. Furthermore, this Court finds the

~~testimony would not have been admissible under Rule 404 of the South Carolina Rules of Evidence. Under Rule 404(b) of the SCRE,~~

~~Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.~~

~~This testimony by Jenkins could not have been offered for any of the purposes that are allowed under Rule 404(b), SCRE.~~

Finally, in light of the other evidence of Applicant's guilt that was presented at trial, the Applicant has not met his burden of showing there was a reasonable probability that the result at trial would have been different had counsel presented Jenkins' testimony. Indeed, much of Jenkins' testimony would refute any notion that Tindal was abusive with children.

As a result, this claim of ineffective assistance of counsel is denied.

(12) Allegation #12: Military Combat Service

Ground 10(a)(12) is denied. In this Ground, Applicant asserts trial counsel was ineffective because they did not object to the state's use of Applicant's military combat service in the first Gulf War and his training as evidence against Applicant. Counsel's testimony clearly establishes that he did not object for strategic reasons. Further, Applicant fails to establish that counsel was either deficient or that Applicant was prejudiced by counsel not objecting to the state's use of Applicant's military service.

During his cross-examination at trial, Applicant was asked if he was in the Special Forces while he was in the service. {R. 1829}. When Applicant originally

denied being in the Special Forces, the solicitor asked him about his certificate of training from the Army Special Operations Commands called "the Night Stalkers." {R. 1829}. Applicant said it was a task force unit. He also noted that "Death Waits in the Dark, the Night Stalkers" was just a motto. {R. 1829}. The certificate was offered into evidence with no objection. {R. 1829, 2247}. During closing argument during the guilt phase, the solicitor did mention Applicant's service in the Special Forces once. {R. 1935}.

At the evidentiary hearing, Littlejohn testified that the State brought out a certificate regarding Applicant's service in the Army. {Tr. 119}. Applicant was a helicopter mechanic and specialized in hydraulic systems. {Tr. 119}. They gave him a certificate with the group that he had worked on helicopters. {Tr. 119}. On the certificate, there was some motto about how tough the unit was. Littlejohn noted that Solicitor Myers brought out that motto, and he attempted to infer that Applicant was tough like those guys. At that point, Applicant had already testified that he was a helicopter mechanic and that was basically it. {Tr. 119-20}.

Littlejohn testified that he did not object to the questions regarding the certificate for several reasons. First, he asserted that he did not want to interrupt Applicant's cross-examination because he did not want it to seem as if the defense was trying to hide anything. {Tr. 121}. Applicant was very intelligent, and Littlejohn had no qualms about him making a good presentation. {Tr. 121}. Second, Littlejohn testified that he thought the point the solicitor was trying to make with the certificate might have backfired on him a little bit. {Tr. 121}. Applicant served in the Gulf War overseas. {Tr. 121-22}. Littlejohn did not recall

if he thought about putting up any other military certificates to corroborate Applicant's good character.⁵ {Tr. 122}.

During cross-examination, Littlejohn noted that he was the one who introduced Applicant's military record first, and he did so because it was a positive attribute for his client. {Tr. 200}. Thus, he felt he had put the issue of military service in play. {Tr. 200}. He also noted that he did not object to the State's argument because he thought the jury would see the State's introduction of the certificate was overreaching. {Tr. 201}. Littlejohn thought the state was making a mountain out of a molehill. {Tr. 201}.

Counsel was not ineffective in not objecting to the State's use of Applicant's military service in the first Gulf War as a negative. First, Applicant fails to show counsel was deficient in this regard. Specifically, they have failed to provide an arguable basis for objecting to the State's questions and very limited argument regarding Applicant's military service. See Ellenburg v. State, 367 S.C. 66, 69-70, 625 S.E.2d 224, 226 (2009)(counsel not ineffective for not objecting to solicitor's argument when argument is not unfair).

Second, counsel's testimony at the evidentiary hearing clearly establishes that he did not make any objections regarding the State's questions regarding Applicant's military service for strategic reasons. Counsel's testimony indicated that he thought not objecting was the best course of action because it was clear the state was overreaching in making the argument. He did not want to give such a bad argument any credence by making any further issue of the matter.

⁵ Applicant's 20-23 were offered into evidence on this issue.

This was clearly a reasonable strategic decision. As a result, counsel's actions were not ineffective.

Finally, Applicant failed to establish that he was prejudiced by counsel not objecting to the questions regarding Applicant's military service. ~~Since there was no valid basis for the Applicant's proposed objection, it would not have prevailed.~~

In light of the other evidence that was presented at trial of Applicant's guilt, he fails to meet his burden of showing there was a reasonable probability the result at trial would have been different had counsel objected. Since Applicant has failed to establish trial counsel was ineffective in this regard, Applicant's twelfth claim of ineffective assistance of counsel is denied.

(13) Allegation # 13: Summer J. [REDACTED] Statements

Ground 10(a)(13) is denied. In this Ground, Applicant asserts trial counsel was ineffective because they failed to utilize information contained in Summer J. [REDACTED]'s statements to law enforcement to impeach Tindal's testimony. Specifically, Applicant asserts counsel could have used J. [REDACTED]'s statement to argue that Tindal was the one who caused the finger pad bruising seen on Joshua's leg in the autopsy photographs. Also, Applicant asserts that J. [REDACTED]'s statement could have impeached Tindal's testimony regarding why Applicant kicked her out of his house a few weeks before Joshua's death. Applicant has failed to establish by a preponderance of the evidence that counsel was deficient in not presenting information from Summer's statements. Further, Applicant has not established by a preponderance of the evidence that he was prejudiced as a result of any alleged deficiency of counsel in this regard.

During cross-examination at trial, Dr. Sexton testified that bruising around the front of Joshua's right leg could have been consistent with finger pad bruising because they were the size of the finger pad. {R. 1635}. Also, Tindal testified that a couple weeks before Joshua was killed, Applicant and she got into an argument. {R. 1361}. The argument was about her staying over at the Hass Lucas house with Summer one night. {R. 1361}. When she returned to Applicant's trailer the next morning with her younger son, Applicant told her to get her stuff and get out. {R. 1361-62}.

At the evidentiary hearing, Littlejohn reviewed statements that were given by Summer Jo [REDACTED] to police. {Tr. 112, see Applicant's 17 and 18}. He was asked to read a sentence from page 9 of Applicant's 17, which stated "Mom said they were probably, from when she held Josh, upside down and had Jeff hit him on the back in case something was lodged in the child's throat." {Tr. 112}. Littlejohn noted Tindal had not testified to ever holding Joshua upside down. {Tr. 113}. He testified that the statement could have been used against Tindal, and that it might have been overlooked. {Tr. 112-13}. He also testified that he did not know that it would have been a major point of contention or that it was something he could have used. {Tr. 113}.

As for Applicant's 18's discussion regarding the argument between Applicant and Tindal, Littlejohn recalled there was an argument between the two some weeks before the murder. {Tr. 113}. He also remembered that Applicant's explanation for the argument was that it was the result of Tindal going out on a Friday night. {Tr. 113}. She was supposed to come back to Applicant's place

after her evening out, but she did not show up until the next morning at 8:30 a.m. {Tr. 113-14}. That was Applicant's reason for kicking her out of his home. Littlejohn indicated that was apparently what happened, but Tindal added a different twist when she testified. {Tr. 114}.

Further, in Summer's typed statement on page 25, Summer states that Tindal went to Applicant's place, Applicant and Tindal got into an argument about her being out all night, and Applicant told her to get her stuff and get out. {Tr. 114, Applicant's 18}. In all, Littlejohn noted that Summer corroborated Applicant's version of the argument between him and Tindal to the extent she could. {Tr. 114-15}. He also indicated that he did not think Summer was present when the argument between Applicant and Tindal occurred. {Tr. 115}. During cross-examination, Littlejohn indicated that he did not recall specifically his thought process in not asking Summer J[REDACTED] about why Tindal and Applicant broke up. He also recalled not seeing anything in J[REDACTED]'s statements that he could use to impeach Tindal. He also indicated that he did not think it would have helped to recall J[REDACTED] to ask about the finger pad bruising. {Tr. 208}. He saw the loss would exceed any gain because Summer was obviously hostile to the defense. {Tr. 208}. He noted that it would have been a risky move, and he could not have been sure what response he would have gotten. {Tr. 208}. Littlejohn indicated he likely would not have recalled Summer given the risks. {Tr. 208}.

In her statement, Summer did indicate that Tindal did say that she held Joshua upside down on the night of the murder. According to the statement,

Tindal told Summer that those bruises were likely from when Tindal held Joshua upside down and Applicant hit Joshua on the back to ensure that Joshua did not have something lodged in his nose. **{Applicant's 17, at p. 9}**.

Applicant failed to meet his burden of establishing counsel was ineffective in not utilizing information in Summer's statements. First, Applicant fails to show that counsel was deficient in not using Summer's handwritten statement to impeach Tindal about her involvement in holding Joshua upside down on the night of his death. As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). At the evidentiary hearing, counsel agreed:

Q: And that's true about all cross-examinations. You always have an idea of what you're going to do, but as you go through in the heat of battle, inevitably, you know, some questions you might liked to have asked, but you didn't ask and others you think of on the spot turn out to be pretty good; is that fair to say?

A: That's how cross-examination goes many times, yes.

{Tr. 203}. Clearly, counsel engaged in a strong cross-examination of Tindal on several issues. The fact that one minor point may have been missed does not mean that counsel was deficient in his cross-examination.

Second, Applicant fails to show that counsel was deficient in not using Summer's statement to impeach Tindal on why she and Applicant broke up the first time. Summer's statement is consistent with Tindal's testimony in regards to why they broke up. Both indicate that Tindal went out with Summer on a Friday night. Neither statement says that Tindal was drinking that night. Both Tindal's testimony and Summer's interview statement also note that Tindal went home with Summer because she had to pick up her son early the next morning, and her son was closer to Tindal's place than it was to Applicant's. Her statement also corroborates Tindal's testimony that when she arrived the next morning, Applicant told her to get her stuff and get out. Counsel did question Tindal about the reasons for Applicant kicking her out of his trailer. Since the statement was consistent with Tindal's testimony at trial, counsel was not deficient in not utilizing the information in the statement.

Furthermore, counsel clearly gave reasonable strategic reasons for not recalling Summer J. [REDACTED] the stand to ask her to testify about what was contained in her statements. Summer would have been hostile to the defense.

Finally, Applicant fails to show how he was prejudiced by counsel not utilizing the information in Summer's statements. In light of the other evidence of Applicant's guilt that was presented at trial, he has failed to show there was a reasonable probability that the result at trial would have been different had trial

counsel utilized Summer's statements. As a result, this claim of ineffective assistance of counsel is denied.

(14) Allegation #14: History with Police

Ground 10(a)(14) is denied. In this Ground, Applicant asserts that trial counsel was ineffective because they failed to investigate, develop, and present evidence that J [REDACTED] had lodged various police reports prior to Joshua's death. Applicant argues the defense could have used those reports ^{W/see} to show to impeach J [REDACTED]'s testimony that she feared for her and her family's safety.

At the evidentiary hearing, Littlejohn testified that he did not recall doing a 911 report on Summer J [REDACTED] at all. {Tr. 115}. He reviewed the 911 log that was compiled by Applicant, and he noted there were approximately eight (8) calls listed prior to Joshua's murder. {Tr. 115-16, see Applicant's 19}. Littlejohn testified that he did not know how he could impeach Tindal with what Summer had done. {Tr. 116}. He noted that he could have asked Summer about it, but he did not know if that would have impeached her or made her testimony any less believable. {Tr. 116}.

During her testimony at the evidentiary hearing, Summer J [REDACTED] agreed that she had made several calls to police both prior to and subsequent to Joshua's death on unrelated matters. {Tr. 662-666}. She also indicated that some of the incident reports presented to her at the hearing were from incidents where her mother called the police. {Tr. 662-666}. She also noted that some calls that she did make to police were not reflected in Applicant's 19. {Tr. 665-66}.

Applicant cannot show that trial counsel was deficient in not pursuing this line of questioning. First, there was no testimony from Summer J. [REDACTED] at trial that indicated that she was afraid for her life after Applicant killed Joshua. There is no testimony in the record from Summer J. [REDACTED] that indicates she feared Applicant. {R. 1498-1538}. Since there was no testimony regarding some fear by Summer J. [REDACTED], there was no testimony to impeach. Thus, as a preliminary matter, counsel could not be deficient because there was nothing to impeach.

Second, Applicant cannot show that he was prejudiced by counsel not using the police reports filed by J. [REDACTED] to show that she would have no reason to fear Applicant. Since Summer never indicated she was threatened by Applicant or that she feared for her or her family's safety, any attempt to impeach her in this regard would have been futile.

Furthermore, Applicant failed to establish a reasonable probability that the result at his trial would have been different had counsel presented these police reports. This would be a minor point at best.

In all, there was no probative evidence presented at the evidentiary hearing that indicated Summer J. [REDACTED] did not get in contact with police about Applicant's case because she was afraid for someone's safety. This claim is not supported by the record from Applicant's trial or from the testimony presented at the evidentiary hearing. Since there is no underlying factual basis for this claim, Applicant fails to establish that counsel was deficient in this regard. Further, Applicant fails to establish that he was prejudiced in any way by the lack of

presentation regarding Summer's previous interactions with law enforcement. As a result, this claim of ineffective assistance of counsel is denied.

(15) Allegation # 15: David Sullivan

Ground 10(a)(15) is denied. In this Ground, Applicant asserts trial counsel was ineffective because they failed to interview Emergency Medical Technician David Sullivan. Sullivan was one of the emergency medical technicians ("EMTs") who responded to the 911 call on May 13, 1999. Applicant asserts that Sullivan would have testified that Applicant was very upset when emergency personnel arrived at his home that early morning. Sullivan also would have testified to the fact that Applicant was the one who flagged down the EMTs. Applicant asserts this would have corroborated his testimony on those issues, and the testimony would have combated testimony to the contrary.

At trial, the State called Tim Wojcik, another EMT who responded to the call to Applicant's home on May 13, 1999. {R. 1265-1280}. He responded with Sullivan that morning. {R. 1266}. Wojcik testified that Applicant met them at the mailbox. {R. 1267, 1279}. He directed them to the house. {R. 1267, 1279}. Wojcik indicated that Applicant directed them to where Joshua was located in the trailer. {R. 1267-8, 1279}. Wojcik testified that he recalled the female who was performing CPR when they arrived (Tindal) was very upset when they arrived. {R. 1269, 1280}. However, he did not notice any particular demeanor about Applicant. {R. 1270, 1281}.⁶ He indicated that after they got into the house, it appeared to him that Applicant went in a different direction and they hardly saw

⁶ He clarified in his cross-examination that Applicant's demeanor just did not stick out either good or bad. {R. 1281}.

him after that. {R. 1270}. He also indicated Applicant went to a different part of the home. {R. 1270}.

At the evidentiary hearing, Sullivan testified that he recalled it was Applicant who flagged them down outside the home. {Tr. 441-43}. He also indicated that when they arrived, Applicant was upset. {Tr. 443}. He also noted that everyone was upset when they arrived. {Tr. 443}. He did specifically recall Applicant tripping out. {Tr. 443}. He did not recall how Applicant got to the hospital. {Tr. 443-444}. Also, Applicant introduced law enforcement interview notes from Sullivan, which indicated that Sullivan saw "the father was tripping out and that both adults were upset." {Applicant's 20}.

Littlejohn testified that they did attempt to find Sullivan to testify at trial. {Tr. 118, 205}. He testified that he sent his investigator, Tommy Davis, to find Sullivan. {Tr. 118, see State's 8}. He indicated that they he could not remember why, but the defense could not get Sullivan into court. {Tr. 118}. He recalled that they attempted to get Sullivan as a witness because Sullivan indicated Applicant was very emotional when the EMTs arrived in response to the 911 call. {Tr. 118}. He noted that if Sullivan stuck by his statement to law enforcement, it would have been helpful to counter the solicitor's point that Applicant was uncaring when emergency medical personnel arrived. {Tr. 118-19}.

Applicant fails to show that counsel was deficient in this regard. First, counsel did investigate and attempted to call Sullivan to the stand. Counsel's testimony clearly indicates that he did as much as he could to present Sullivan's

testimony, but due to factors beyond counsel's control they could not get Sullivan into the courtroom. There was no testimony that indicated that Sullivan was available to testify at Applicant's trial. Since counsel did attempt to have Sullivan testify in this case, Applicant fails to show by a preponderance of the evidence that counsel was deficient in this regard.

Furthermore, Applicant fails to show that he was prejudiced by the defense not calling Sullivan at trial. The only inconsistency between Sullivan's testimony and Wojcik's testimony was that Sullivan says Applicant was "tripping out" when they arrived. In the end, Wojcik stated that he did not recall Applicant's demeanor. Thus, Sullivan's testimony was of very limited value to the defense's case. In light of the other evidence of Applicant's guilt that was presented at trial, Applicant did not establish there was a reasonable probability that the result at his trial would have been different had Sullivan's testimony been presented by the defense. As a result, this claim of ineffective assistance of counsel is denied.

(16) Allegation #16: David Shull

Ground 10(a)(16) is denied. In this Ground, Applicant was ineffective in not interviewing and calling EMT David Shull to testify. Basically, Applicant asserts that Shull could have testified about Applicant's demeanor that early morning.

At the evidentiary hearing, Shull testified that he recalled handling the 911 call from Applicant and Tindal that morning. He testified that he talked with both an adult female and a male. He talked Tindal through the steps for checking for

airway obstruction and CPR. He also indicated that both the male and female were frantic. When the male took the phone, Shull indicated that he was initially upset, but then he became focused. Shull also recalled that Applicant told Shull he was going outside to flag down the ambulance. Also, Applicant introduced law enforcement interview notes from Shull, which indicated that Shull stated

They both had shaky voices and were upset and rattled but the father seemed to settle down and became rational. The father was concerned about getting to the road to flag down the ambulance. David stated he asked if the child had been sick running a fever or had any shots that week. The Father told him no.

{Applicant's 21}.

On direct, Littlejohn testified that Shull was not at the scene. **{Tr. 119}**. Reading Shull's statement, it appeared that he may have been some help on the Applicant's demeanor at the scene, but he was not at the scene to personally witness it. **{Tr. 119}**. Littlejohn testified that they were hoping Shull was going to be called by the State. **{Tr. 205}**. Shull was on the State's witness list. **{Tr. 205}**. The defense was hoping to cross-examine Shull.⁷ **{Tr. 205}**. Littlejohn was not sure how much hay they could make, but their hope was that he would be called by the State so they could cross-examine him. **{Tr. 205}**.

Applicant failed to establish by a preponderance of the evidence that counsel was ineffective in not calling Shull to testify. First, Applicant cannot establish that counsel was deficient. Counsel's testimony clearly indicated that he would not have called Shull as a defense witness because he was already

⁷ Shull was on the State's witness list. Sullivan was not.

listed as a State's witness, and his testimony was of limited value because he only spoke with Applicant and Tindal on the telephone.

Applicant also fails to show that he was prejudiced as a result of counsel not calling Shull to testify. Counsel clearly indicated that he felt Shull's testimony was of limited value because Shull was not on the scene. He could only testify about what he heard on the phone. Thus, in light of the other evidence of Applicant's guilt that was presented at trial, Applicant did not establish that there was a reasonable probability that the result of his trial would have been different had counsel called Shull to testify. What limited benefit Shull could have offered does not have a reasonable probability of carrying the day. As a result, this claim of ineffective assistance of counsel is denied.

(17) Allegation # 17: Admission of Polygraph Evidence

Applicant next contends that his trial counsel was ineffective for failing to properly make a proffer to support the admission of polygraph results, and for failing properly argue its admissibility under Rule 702, SCRE.

A. Events at trial and in PCR

During a break at trial, the solicitor raised the issue to the judge that the defense might attempt to introduce evidence on a polygraph taken by Rebecca Tindal. The trial court stated that polygraphs were not admissible under State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996) and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Defense counsel responded that Council did not hold the polygraphs were *per se* inadmissible, but could be shown to be scientifically reliable. Defense counsel noted that in the other cases the court had appointed

the defense an expert, and the trial court stated it was not appointing any experts as the "case law was clear." The judge noted he was very familiar with the Council case and did not think there was an expert who could change his mind on the issue. After a lunch recess, the court stated that it would have a hearing on admissibility under Rule 702 if the defense so desired. The court pointed out that in the other cases there had been a motion made prior to trial, and none had been made here. However, the court stated that if the defense desired it would hear the matter. {R. 1437-41}.

At PCR, Petitioner called Joel Huggins, who gave two polygraphs to Rebecca Tindal back during the investigation prior to trial, and Thomas Williams, who gave a polygraph to Applicant shortly before the PCR hearing. Huggins testified that he scored Tindal as "deception indicated," or DI, on the two tests he gave her in 1999. The first test included relevant questions of whether she participated in hitting the child, whether she hit the child, whether ~~the~~ ^{WAS} she WAS physically present when the child was hit, and whether she knew who hit the child. The second test included relevant questions as to whether she hit the victim, whether she hit the victim with a closed fist, and whether she was holding the child when he was hit. {Tr. 391-95}.

Williams testified he gave Applicant a polygraph test in September 2009 for which he scored Applicant as "no deception indicated," or NDI. This test included the relevant questions as to whether Applicant struck Josh with anything the night he died, and whether Applicant saw Josh being struck with anything the night he died. {Tr. 726-28}. Williams admitted on cross that a different examiner

had given Applicant a polygraph examination a few weeks prior, and Applicant's result on that test was "deceptive." {Tr. 753-54}.

The State called SLED Lt. Dennis Coggins, Agent John Burnett, and Agent Robert Antonelli of SLED's polygraphy section. All of them had reviewed Williams' charts of Applicant and scored them not as NDI like Williams, but as inconclusive. They also took issue with the manner in which Williams' charts were run, with Agent Burnett noting that had he turned in similar charts during his training he would have gotten a "F." The agents also saw evidence of abnormal breathing on Williams' charts, which was indicative of use of countermeasures to avoid detection, and they noted that the chart Williams threw out and did not score for "outside noise" was trending particularly badly for Applicant. {Tr. 771-825; 860-75}.

In reply, Applicant called Frank Bloomingburg, Williams' partner, who testified that he reviewed Applicant's charts and concurred in Williams' finding of NDI. However, Bloomingburg admitted he also saw evidence of abnormal breathing on the charts which concerned him, but decided not to consider it because he did not think Haselden would have had access to literature on how to "beat the box." {Tr. 880-82}. Bloomingburg conceded, though that he was ignoring the abnormal breathing based on this belief about what Applicant supposedly did not know, even though Bloomingburg knew absolutely nothing about Applicant, had never met him, did not know if Applicant actually did have access to information from friends or family or a computer, and did not sit in on any of the test. {Tr. 888-92}.

B. Counsel cannot be found deficient because they were not "trailblazers" on the issue.

As an initial matter, this Court finds counsel was not deficient for not doing more to try to introduce the polygraph results of Tindal or Applicant.

First, though, a word must be said about the development of the law regarding polygraphs. Prior to State v. Council, there was essentially a *per se* rule that polygraphs were not admissible as substantive evidence in South Carolina. State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996) (generally inadmissible); State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982) (polygraphs inadmissible due to questionable reliability for scientific accuracy). However, in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the Court held that polygraphs should be analyzed like other proposed scientific or expert testimony under Rule 702, SCRE, and the factors in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Essentially, for admission, the trial judge must determine:

- (a) the evidence will assist the trier of fact;
- (b) the expert witness is qualified;
- (c) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979):
 - (i) the publications and peer review of the technique;
 - (ii) prior application of the method to the type of evidence involved in the case;
 - (iii) the quality control procedures used to ensure reliability;
 - (iv) the consistency of the method with recognized scientific laws and procedures; and

(d) finally, the probative value of the evidence must outweigh its prejudicial effect.

Subsequently, in State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001), the South Carolina Supreme Court faced an issue in which a criminal defendant wished to introduce polygraph results. McHoney first noted that polygraph results were generally inadmissible, and that the United States Supreme Court had even held that a *per se* rule banning polygraph results in a trial was not improper due to the fact that the scientific community was “extremely polarized” on the issue of reliability. The court concluded that the trial court did not abuse its discretion, because “at the time of McHoney’s 1997 trial, polygraph examinations were generally not admissible because of their unreliability.” The Court then noted that Applicant had not met his burden of proof “even under a Council analysis.” McHoney, 344 S.C. at 95-97, 544 S.E.2d at 34-36.

Since that time, this Court is not aware of an appellate decision or criminal case in South Carolina during which a criminal defendant was able to “force” admission of a polygraph as substantive evidence over objection of the opposing party. The reality is that on the whole as a practical matter, there has been no consensus or opening of the floodgates whereby polygraph evidence has been typically allowed to cross the Council barrier.

Applicant’s trial took place in February 2001, after Council but shortly before McHoney was issued. And, of course, the decisions and actions of counsel must be judged for reasonableness at the time they occurred, back in 2001. See Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight). Initially, it is that

temporal limitation that is significant, because nothing in the law will find counsel constitutionally deficient for failing to be a trailblazer or for not being the first attorney to break down a longstanding legal barrier. This principle flows from the fact that the test for deficiency only looks to whether counsel met the standards of a reasonably competent attorney – *not* the standard of the best or an exceptional or groundbreaking lawyer. It also flows from the rule that counsel are not required to anticipate changes in the law. See Strickland, 466 U.S. 668 (deficiency is where performance fell below an objective standard of reasonableness); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (trial counsel could not be required to foresee future changes in the law); Schneider v. Day, 73 F.3d 610 (5th Cir. 1996) (counsel cannot be ineffective for failing to foresee changes in the law subsequent to the Petitioner's trial).

While undoubtedly Council was out when Applicant's trial took place, it was only recently out, and there had been no groundswell of success with lawyers being able to meet the Council test and force polygraph results into evidence at trials. Indeed, there has been no groundswell of success in the nine years since Applicant's trial. For example, in 2008 our state supreme court reversed a granting of PCR relief for counsel's failure to have a polygraph performed of the defendant, in part by reiterating the statement from Council that the court "has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable." Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008). See also State v. Johnson, 376 S.C. 8, 654 S.E.2d 835 (2007) (general rule is that no mention of a

polygraph test should be placed before the jury); Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006) (mere mention of a polygraph during testimony is not prejudicial where no results are put into evidence); State v. Jackson, 364 S.C. 329, 613 S.E.2d 374 (2005) (defense waived motion to admit polygraph results when it ultimately declined trial court's offer for a Council hearing).

Indeed, many courts after Daubert have still refused to admit polygraph evidence based on reliability concerns. See, e.g., United States v. Duverge Perez, 295 F.3d 249, 253-54 (2d Cir.2002) (finding no abuse of discretion from the district court's refusal to admit polygraph evidence in connection with the defendant's sentencing); United States v. Ruggiero, 100 F.3d 284, 292 (2d Cir.1996) (dismissing the significance of polygraph results that might corroborate a defendant's testimony because of their "questionable accuracy"); Monsanto v. United States, Nos. 97 Civ. 4700, S 87 Cr. 555, 2000 WL 1206744, *4 (S.D.N.Y. Aug.24, 2000) ("[P]olygraph examinations are considered unreliable and are inadmissible in court."); United States v. Bellomo, 944 F.Supp. 1160, 1164 (S.D.N.Y.1996) ("[P]olygraph evidence never has been admitted in a federal trial in this Circuit, even in the three years since Daubert"); United States v. Black, 831 F.Supp. 120, 123 (E.D.N.Y.1993) (holding that, even after Daubert, "[t]he polygraph test is simply not sufficiently reliable to be admissible").⁸

⁸ See also United States v. Ramirez, 386 F.3d 1234 (9th Cir. 2004) (prejudicial effect of polygraph outweighed probative value); United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003) (refusing to abandon per se rule of exclusion even after Daubert); United States v. Canter, 338 F.Supp.2d 460 (S.D.N.Y. 2004) (discussing vast weight of authority excluding polygraphy under Rule 702); Ross v. State, 133 S.W.3d 618 (Tex. Crim App. 2004) (finding no abuse of discretion in exclusion given the lack of a consensus as to reliability).

Therefore, this Court cannot hold counsel deficient because they were unable to do in 2001 what no lawyer had been able to do not only then, but also in the nine years *since* Applicant's trial. To hold otherwise would be to find counsel here fell below the reasonable standard of competence for a lawyer nine years ago, on an issue where as a general matter lawyers do not even have any success *today*. Such a holding would be revisionist and unrealistic.

C. Counsel were not deficient nor Applicant prejudiced because Applicant has failed to establish admissibility.

Regardless of the preceding discussion, counsel could not have been deficient nor Petitioner prejudiced because Applicant failed to establish the admissibility of the polygraph evidence under the test set forth in Council.

The first and main problem for admission is under the prong of the Jones test regarding "the consistency of the method with recognized scientific laws and procedures." A polygraph uses a machine to record respiration, heart rate, blood pressure, and galvanic skin response. The theory is that due to the link between the mind and body, fear of detection when asked a relevant question will cause the examinee to mobilize defenses that can be detected by changes in the data recorded. {Tr. 773-74; 807-08; 862}.

Undoubtedly, scientific instruments are used to record a person's respiration, heart rate, blood pressure, and galvanic skin response, and this Court has no doubt that the polygraphers are able to accurately record that data. The link Applicant failed to establish, however, is ^{the (way)} most important part – the theory that certain changes in the data recorded by the polygraph machine necessarily can be used to detect deception. Applicant presented the testimony of three

polygraphers who were all qualified as technicians in using the machine and the method – but none of these polygraphers was an actual *scientist* who provided evidence or testimony that would establish the reliability of the underlying theory. There was no *scientific* evidence presented to establish that as a scientifically reproducible matter deception can be necessarily detected by changes in the data. Simple testimony from a technician that in his experience a polygraph was accurate or reliable, where the technician had no scientific training, and more importantly had conducted no experiments or studies in accordance with scientific laws or procedures on the validity of the underlying theory, does nothing to *scientifically* prove that the underlying theory meets “recognized scientific laws and procedures.” Such testimony misses the distinction between empirical data or experience and scientific proof, and the distinction between technical knowledge to use a method and scientific knowledge as to the validity of the theory underlying it.

Indeed, as Lt. Coggins testified, scientists still remain very “anti-polygraph.” {Tr. 808}. This was echoed by the United States Supreme Court:

[T]here is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques.

United States v. Scheffer, 118 S.Ct. 1261, 1265 (1998). Applicant presented no scientific testimony or evidence to overcome this general view.

But regardless of Applicant's complete failure to provide scientific proof of the underlying theory of polygraph, which is alone sufficient to reject the claim, there are also other issues apparent from the testimony that alone or together

call into question the admissibility of the evidence as scientifically reliable. First is the importance to the method of the "pretest" or the "psychological set," which is a completely subjective process between the polygrapher and the examinee in which the polygrapher tries to put the examinee in the "right" frame of mind and determine proper questions that will elicit a reaction only if the examinee is being deceptive. All the SLED witnesses and Chief Huggins credibly testified that this subjective process between two people is the most important part of the polygraph. {Tr. 399-403; 774-75; 810-12; 862-64}. There was credible evidence that if a person becomes oversensitized or has lingering guilt on other issues, he might react even though not being deceptive, and a person who becomes desensitized or feels no fear of detection may not react even if being deceptive. {Tr. 410-11; 775-77; 811-12; 863-64; 399-403}. This subjective component of an interview and its importance to normal polygraphy procedure cannot be understated, and it is certainly a non-scientific component to the examiner's opinion.

Second is the fact that the scoring of the charts itself involves subjectivity. While undoubtedly "good paper" should produce more consistent results among trained polygraphers, there was credible evidence from the SLED witnesses and even defense expert Williams that scoring remains a subjective process and biases and preconceptions can creep into the process. {Tr. 767; 781; 808-10; 866-67}.

Third is the necessity of an examiner to assess for and prevent the use of countermeasures, descriptions of which are commonly available on the internet.

These include controlled breathing, use of drugs, tightening of the sphincter, self-hypnosis, and putting a tack in the shoe. {Tr. 406-07; 776-79; 812-13; 864-66}.

While the ability of someone to manipulate data would not mean that reliance on the data would prevent a method from being scientific, here the ability to detect countermeasures to some degree depends on the examiner's subjective "reading" of the examinee – hardly indicative of a process that is scientifically reproducible in a controlled setting.

Regardless of the lack of polygraph's consistency of the method with recognized scientific laws and procedures, many of these issues also lead this Court to conclude that the prejudicial effect would outweigh the probative value. A jury could be easily tempted to abdicate its most important function and prejudicially rely solely on the magic bullet of a polygraph, when because of these issues its probative value is not that high. There was credible evidence that even the best polygraphers are going to have false positives and false negatives. {Tr. 401}. This is why SLED's policy is to advise officers that polygraphs are a very valuable investigative tool like any other, and, is not to be used or considered to the exclusion of other evidence in the case. {Tr. 794-95; 810; 872}. These considerations make it impossible for this Court to allow expert testimony on the one most sacred issue for which we have juries: judging credibility.

Moreover, a polygraph test can only state whether an answer indicated deception. In Council, our state supreme court was unimpressed with similar testimony, finding that the "fact [a person's polygraph] exam showed deception

does not prove that [he] was lying.” State v. Council, 335 S.C. 1, 24, 515 S.E.2d 508, 520 (1999). The Court in Council concluded that such testimony about whether deception was indicated would only confuse and mislead the jury, and that its prejudicial effect far outweighed its probative value. Id. This Court finds similarly here under Rules 702 and 403, SCRE.

Accordingly, since Applicant has not established that polygraph evidence would have been admissible at the time of trial in 2001, he can show neither deficiency nor prejudice. See generally Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

D. Applicant cannot show prejudice.

Applicant also cannot show prejudice. Obviously, it is a bit touchy with regard to the DI tests of Becky, as the defense would be aided by the introduction of such evidence. But aid is somewhat different than whether it would create a reasonable probability of a different result. Although close, given that both polygraphs given to Tindal contained questions in which she was merely present or not the primary actor – which could have triggered her failure if she was present and did not personally strike the blows that killed Josh; the fact that lingering guilt or oversensitization can cause a false positive; the force of the injuries; and Applicant’s claims to the ER and the doctors that he had checked on Josh 20 minutes prior and he was fine; it cannot be said that admission of

Tindal's polygraph would create a reasonable probability of an acquittal. {R. 1258-73; 1302-04; 1412}. Regardless, though, is the fact that Applicant cannot show prejudice as he failed to show the results were admissible anyway, as set forth in the preceding subsection.

With regard to the Williams polygraph of Applicant himself, the lack of prejudice is undeniable. This Court finds the testimony of SLED Lt. Coggins, Agent Burnett, and Agent Antonelli credible that not only did the Williams polygraph have problems with the way it was run, including the "pen stop" issue and the failure to establish homeostasis, but that at best for Applicant it could only be scored as inconclusive – not as a NDI. {Tr. 782-94; 814-17; 867-69; 872}. Indeed, the SLED agents criticized Williams' decision to throw out chart three altogether for outside noise on one relevant question, and Lt. Coggins noted that if the remainder of chart three was included some examiners would have scored the test not as merely inconclusive but as deceptive. {Tr. 791-93; 800; 816-20; 869-71}.

Additionally, the SLED agents saw abnormal breathing on the charts, which of course could be evidence of someone using countermeasures in an attempt to deceive the test. {Tr. 783-84; 787-88; 792-93; 816-17; 818-19; 869}. Indeed, even defense expert Bloomingburg admitted he saw the abnormal breathing on the test, but decided to discount it because Bloomingburg did not think Applicant would have had access to information on countermeasures or time to study it. This Court cannot accept Bloomingburg's decision, given testimony from the SLED agents as to how readily available information is on

countermeasures for polygraphs and how frequently they see people attempt them {Tr. 777; 812; 864-66}, as well as the fact that Bloomingburg held to his belief that Applicant would not know about countermeasures even though he had never met Applicant, did not know anything about Applicant, and did not observe the test. {Tr. 881-82; 888-92}.

Furthermore, during cross-examination about his test Williams testified that Applicant *had* been found deceptive and failed a polygraph given about a month before the Williams test. {Tr. 753-54}. Not only is Applicant's failure of the test ~~damning~~ ^{DAMAGING} in and of itself, but the fact he failed his first try and was getting another try one month later certainly makes Applicant's abnormal breathing on the second test extremely suspicious and not so easily discounted by Bloomingburg's unsupported belief about Applicant. Moreover, Williams also conceded that Applicant understood the test would not be disclosed if it did not go well for him, which could reduce sensitivity and fear of detection; Williams did not use a seat pad detector, which could prevent detection of countermeasures; and in scoring the charts, whenever Williams had a close call he always gave the score most favorable to Applicant. {Tr. 748-49; 752-53}.

Therefore, not only is the testimony unconvincing that Applicant actually passed the Williams polygraph, if anything it is ~~damning~~ ^{DAMAGING} in that it shows he failed at least one polygraph test and was inconclusive at best on the second one, aside from the issues with the third chart and the evidence of his abnormal breathing. ~~No lawyer in his right mind would open such doors – thus, there could~~ ^{IT WAS REASONABLE FOR TRIAL COUNSEL NOT TO} ~~open~~ ^{WAS}

be no deficiency. And, there is no way that such ~~damning~~^{Wife} evidence could create a reasonable probability of acquittal – thus, there is no prejudice.

(18) Ground 10(a)(18) independent forensic pathologist claim

Applicant next contends counsel was ineffective for not using or calling a pathologist to testify that the alcohol incident was the result of forced ingestion or that the spiral fracture was the result of abuse.

This ground has already been discussed in allegations (A)(3) and (A)(4), *supra*, and that discussion is incorporated here. To quickly recap, counsel made a reasonable strategic decision not to pursue prior instances of alleged abuse as it potentially could be more ~~damning~~^{DAMAGING} to Applicant than helpful. Moreover, ~~he~~^{the} ~~Applicant~~^{Applicant} failed to establish admissibility under Rule 404, whether under the permissible exceptions or with the necessary clear and convincing evidence, that it was Tindal who intentionally committed these acts. Finally, there was no prejudice, given the other evidence introduced and the lack of clarity surrounding these issues. As such, the issue must be denied.

(19) Allegation # 19: Reenactment of Night of Murder

Ground 10(a)(19) should also be denied. In this Ground, Applicant asserts that trial counsel was ineffective because they did not have Tindal reenact her description of the alleged beatings. He asserts that had Tindal been required to reenact her description, her testimony would have been revealed to be a pure fabrication. This claim should be denied because Applicant failed to present any probative evidence establishing what type of reenactment should

have been requested at trial. Further, counsel clearly provided reasonable strategic reasons why he would not have requested Tindal reenact the beating.

At trial, Tindal testified that after she put Felicia back to bed, she went into Joshua's bedroom. {R. 1394-5}. When she walked in, she saw Applicant swinging his arm. {R. 1395}. She noted that she could see Applicant's back because they were both facing towards the inside of the room. {R. 1395}. At the time, she could not see Joshua because he was in front of Applicant. {R. 1396}. She testified that she saw Applicant's arm swing three to four times. {R. 1396}. She could not see Josh, but she stated it was pretty obvious that Applicant was hitting Joshua. {R. 1396}. She indicated that she could not see exactly where the blows were landing. {R. 1396}. All she could see was Applicant's arm moving. {R. 1396}. She could not tell if he was hitting Joshua with an open hand or a closed hand. {R. 1396}.

Tindal testified that Applicant was saying "Do you hear me, boy, do you hear me." {R. 1397}. She noted that Applicant was hitting Josh hard. {R. 1397}. She could tell by the way he was swinging. Tindal testified that when she saw this, she stepped into the room and grabbed Applicant by his shirt. {R. 1397}. She told Applicant that was enough. {R. 1398}. She testified that Applicant turned around and grabbed the front of her t-shirt. {R. 1398}. Applicant then told Tindal that it was his son and he would punish him the way he wanted to punish him. {R. 1398}. Tindal then stated that Applicant pushed her, and she stumbled back and into Joshua. {R. 1398}. That caused Joshua to fall, and then Tindal fell. {R. 1398}.

At the evidentiary hearing, Littlejohn testified that he did not consider asking Tindal to do a reenactment of the beatings. {Tr. 133}. He stated that he would not have because he did not have any idea of what she would do in such a reenactment. {Tr. 133}.

I've been trying cases for 34 years and one of the cardinal rules is you don't ask a witness, especially on cross-examination, a question that you don't know the answer to. And by asking this lady to reenact something that I don't know what she's going to do, just runs counter to that. She may have gotten up there and gave a beautiful presentation of exactly how it happened and then I would have, you know, I would have been helping the State prove their case. So, basically, I try and avoid getting into something that I don't know what the answer's going to be.

{Tr. 133-34}.

He further noted during cross-examination that it was also Tindal's testimony that Applicant told her to get out of the room, and that Applicant further stated that he would discipline his kid the way he wanted. {Tr. 209}. That still left open a window in which Applicant could have inflicted other injuries. {Tr. 209}. Further, he reiterated he did not know what Tindal would have done had he asked her to reenact, and her reenactment could have worked to their detriment. {Tr. 210}. Insofar as her testimony that she left the room for five minutes, Tindal did not know what happened during that five minutes, or she did not testify to hearing or seeing anything during that five minutes. {Tr. 210-11}.

Rebecca Tindal did not testify at the evidentiary hearing. No reenactment was presented to this Court.

Applicant fails to meet its burden in establishing that trial counsel was ineffective for not asking Tindal to reenact her testimony regarding her

observations of the beating and being pushed into Joshua. First, trial counsel clearly provided reasonable strategic reasons for not asking Tindal to reenact her testimony. He did not want to ask a question to which he was not sure how the witness would respond.

Second, Applicant presented no probative evidence of what a reenactment of the beatings would have looked like to the jury. Thus, Applicant has failed to establish counsel was deficient in this regard.

Further, Applicant failed to establish he was also prejudiced by counsel not requesting Tindal reenact the beating, Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Cf. generally Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony). Thus, Applicant has failed to meet his burden of establishing counsel was ineffective in this regard. As a result, this claim for relief is denied.

(20) Allegation #20: Charles Langenburg

Ground 10(a)(20) is denied. In this Ground, Applicant asserts trial counsel was ineffective because he did not interview Charles Anthony Langenburg,

Applicant's former landlord. Applicant asserts that Langenburg could have testified that Applicant was a happy dad and that Applicant was not a violent person. Counsel indicated that Langenburg's testimony was not the best fit for Applicant's defense because he did not have first hand knowledge of Applicant's relationship with his children. Further, Applicant fails to establish that counsel was otherwise deficient in not presenting the testimony, or that he was prejudiced by counsel not presenting Langenburg's testimony.

At the evidentiary hearing, Littlejohn testified that he knew about Charles Langenburg. {Tr. 205-06}. Littlejohn noted that Langenburg's daughter worked for Littlejohn as a secretary, and she still works in his building. {Tr. 205}. Langenburg was Applicant's landlord. {Tr. 205}. Littlejohn did not see what Langenburg could add other than Applicant, from what Langenburg saw, was good to the children. {Tr. 206}. He noted there was an investigative note to that effect. {Tr. 206}. Littlejohn noted that they did interview Langenburg. {Tr. 206}. The defense just did not see what he could add. Instead, they called Applicant's babysitter, Garner, who had first hand knowledge of Applicant's relationship with his children. {Tr. 206}.

Charles Langenburg testified that he had no trouble with Applicant as a tenant. {Tr. 635}. He noted that he had observed Applicant with his children a few times. {Tr. 635}. Their interactions seemed normal. {Tr. 635}. Langenburg never saw Applicant strike his children. {Tr. 635}. He somewhat recalled telling law enforcement that he thought Applicant was a happy dad. {Tr. 635-36}. He also indicated that if he was contacted by the defense, he would have told them

the same thing he told law enforcement. {Tr. 636}. He did not recall having a telephone conversation with Littlejohn. {Tr. 637}. Langenburg also testified that he recalled Applicant telling him that it was Felicia who broke Joshua's leg. {Tr. 637}. He also told law enforcement that is what Applicant told him about the broken leg. {Tr. 638}.

Applicant has failed to meet his burden of establishing trial counsel was ineffective in this regard. First, Applicant has not shown that trial counsel was deficient in not calling Langenburg as a witness at trial. Based upon the testimony that Langenburg gave at the evidentiary hearing, it appears that the only information that he could offer would be that he thought Applicant was a happy dad, and that he never saw Applicant hit his children. This testimony

~~WMA would have been inadmissible under Rule 608, SCRE. It is clearly character evidence, and it does not refer to Applicant's character for truthfulness or untruthfulness. Since the testimony was inadmissible, Applicant fails to show that counsel was deficient in not presenting the testimony. See Hoots v. Allsbrook, 785 F.2d 1214, 1221-22 (4th Cir. 1986); see also Russell v. Jones, 886 F.2d 149, 152 (8th Cir. 1989).~~ WMA

Counsel's testimony clearly shows that the decision not to call Langenburg to testify was a reasonable strategic decision. Counsel indicated that Langenburg did not have any first-hand knowledge of Applicant's relationship with the children. Counsel also testified that he thought the testimony regarding Applicant's interaction with the children was better coming from someone with firsthand knowledge, and he called that person by having Ms. Garner testify.

Counsel clearly decided it would be in Applicant's best interest ^Wto not introduce the testimony from Langenburg.

Furthermore, presenting the testimony of someone like Langenburg, who did not have firsthand knowledge of Applicant's relationship with his children, could have been seen by the jury as a desperate attempt to show Applicant was not a bad father. Langenburg's testimony simply would not create a reasonable probability of a different result at trial. In light of the other evidence of Applicant's guilt that was presented at trial, Applicant has not shown there was a reasonable probability that the result at trial would have been different but for the lack of presenting Langenburg's testimony. This relatively minor testimony would not have a reasonable probability of carrying the day. As a result, Applicant's claim for relief in this allegation is denied.

(21) Allegation # 21: Dr. Donato Interview

Ground 10(a)(21) is denied. In this Ground, Applicant asserts trial counsel was ineffective because they did not interview Andrew Donato, M.D. Donato was the emergency room physician who initially treated Joshua H [REDACTED] when he was taken in for the alcohol overdose on December 12, 1998. Applicant asserts that Donato would have testified that Tindal was the person who poured the drink. Applicant also asserts that Donato would have testified that the beverage was straight whiskey and that it would have been forcibly administered to Joshua. This claim is denied because counsel indicated that he would not have called Donato even if he had interviewed him. Counsel made a strategic decision not to go into the alcohol ingestion incident at trial. Further, Applicant

fails to show that counsel was deficient in not interviewing Donato, or that he was prejudiced as a result.

At the evidentiary hearing, Littlejohn testified that he did not recall interviewing Dr. Donato. {Tr. 80}. Donato also testified at the evidentiary hearing. {Tr. 346-59}. He testified that after reviewing the records, he recalled that Joshua was brought in by private vehicle, and he was unresponsive when he arrived. {Tr. 348}. He knew the female that brought him in was not Joshua's mother. {Tr. 348}. He also indicated that the story that he was told indicated that as that female was vacuuming, she had left out a shot glass with Seagram's 7. {Tr. 349-50}. He could not recall who gave him that information. {Tr. 350}. Donato conducted a rapid assessment of Joshua. {Tr. 350}. The child was in a deep unconscious state, but he still had a gag reflex. {Tr. 350}. The child was breathing on his own, and his vitals were stable. {Tr. 350}. Dr. Donato indicated that he could smell the alcohol on Joshua's breath. {Tr. 351}. Testing revealed his blood alcohol content was .417, which was four times the legal limit for driving. {Tr. 351-52}. He noted that it was highly unusual for a child to have such a high blood alcohol content. {Tr. 352}. Donato also testified that based upon the estimated amount of alcohol he was told the child was given, his blood alcohol content should not have been that high. {Tr. 353-54}. His calculations indicated that the child's blood alcohol content should have been .158. {Tr. 353}.

Donato indicated this was the only incident of alcohol ingestion by a child that he had seen in his practice. {Tr. 354}. He recognized that Joshua would likely need further observation, so he had him transferred to Palmetto Richland

Hospital. {Tr. 354-55}. He told Dr. Hubbard about the explanation he received, and noted that the story did not match up to the blood alcohol content. {Tr. 355}. Donato could not recall if he told Applicant of his concern about the story regarding the consumption. {Tr. 356}. He also did not recall hearing from either of Applicant's trial attorneys or from their investigator, Tommy Davis. {Tr. 356-57}. Donato indicated on cross-examination that he could not recall who said what. {Tr. 358}. He also did not recall any mention of a mixer or a shot glass. {Tr. 359}.

Applicant has failed to establish that trial counsel was ineffective in not interviewing Dr. Donato. Specifically, Applicant fails to establish that he was prejudiced by counsel not interviewing Dr. Donato. Dr. Donato's testimony would only have been relevant if counsel argued at trial that the alcohol ingestion incident should have been presented. As already noted in response to Applicant's claim third allegation in Ground A, trial counsel, after discussion with Applicant, decided that it would not be in Applicant's best interest to introduce any evidence regarding the alcohol ingestion incident. Counsel determined that presenting the evidence would have been too risky in light of the conflicting statements regarding Applicant's role in the incident (i.e. leaving out the alcoholic drink). Dr. Donato's testimony would not have made the presentation of the evidence regarding the alcohol ingestion incident any less risky.

IT IS QUESTIONABLE WHETHER *(Lujan)* *(Lujan)*
Moreover, ~~as noted in allegation 3, supra,~~ the evidence would ~~not~~ be admissible. It would not have established by clear and convincing evidence that Tindal was the one who left out the alcoholic beverage that Joshua drank on

December 12, 1998. Further, it does not fit under the exception for admission in Rule 404. Since the alcohol ingestion incident was not going to be presented at trial, Applicant fails to show how counsel not interviewing Dr. Donato prejudiced him. As a result, this claim of ineffective assistance of counsel is denied.

(22) Allegation #22: Who Found Joshua on the Floor

Ground 10(a)(22) is denied. In this Ground, Applicant asserts trial counsel was ineffective because they failed to introduce evidence that Applicant told emergency personnel that Tindal was the one who found Joshua unconscious on his bedroom floor the night he died.

At trial, Tindal testified that she was the one who found Joshua laying limp on the floor that night. {R. 1403-04; 1470-71}. Similarly, when Applicant testified at trial, he also indicated that Tindal was the one who found Joshua on the floor in his bedroom. {R. 1737-38}. Steven Caughman, a deputy coroner for Lexington County, testified that Applicant informed him that he checked on Joshua at 11:30 pm, and everything appeared to be okay. {R. 1312-15, 1316, 1319, 1321-22}. Applicant then told Caughman that when he was going to bed at approximately 12:20 am, he saw the victim approximately five feet from the bed lying unresponsive. {R. 1315, 1316, 1317, 1319-20, 1321-22}. Then 911 was called. {R. 1315}. Dr. Mark Johnson, one of the emergency physicians who treated Joshua on the morning of his death, testified that Applicant told him he checked on Joshua at 11:30 pm, and Joshua was okay at that time. {R. 1304, 1305}. Applicant also told Dr. Johnson that when he checked on Joshua at 12:20am, Joshua was not breathing. {R. 1304, 1305}.

The following exchange occurred during Applicant's cross-examination at trial.

Q: And then you told people at the hospital, the doctor, Mr. Caughman with the funeral home, and the coroner's office, that you checked on Josh at 11:30; isn't that right.

A: I could have said we.

Q: No. You said, I checked on Josh at 11:30. There wasn't no we in there?

A: I believe, at one point, I told – when I spoke to someone, I said we.

Q: Well, did you tell Coroner Caughman that?

A: I can't recall.

Q: Didn't you tell Mr. Wojcik, the E.M.S., that you had checked on Josh 20 minutes before the 911 call?

A: I could have.

Q: So you checked on Josh 20 minutes before the 911 call, and he was okay?

A: No, I didn't check on him.

Q: So you lied to the E.M.S.?

A: That was not what I meant, I meant he was checked on. I could have mistakenly said I, but I actually meant he was checked on at that time.

Q: So if you told Mr. Wojcik, who was there to revive your son, I checked on him 20 minutes before the 911 call, you were just mistaken; is that what you're telling this jury?

A: On how – on who – who I said checked him; is that what you're asking?

Q: Do you understand my question?

A: No.

Q: When you told that E.M.S. guy, I checked on my son 20 minutes before the 911 call, you were just mistaken, is that what you're telling this jury?

A: I don't remember talking to the E.M.S. guy about who checked on him.

Q: You don't even remember saying that now; is that right?

A: Not right offhand.

Q: So you don't remember saying, I, we or somebody checked on him 20 minutes before we called; is that what you're telling us?

A: Not to the E.M.S. guy.

Q: Not to the E.M.S. guy, the fellow that testified the other night, the second witness, you don't remember telling?

A: There was two of them, and like I said, I don't recognize – I don't recognize him. He was one of them.

Q: Well, what difference does it make if ^{it} was two or ten? You're saying that you don't remember telling anybody that, is that right?

A: Uh -huh.

Q: Is that right?

A: Uh-huh.

Q: That's what you're saying?

A: Yes.

Q: And telling the people at the hospital, the doctor, Mr. Caughman, people there that you, you, I found Josh at 12:20; that's a lie, isn't it?

A: No. Like I said, I remember saying we.

Q: No, it's we. We found him, Not I. Is that what you're saying?

A: I said we. It's possible I could have said I. I don't remember. At that time, when they were asking me questions, I was half paying attention to what they were telling me.

{R. 1783-85}.

During closing argument, the solicitor stated:

He gets to the hospital, he gets to the hospital and he talks to, first, Doctor Johnson, I checked on Josh at 11:30 and he was okay. I checked on Josh at 12:20 and he's not breathing. Talks to Coroner Caughman, got home 10:15, 10:30, checked on Josh at 11:30, I did, he's okay. And he's not responsive. I checked on Josh at 12:20 told that to Caughman, told it to Wilson, told it to the doctor. Now he come up here and tell you I said we, I said we because I never saw him after I got home.

{R. 1937-38}.

This claim is denied because Applicant failed to produce any evidence to support this claim. Specifically, Applicant presented none of the alleged discovery he claims was provided to trial counsel that indicated Applicant told emergency personnel that it was Tindal who discovered Joshua unconscious in the bedroom. Since Applicant has failed to present any evidence to support this claim, it is denied.

Furthermore, Applicant fails to prove that trial counsel was deficient in this regard. This issue was not discussed at the evidentiary hearing. However, in light of the fact Applicant failed to identify to whom he made the alleged statements that Tindal was the one who checked on Joshua, he cannot establish that counsel was deficient in not presenting evidence of such a conversation. Also, Applicant similarly cannot establish by a preponderance of the evidence that he was prejudiced as a result of counsel not presenting this evidence. In light of the overwhelming evidence of guilt against Applicant, he cannot establish

that there is a reasonable probability the result at trial would have been different but for counsel not presenting this evidence.⁹

To the extent Applicant raises this claim in the alternative and states that the State acted in bad faith in making its closing argument regarding this issue, Applicant's claim lacks merit. No probative evidence was presented at the evidentiary hearing to establish that either Dr. Johnson or Coroner Caughman lied on the stand about what Applicant told them in regards to who checked on Joshua and who found Joshua unconscious. The State's closing argument was clearly based upon the testimony of those two witnesses and Applicant's testimony. Thus, Applicant cannot establish that the closing argument was improper. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. New, 338 S.C. 313, 526 S.E.2d 237, 240 (Ct.App.1999)("If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). As a result, that claim is denied.

(23) Allegation # 23: Cumulative Error

Ground 10(a)(23) is denied. In this Ground Applicant asserts he is entitled to a new trial because of the cumulative effect of all of the alleged errors made by counsel. The record does not support this claim. As noted above, Applicant has failed to establish that counsel was ineffective in any regard. Since there were

⁹ To the extent Applicant may be relying upon statements made to David Shull or David Sullivan, his claim lacks merit. In the interview notes for both, it was indicated that Applicant stated "they" last checked on Joshua around midnight. {Applicant's 20, 21}.

not multiple errors by counsel in this case, this claim is denied. Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002).

Furthermore, counsel cannot be found ineffective based upon the cumulative effect of alleged deficiencies. "[W]hether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.'" Lorenzen v. State, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006). However, the Fourth Circuit Court of Appeals has stated "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" Fisher v. Angelone, 163 F.3d 835, 852 (1998). In Fisher, the Fourth Circuit also noted that any cumulative error analysis should only evaluate those claims where there was an actual determination of constitutional error, not the cumulative effect of all of counsel's actions deemed deficient. Id. at 853, n.9. In light of the Fourth Circuit's reasoning in Fisher, Applicant has failed to set forth a meritorious claim.

Further, for the reasons stated in response to Allegations 1-22, Applicant has failed to establish that counsel was ineffective in any regard. Thus, there is no basis upon which this Court can consider the cumulative effect of any alleged deficiencies of counsel. As a result, Applicant's claim in this allegation is without merit. Applicant's claim in this allegation is denied.

Ground B: Failure to Correct Testimony, Tindal at Trailer on May 9, 1999

Ground 10(B) is denied. In this Ground, Applicant asserts he was denied due process of law and a fair trial because the State failed to correct false

testimony at trial. Specifically, Applicant alleges that Rebecca Tindal falsely testified that she was not present at his home on Sunday, May 9, 1999. He claims that the State was aware that she lied when she testified she was not at the trailer, and the state erred in not correcting that testimony allowed Tindal to conceal her motives for lying about Joshua's death and conceal her own guilt for Joshua's death.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

However, "mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." Id. Rather, "the alleged perjured testimony must bear a direct relationship to the defendant's guilt or innocence." Id. Finally, when a defendant alleges that the prosecution used perjured testimony, we must inquire into whether the defendant had adequate opportunity to expose the alleged perjury on cross-examination.

Simental v. Matrisciano, 363 F.3d 607, 615 (7th Cir.2004) (quoting United States v. Saadeh, 61 F.3d 510, 523 (7th Cir.1995)).

During cross-examination at trial, Tindal was asked if she had gone to Applicant's trailer on Sunday, May 9, 1999.

Q. Ms. Tindal, let me refer you to the week of May 10th, 1999. that Sunday, did you not go to Jeffrey's house Sunday before May 12th, 13th?

A: No. I think, that was Mother's Day, wasn't it?

Q: I'm not sure, ma'am.

A: I believe that was Mother's Day. I didn't go there.

{R. 1443}.

In her statement to police on May 15, 1999, at 4:20 p.m. Tindal stated

Tindal: Well I mean it doesn't bother me. I don't mind if you know cause I was gonna take see it was Mother's Day last Sunday.

Phillips: Uh umm.

Tindal: And I was planning on spending the day with my son and Jeff heard me talking to him about bowling and he said well what time are yall going bowling? And I said probably after we eat cause my son had saved up his money and wanted to take me out to eat um he said well call me when yall get done and so when we got finished eating I beeped Jeff and of course he didn't call back so I told Do [REDACTED] I said we were right up the road from Jeff's house, I said well we'll ride on up there real quick and see if he's there you know if he's back from eating with his mama and them. And he wasn't and the front door was unlocked so I went on in and I beeped him again and he called me and he had gone to Batesburg to see his I guess to see his brother and them or went back there with him or something you know. I told him we were going on bowling and he said well Josh has been showing his ass (spells ass out letter by letter) and I said what do you mean? He said the minute they walked in the restaurant Josh started throwing a temper tantrum. He said so I don't know if it would be a good idea to bring Josh. I said well you bring him on. I said I can handle Josh, Josh is a good boy for me and um you know he finally said okay and they met us there and we bowled and Do [REDACTED] and I were already there and bowling one game when they got there. So when it was all over we took all the shoes up there.

{Applicant's 73, at pp. 6-7}. At the evidentiary hearing, Littlejohn testified that he did not know what would have been accomplished by impeaching Tindal on whether she was at Applicant's trailer on Mother's Day. {See Tr. 104}. There is

simply no evidence the State knowingly presented false testimony to the Court simply because there is some arguable inaccuracy as to whether Tindal was at Applicant's house a few days before the murder.

Applicant fails to show that the alleged false statement about whether she went to Applicant's trailer on Mother's Day was material to Applicant's case. Whether Tindal was at Applicant's trailer on May 9, 1999 has absolutely no bearing upon whether he killed Joshua. Applicant failed to present any testimony and/or probative evidence to establish that Tindal's presence at Applicant's trailer on the Sunday before Joshua's murder was relevant to any issue that was either raised at trial or could have been raised at trial.

This is not similar to the situation in Riddle. In Riddle, the South Carolina Supreme Court held that the State improperly failed to correct false testimony when it failed to correct a witness's testimony that he had not spoken with anyone about the case after he gave his first statement. Id. at 47-8, 631 S.E.2d at 75. The witness had, in fact, met with and given law enforcement a second statement, and had further discussions with law enforcement on another trip. Id.

Unlike Riddle, the disputed testimony here is not related to the night of the murder or to the events leading up to the murder. Furthermore, the alleged false testimony was not about some secret dealings between the State and Tindal. In fact, as recognized by Applicant in his eighth allegation in Ground A, counsel was aware that Tindal had indicated in one of her statements to police that she went over to Applicant's trailer on Mother's Day. Even Applicant's trial counsel indicated that Tindal's denial of her visit to Applicant's trailer on Mother's Day

was of very limited value because it was three days before the murder. {Tr. 104}.

In all, Applicant has failed to prove by a preponderance of the evidence that there was a reasonable likelihood the false testimony could have affected the judgment of the jury. Thus, he did not establish the testimony was material. As a result, Applicant fails to meet his burden of establishing there was a due process violation. This Ground for relief is therefore denied.

Ground C: False Testimony Regarding Time of Death

Applicant next raises a due process violation by asserting that the State knowingly concealed the fact that Dr. Sexton supposedly had concluded the time of death was closer to 8:00 p.m., and not after 11:00 p.m. He relies on the statement in the DSS filing. {Applicant's 8}.

Much of the facts and context of this issue was addressed in Issue (A)(17), *supra*, and that discussion is incorporated here. To quickly recap, counsel Littlejohn testified that he spoke to Dr. Sexton prior to trial, and Dr. Sexton stated he could not give a time of death due to all the variables and contingences. Littlejohn stated he saw no way to cross Dr. Sexton for what some attorney wrote in a DSS pleading, or on what Robin Mozingo says she was told by police. For his part, Dr. Sexton testified that he never would have opined the time of death was 8:00 p.m., and that doing so would be inconsistent with his years of practice. He speculated that perhaps someone at the autopsy overheard the pathologists talking and made an improper assumption.

To this must be added the credible testimony from Assistant Solicitor Shawn Graham at the PCR. He was examined about a notepad containing notes he took during a pretrial discussion with Dr. Sexton. Given that a decade had passed, Graham was trying to interpret notes from a conversation years prior, but he testified there was no answer written when he asked Dr. Sexton whether Dr. Sexton had an 8:00 p.m. time of death, and instead the notes reflect a discussion of a one to six hour range from 6:00 p.m. to 12:00 a.m. Graham was adamant that Dr. Sexton never told him the time of death was 8:00 p.m., and if Dr. Sexton had, he would have turned it over to the defense. {Tr. 591-97}. Graham testified he was well aware of his Brady and due process obligations, and he took them very seriously. {Tr. 563-64; 598-97}.

Applicant has failed to establish a due process claim. A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 405 U.S. 150, 153 (1972) (quoted in Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006)). As noted in the preceding ground, a claim along these lines requires a showing of the falsity and materiality of testimony and the prosecutor's knowledge of its falsity. See also Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002).

Applicant has not shown falsity. As found in Ground (A)(2), *supra*, this Court finds credible Dr. Sexton, Cam Littlejohn, and Shaw Graham's testimony that Dr. Sexton never opined the time of death was 8:00 p.m. or closer to 8:00

p.m. Moreover, Applicant has not shown knowledge, as Graham credibly testified that Dr. Sexton never told him the time of death was closer to 8:00 p.m.

Moreover, Applicant has not shown materiality, given, as discussed in Ground (A)(2), *supra*, that even at best the time of death cannot be reliably established on the earlier end of the short window at issue such that there would be a reasonable probability of a different result. This is particularly so when Applicant told people with no reason to lie – including an EMT, an ER doctor, and a deputy coroner – that he checked on Josh very late in the evening or shortly before he was found on the floor and Josh was fine.¹

The issue is denied.

Ground D: False Impression on Reaction to 911 Responders

This ground for post-conviction relief is denied because it is without merit. In Ground D, Applicant asserts that he was denied his right to due process of law and a fair trial in violation of the Sixth and Fourteenth Amendments in that the State intentionally created the false impression that Applicant was uncaring and disinterested in the condition of his son and the heroic efforts 911 responders engaged in while trying to resuscitate Joshua.

First, this claim fails to state a valid due process claim. At trial, the State called Tim Wojcik, one of the EMT who responded to the call to Applicant's home on May 13, 1999. {R. 1265-1280}. He responded with Sullivan that morning. {R. 1266}. Wojcik testified that Applicant met them at the mailbox. {R. 1267, 1279}. He directed them to the house. {R. 1267, 1279}. Wojcik indicated that

¹ See {R. 1270-72; 1304; 1315}. {Tr. 157-58}.

Applicant directed them to where Joshua was located in the trailer. {R. 1267-8, 1279}. Wojcik testified that he recalled the female who was performing CPR when they arrived (Tindal) was very upset, ^Wwhen they arrived. {R. 1269, 1280}. However, he did not notice any particular demeanor about Applicant. {R. 1270, 1281}.¹⁰ He indicated that after they got into the house, it appeared to him that Applicant went in a different direction and they hardly saw him after that. {R. 1270}. He also indicated Applicant went to a different part of the home. {R. 1270}.

During closing arguments during the guilt phase of Applicant's trial, Deputy Solicitor Riddle argued,

And the ambulance comes. The ambulance comes. And what does Jeff Haselden tell them? I checked on Josh 20 minutes before the 911 call and he was okay. I guess that must have been when he was coming out of the room after beating him to death. What else does he tell Tim Wojcik, the E.M.T. that testified? Oh ^Wyeah, it must have been something from that boy sticking stuff up his nose.

Well, now Jeff Haselden would have you believe there was nothing going on with his nose that night. But the first person he talks to, he's stuffing stuff up his nose. Then he tells Kevin Wilson that at the hospital. Stuffing stuff up his nose. But that didn't happen, that didn't happen.

What else does Tim ^W tell you, Tim Wojcik, the E.M.T.? He says when I get there, she's giving him C.P.R. Well, where is dad? He's in another room. Becky Tindal's upset. Daddy's calm. Why is he calm? Because he knows. He knows.

{R. 1937}.

¹⁰ He clarified in his cross-examination that Applicant's demeanor just did not stick out either good or bad. {R. 1281}.

Applicant argues that the testimony of Wojcik and the argument made in closing argument created a false impression that Applicant did not care about the condition of his son. In support of this argument, they point to the statements of David Sullivan and David Shull. In the interview notes of law enforcement's interview with Shull, he stated:

They both had shaky voices and were upset and rattled but the father seemed to settle down and became rational. The father was concerned about getting to the road to flag down the ambulance. David stated he asked if the child had been sick running a fever or had any shots that week. The Father told him no.

{Applicant's 21}. Sullivan also gave a statement to law enforcement. In his interview, Sullivan stated:

He and his partner responded to the Haselden residence on the morning of 5-13-99 where the father who was standing on the side of the road flagging them down met them. The father told them his son was in the back room. There was a woman whom David assumed to be the mother in the room doing CPR on the boy. The father told David they had just come in and found the child about 15 minutes before lying where was on the floor.

...

David said the father was tripping out and that both adults were upset.

{Applicant's 20}.

Applicant's claim is denied for several reasons. First, contrary to Applicant's assertion in this Ground, the State did not fail to correct any false information in this case. Absolutely no probative evidence presented at the evidentiary hearing indicated that Tim Wojcik lied when he testified about his observations. Since the State's presentation at trial was not based upon any

false testimony, Applicant's reliance upon Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) is misplaced.

In Riddle, the South Carolina Supreme Court held that the State improperly failed to correct false testimony when the witness testified that he had not spoken with anyone about the case after he gave his first statement. Id. at 47-8, 631 S.E.2d at 75. The witness had, in fact, met with and given law enforcement a second statement, and had further discussions with law enforcement on another trip. Id.

In Applicant's case, there is neither a claim nor any evidence that Wojcik gave false testimony. Instead, Applicant's argument is based merely upon the difference in the observations of two witnesses as to how Applicant was acting on the night of the murder. The solicitor's closing argument was clearly based upon the evidence that was presented at trial in the form of Wojcik's testimony. There was nothing improper about the closing in this regard. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct.App.1999)("If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.").

Second, under this factual scenario, Applicant has failed to state a claim upon which post-conviction relief can be granted. Specifically, Applicant has failed to assert a viable due process claim. There are two types of due process

claims that can generally be raised in the post-conviction relief context in regards to evidence. First, an Applicant can assert a Brady claim, which requires a showing that the State withheld favorable and material evidence. {See discussion *infra* in response to Ground H}. Second, an applicant can assert the State presented false testimony at trial, as Applicant has asserted in Grounds B and C.

Applicant has not attempted to establish either of these types of claims. Here, Applicant essentially argues that his right to due process was violated by the State not calling either David Shull or David Sullivan to testify at trial. "[T]he State is not required to produce and place upon the stand every witness who has knowledge of some facts connected with the crime charged." State v. Weaver, 265 S.C. 130, 138, 217 S.E.2d 31, 35 (1975) (citing State v. Watts, 249 S.C. 80, 152 S.E.2d 684 (1967); State v. Richardson, 253 S.C. 468, 171 S.E.2d 717 (1969); and State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973)); see United States v. Levi, 405 F.2d 380, 381-82 (4th Cir. 1968). Applicant presented no evidence that the State relied upon evidence from any witnesses absent from Applicant's trial. Thus, Applicant has failed to establish that his due process rights were violated in this claim.

Finally, given all the evidence of guilt presented at trial, it cannot be said that the evidence from Sullivan and Shull on Applicant's demeanor would have been sufficient to create a reasonable probability of a different result. Ultimately, the point, while helpful to the State, was not crucial.

As a result, Ground D is denied.

Ground E: Discovery Violations

This ground for post-conviction relief is denied because it fails to state a claim upon which post-conviction relief can be granted. S.C. Code Ann. § 17-27-20(a) states:

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

(Writ)
~~The statute clearly does not provide that relief is available if an applicant does not receive discovery that he requests.~~ *(Writ)*

(Writ)
Furthermore, Applicant has failed to establish that they have not received all of the documents they have requested. Specifically, Applicant fails to show there was a statement taken from Rebecca Tindal on June 17, 1999.

At the evidentiary hearing, Applicant introduced notes that were taken by Eleventh Circuit Assistant Solicitor Shawn Graham. {Tr. 552-53, Applicant's

37}. In Applicant's 37, dated December 15, 2000, the notes indicate that Graham talked with Joel Huggins.

GRAHAM: Right underneath the date, there is an arrow, a bullet arrow, it says, Joel Huggins, with a dash. And it says, Tracey and I. Below that is, First and then there's a five slash 15. It says, Had already given first statement. The next line says, Second with a six slash 17 with a bullet arrow saying she failed. There's another bullet below that says, Talked with her for three hours. Above the word hours, whole thing is written. The next bullet down, I am guessing, but I'm assuming that's Jay underlined or Kevin underlined would have been –

BLOOM: Is that around?

GRAHAM: -- would have -- I'm sorry?

BLOOM: Is that would have been around?

GRAHAM: I don't know. It says, Would have. And the next line right underneath Jay or whatever that is, it says, Been, it appears to be an I, I don't know whether it's viewed, which wouldn't be good grammar, but that's what it appears to be what it is is viewed, but I don't know.

{Tr. 552-53}. Using this, Applicant attempts to argue that this was evidence there was a statement taken by law enforcement from Tindal. An investigative note dated June 17, 1999 was provided to the defense. {Applicant's 75, see Tr. 840}. The statement that was typed in this investigative note was the handwritten statement that was given by Tindal to police on May 12, 1999. Applicant alleges that the typed statement was fraudulently used to replace a statement that was given by Tindal on June 17, 1999:

Applicant fails to establish that the state failed to provide the defense with material evidence. During cross-examination, Graham testified that the notes appeared to be from an interview he did with Huggins. {Tr. 581}. Huggins was

the polygraph examiner. {Tr. 581}. The note indicated that the polygraph took three hours. {Tr. 581}. Graham indicated that he did not remember meeting with Huggins. {Tr. 581}. He did not know what three hours, whole thing meant specifically. {Tr. 581}. However, Graham's interpretation of his notes was that they meant that Huggins told Graham ^{Wilson} ~~told him~~ that he spent three hours on the polygraph, and the whole thing would refer to the time from when Huggins first met Tindal that day. {Tr. 582}. It would include the pretest interview, the explanation of the test, administration of the test, and everything else up until Huggins concluded his time with Tindal. {Tr. 582-83}.

Graham further testified that the defense was made aware of the fact that Tindal was polygraphed twice. {Tr. 583}. That was turned over with discovery. One was on June 17, 1999. {Tr. 583}. It was turned over on August 20, 1999 according to the date stamped on the documents. {Tr. 583}.

Kevin Wilson testified that the typed statement attached to the June 17, 1999 investigative report was the interview taken on May 12, 1999. {Tr. 827-28}. He further testified that it was his normal practice to type up a handwritten statement. {Tr. 829}. He did not replace a supposed statement made on June 17 with the one that was typed. {Tr. 829}.

During cross-examination, he noted that he did not take a statement from Tindal on June 17. {Tr. 831, 847-48}. He could not remember anyone else interviewing Tindal on June 17, and he would have written something down in an investigative report if he had known. {Tr. 831}. Wilson also had no knowledge of

Tindal spending three hours at the Lexington County Sheriff's Department that day. {Tr. 832, 848}.

Joel Huggins, the polygraph examiner who gave Tindal an exam on June 17, 1999, testified that he did not recall meeting one of the assistant solicitors in Applicant's case. {Tr. 411}. He noted that if he told an assistant solicitor that he spent three hours with Tindal, it could have been the pretest, the test itself, and the posttest altogether. {Tr. 415}. He noted that in general, if an examinee wanted to give a statement, usually an investigator was in another room watching the exam. {Tr. 415}. After an oral statement was given, Huggins would go out and speak with the investigator to make sure that he had the information that he needed. {Tr. 415}. Then the investigator would go and speak with the examinee and attempt to get a written statement from that person. {Tr. 415}. If the investigator was unsuccessful, Huggins would write a statement. {Tr. 415}. In most cases, he did not write a statement. He testified that he did not hide any evidence in this case. {Tr. 416}.

In all, Applicant failed to present probative evidence establishing law enforcement took a statement from Tindal on June 17, 1999. No such statement was presented at the evidentiary hearing. Further, there was no testimony at the evidentiary hearing that indicated that either the prosecutors or law enforcement were aware of a statement being taken on June 17, 1999. Applicant also did not present any testimony from Tindal to support their claim that she was interviewed for three hours or that she gave a statement on June 17, 1999. This Court finds that Assistant Solicitor Graham and Investigator Wilson were credible, and both

indicated they were unaware of any statement taken from Tindal on June 17, 1999. Since no probative evidence establishing such a statement was taken on June 17, 1999 was presented, Applicant has failed to establish that his due process rights were violated because there was no statement to be turned over.

To the extent Applicant still asserts that some of Deputy Solicitor Dayton Riddle's notes were not turned over, the record does not support Applicant's claim. There was no probative evidence presented at the evidentiary hearing that indicated notes from Riddle were not turned over.

Also, Applicant has failed to present any probative evidence that establishes there are documents available that were not turned over to Applicant's counsel. {See Tr. 545-47, 836-37, 923-25}. In all, Applicant fails to establish by a preponderance of the evidence a factual basis for this claim. Since ^{waive} ~~this is not a cognizable claim for post conviction relief~~ ^{waive} and there is no factual support for this claim, Ground E is denied.

Ground F: Solicitor's Note on Finding Someone To Discuss Cause of Spiral Fracture and Presentation of Photographs of Toys and Pictures

In Ground F, Applicant asserts that the State violated his right to due process and a fair trial by acting "to conceal this information from the court and to bluff trial counsel out of attempting to explore the information during Tindal's cross-examination." It appears that Applicant is specifically asserting that the State attempted to find an expert who would testify that the spiral fracture suffered by Joshua could only be the result of twisting. Applicant claims that his right to due process was violated because the State wanted to use such an expert to "bluff" Applicant into not presenting the evidence concerning the spiral

fracture at trial. Further, Applicant asserts that the State created a false impression of Applicant's treatment of Joshua by choosing photographs that did not fully encapsulate the amount of toys and clothes that Applicant had obtained for Joshua. Both of these claims, ^{are} ^{was} is denied because the record does not support them. Moreover, Applicant has failed to assert a cognizable due process claim in this ground.

At the evidentiary hearing, Applicant introduced notes from Shawn Graham. According to Graham's testimony at the evidentiary hearing, one of the notes contained the following language:

There's an asterisk and the number nine with a period. It says, Spiral fracture diagnosed, and then in parentheses, Greene, G-r-e-e-n-e, end of parentheses. The next line says, But not reported. And the next line says, Need to find someone to say spiral fracture is only caused by twisting.

{Tr. 557-58}. Graham later testified that he and Deputy Solicitor Dayton Riddle went and met with Dr. Greene in Columbia.¹¹ {Tr. 575}. They knew Joshua had suffered a spiral fracture prior to his death. {Tr. 575}. They had reviewed the medical files and had seen Dr. Greene's report. {Tr. 575}. Graham believed that at that time, they probably had all of Joshua's medical records or were in the process of obtaining them. {Tr. 575}. He noted that it was his understanding at that time that a spiral fracture was diagnostic of child abuse. {Tr. 575-76}. Graham believed he was told that by Riddle. {Tr. 576}.

Graham recalled that Dr. Greene told them if he had suspected anything from Joshua's spiral fracture, he would have done a long bone x-ray. {Tr. 576}.

¹¹ Dr. Greene was one of Joshua's treating physicians on the spiral fracture injury. {Tr. 179-80}.

Graham also noted that Dr. Greene was a mandatory reporter, and if he believed there was child abuse, he had an obligation under the law to report it. {Tr. 577}. Greene informed them one could not diagnose child abuse with just one spiral fracture, and Greene indicated the spiral fracture could have been the result of uneven weight transfer. {Tr. 577}.

Graham noted that they believed Dr. Greene's statements were inconsistent with their understanding that a spiral fracture was diagnostic of child abuse. {Tr. 577-78}. He also indicated they thought Greene might have been protecting himself. {Tr. 577-78}. As a result, Graham and Riddle sought a second opinion from a doctor who did not have a motive or reason to protect himself. {Tr. 577-78}. Graham noted that was probably what the note off the notepad meant. {Tr. 577}. Graham testified that he believed they met with Dr. Susan Luberoff in downtown Columbia. {Tr. 579}. His recollection of the meeting was that Dr. Luberoff stated that at one time, it was believed to be true that a spiral fracture was accepted as a diagnostic of child abuse. {Tr. 579}. However, at the current time, it only served as an indicia of child abuse. {Tr. 580}.

In all, Graham indicated that the note reflected their belief that a spiral fracture was diagnostic of child abuse and them wanting to talk with another expert who did not have a motive or reason to protect himself. {Tr. 578-79}. Graham testified that he would not try to manufacture science to get conviction unfairly. {Tr. 579}. He just wanted to ensure they covered every base and explored every matter as fully as they could. {Tr. 579}.

At trial, the State presented several photographs of Joshua's room. {See R. 1567-72}. At the evidentiary hearing, Applicant also presented three photographs that were taken of Applicant's trailer shortly after the murder. {Tr. 105-09}. Two of the photographs showed Joshua's toys stacked in a corner and against the wall. {Tr. 106-07, Applicant's 15 and 16}. Another was of a photograph of ~~a photograph~~ ^{Wall} that was on one of Applicant's trailer's walls. {Tr. 107-08, Applicant's 13}.¹²

To the extent Applicant asserted that the State attempted to obtain evidence to bluff Applicant into not raising the fractured leg incident at trial, his claim is denied. Assistant Solicitor Graham's testimony on this issue is credible. Graham testified that the note was nothing more than a reminder that they needed to do some further exploration into whether a spiral fracture was diagnostic of child abuse. As he noted at the evidentiary hearing, the State had some concerns about Dr. Green's findings because of his potential self-preservation motive for not being forthcoming about whether a spiral fracture was diagnostic of child abuse. There was no probative evidence presented at trial to indicate that the State's exploration of the issue was improper.

Also, the record of the argument at trial clearly reflects that the State proffered no argument that the fractured leg was necessarily caused by someone forcibly twisting Joshua's leg. {See R. 1428-1442}. Clearly, the record does not support Applicant's factual allegations in this claim.

¹² Applicant's 14 was an enlargement of Applicant's 13.

Furthermore, Applicant has failed to raise a cognizable due process claim in this regard. As noted in response to Ground D, there are two types of due process claims that can generally be raised in the post-conviction relief context in regards to evidence. First, an Applicant can assert a Brady claim, which requires a showing that the State withheld favorable and material evidence. {See discussion *infra* in response to Ground H}. Second, an applicant can assert the State presented false testimony at trial, as Applicant has asserted in Grounds B and C. Applicant has not attempted to establish either of these types of claims in Ground F. Since this claim is not cognizable, and there is no factual support for granting relief, this claim in Ground F is denied.

Similarly, Applicant's claim that the State created a false impression that Joshua was not equally provided for by Applicant is also not supported by the record. First, Applicant presented no probative evidence or testimony that indicated the photographs submitted to the jury by the State were altered in any way. Nor did Applicant present any evidence to show the photographs were improperly taken by the State. Since there was no evidence presented to indicate the photographs presented false information to the jury, Applicant cannot establish the state presented false evidence. Furthermore, Applicant fails to prove the State engaged in any wrongdoing in presenting the photos it selected at trial. The State has the right to present its case as it sees fit. Old Chief v. United States, 519 U.S. 172, 186-7, 117 S.Ct.644, 653 (1997) (recognizing standard rule that prosecution is entitled to prove its case by evidence of its own choice in addressing the use of stipulations). Again, the record does not support

Applicant's claim regarding the photographs of Applicant's trailer for Joshua's toys and pictures. Also, Applicant has not presented a cognizable claim of denial of due process.

As a result, Ground F is denied.

Ground G: Actual Innocence

Applicant next contends that he is factually, legally, and morally innocent of the murder of Josh for all the grounds set forth in the application. He asserts this entitles him to relief under S.C. Code Ann. § 17-27-20(a)(4), which refers to "material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Of course, the statute also specifically precludes a claim on the ground that the evidence was insufficient to support the conviction. S.C. Code Ann. § 17-27-20(a)(5).

Subsection (a)(4) is essentially a restatement of the standard for a motion for a new trial based on after-discovered evidence. Harrington v. State, 659 N.W.2d 509, 516 (Iowa 2003) (applying similar provisions). In South Carolina, to succeed on such a motion, Applicant must show that the newly-discovered evidence: (1) is such that it would *probably change* the result if a new trial were granted, (2) has been discovered since the trial, (3) could not have been discovered prior to trial in the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001); State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999).

Applicant cannot meet this standard. Indeed, if the claim is one of ineffectiveness, then necessarily it would have been available with the exercise

of due diligence at the time of trial, or counsel could not be faulted for failing to find it. Regardless, this Court has found neither deficiency nor prejudice as to the ineffective assistance issues. Moreover, the Brady or other due process claims have been addressed by this Court by finding neither suppression (or other misconduct) or materiality. All of this would preclude application of the test for a new trial, which requires the somewhat more stringent standard that the evidence would probably change the result.

However the issue is addressed, though, this Court finds no basis for relief whether the issues are considered jointly or severally. Nor has Applicant proven by any standard that he is morally, factually, or legally innocent of the murder of young Joshua H [REDACTED].

Ground H: Brady/Riddle Claims

Applicant finally makes a number of Brady claims.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at

870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)(citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). "[W]here evidence is equally available to the

accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

Allegation #1: Summer J. [REDACTED] Statement that Felicia Broke Joshua's Leg While Wearing Cowboy Boots

Applicant's first Brady claim lacks merit. In this first allegation, Applicant asserts that the State withheld evidence that indicated that Tindal saw Felicia H. [REDACTED] stomp on Joshua's leg and that Applicant spanked Felicia for doing it "when she woke up." This claim is based upon a set of notes taken by Assistant Solicitor Shawn Graham ^(WAG). On one of his notes he had taken during an interview with Summer J. [REDACTED] on December 15, 2000. {Tr. 553-57, Applicant's 40}.

At the evidentiary hearing, Graham indicated the note states as follows:

A: It says, dash disciplining. The next line says, Nothing unusual. The line below that says, dash Mom, and the word Rebecca is above that, Say Felicia. And then there's -- says, Felicia stomps. And above that, above Felicia stomps is an arrow pointing down and above that says, Wearing cowboy boots. And so then it goes back where it says stomps and goes, On Josh's leg, period. The next line says, parentheses, Told, and there's something scribbled out, Summer at that time, end in parentheses.

Q: And keep going on, please.

A: The next line has a dash and says, Jeff spanked F, assuming Felicia, everyday for a week. The next line continuing on is, When she woke up, period. The next line below that is, Not sure when started, heard from Rebecca.

{Tr. 555-56}. Applicant asserts this was evidence that should have been turned over to the defense.

Applicant's claim is without merit. At the evidentiary hearing, Graham testified that the note appeared to be his shorthand for what he was hearing

when he was talking to someone. {Tr. 566}. He noted that he would have better understood what the notes meant then because at the time he would have been very conversant with the facts and what the notes would have meant. {Tr. 565-66}. Graham did not specifically recall the conversation with Summer Jo [REDACTED] {Tr. 566}. He also did not specifically remember what he meant when he wrote the note submitted as Applicant's 40. {Tr. 566}. He did note that the lines do not definitively state that Tindal saw Felicia stomp on Joshua's leg. {Tr. 567}. They say that Felicia was wearing cowboy boots, and on the next line that Tindal told Summer at that time. {Tr. 567}. Graham also indicated the defense was provided with Summer J [REDACTED]'s taped interview and its transcript from May 15, 1999. {Tr. 567}.

On page 23 of Summer's statement, she indicated that Tindal told her that Felicia told Applicant's mother that Applicant broke Joshua's leg. {Tr. 568, Applicant's 18}. Her statement continues on to say that they blew off Felicia's claim as her trying to pass the blame onto someone else. {Tr. 568, Applicant's 18}. Above that, Summer discussed that they were told by police that Joshua's leg had been broken with a spiral break, which meant the leg was twisted. {Tr. 568, Applicant's 18}. According to Summer's statement, Applicant had told her and Tindal that Felicia had done it by stomping on Joshua's leg with a pair of cowboy boots on. {Tr. 568, Applicant's 18}. The police informed them that there was no way the leg could have been broken that way. {Tr. 568}. In the statement, Summer again stated that Applicant had told them Felicia was the one who did it. {Tr. 568, Applicant's 18}. The defense had that statement.

Further, Graham testified the defense had DSS records. {Tr. 569}. For example, on page 34 on the December 1, 2000 records included an interview with a DSS caseworker. {Tr. 569}. It stated that the caseworker went to Applicant's parents' home and interviewed Applicant. {Tr. 569}. Applicant told the caseworker that Joshua and Felicia were in bedroom playing and Applicant kept hearing a thumping noise. {Tr. 569}. When he went in, the kids were facing each other with their legs straight out. {Tr. 569-70}. Felicia was kicking Joshua's leg. {Tr. 570}. At the time, Felicia had on some boots that had little heels, and she was kicking him with the heel. {Tr. 570}. According to the document, Applicant stated that Joshua was not crying. {Tr. 570}.

This Brady claim is denied because it lacks merit. First, Applicant fails to show that the notes from the interview were favorable to Applicant. They were not. As noted by Graham during cross-examination, the notes do not definitively say that Tindal saw Felicia kick Joshua. Furthermore, Applicant fails to establish that the notes were material to Applicant's guilt or innocence, or that they were impeaching. Finally, Applicant was already in possession of the information that was contained in the solicitor's notes. It was contained in Tindal's statement to police on May 15, 1999 at 4:20 p.m.

Tindal's gave a statement to police on May 15, 1999 at 4:20 p.m. In the statement, Tindal stated as follows:

Phillips: Uh, you know I'm curious as to how this incident could have happened from the way which it has been described from the doctors and this force that was necessary and the number of times this child was struck how anybody could be in that (interrupted by Tindal)

Tindal: And not hear it.

Phillips: mobile home near it and not hear anything?

Tindal: I thought the same thing. I have thought the same exact same thing. I I don't know, I don't know and I wished I did but I don't. I do know Josh didn't cry out loud. Josh when Felicia was stomping on his leg that time

Phillips: Uh umm.

Tindal: tears were streaming down his face but he wasn't crying out loud. Felicia whaled you know. Josh doesn't. He fell off the bed and hit his head one time you know when he was smaller didn't make no sound at all but tears were just streaming down that little face. I mean it doesn't surprise me that I didn't hear him necessarily.

{Applicant's 73, at p. 17}.

Applicant has failed to meet his burden of establishing a Brady violation in this claim. First, Applicant failed to demonstrate that the solicitor's notes on the fractured leg incident were favorable to him. Assistant Solicitor Graham clearly testified that his notes did not definitively indicate that Tindal witnessed Felicia stomp on Joshua's leg. Thus, the evidence could not establish that Tindal was the source of that story. Furthermore, even if the notes did indicate Tindal saw Felicia stomp on Joshua's leg, there was never any accusation at trial that Applicant broke Joshua's leg. In fact, as noted in response to the fourth allegation in Ground A, it was never clearly established at any point in time when and how Joshua suffered his fractured leg. Finally, as argued in ground (A)(4), the leg incident was not admissible under Rule 404 anyway. In all, Applicant failed to make a showing as to how this statement was favorable to him.

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ORDER)
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Second, Applicant failed to establish these solicitor's notes were material. The statement was clearly not relevant to Applicant's guilt or innocence. The leg fracture occurred at least more than a month before Joshua's murder. The notes also were not impeaching evidence. There was no testimony at trial regarding Joshua's fractured leg. Furthermore, as noted in response to the fourth claim in Ground A, there never would have been any testimony regarding Joshua's broken leg. The trial court found the possible discussion of the matter to be inadmissible, and trial counsel clearly indicated that he would not have pushed to raise the issue any further because of the potential pitfalls of presenting the subject to the jury. These challenged solicitor's notes do nothing to either change the admissibility problem or change the factual scenario counsel faced in making its decision not to present the issue to the jury. Finally, Applicant's counsel was in possession of Tindal's statement to police on May 15, 1999 at 4:20 p.m. These notes were cumulative to Tindal's statement to police. Since Applicant has failed to establish there was a Brady violation, this claim is denied.

Allegation #2: Dr. Green interview

Applicant withdrew applicant's second claim under 10(h), that the State failed to disclose an interview it had with Dr. Green, by letter dated October 16, 2009. Thus, it has been waived and abandoned.

Allegation #3: June 17, 1999 three hour interview.

In Applicant's third claim under 10(h), he asserts that the State failed to turn over a statement and/or other evidence regarding an alleged interview between law enforcement and Rebecca Tindal on June 17, 1999. As set forth in

Ground E, supra, and incorporated here, this claim is denied because Applicant has failed to establish that any interview took place on June 17, 1999. Thus, Applicant failed to establish by a preponderance of the evidence that the State withheld any information regarding Rebecca Tindal as it relates to June 17, 1999.

In all, Applicant failed to present probative evidence establishing law enforcement took a statement from Tindal on June 17, 1999. No such statement was presented at the evidentiary hearing. Further, there was no testimony at the evidentiary hearing that indicated that either the prosecutors or law enforcement were aware of a statement being taken on June 17, 1999. Applicant also did not present any testimony from Tindal to support their claim that she was interviewed for three hours or that she gave a statement on June 17, 1999. Assistant Solicitor Graham and Investigator Wilson are credible.

Allegation #4: Tindal moved in with Haselden

In Applicant's fourth claim in 10(h), he asserts that the State withheld an admission by Summer J. [REDACTED] that Tindal had moved in with Applicant and was renting her trailer to Summer. Applicant argues that this statement was material because Tindal had denied that happened. This claim is denied because the information was available to Applicant by other means. Specifically, this information was contained in the audio statement given by Summer Jo [REDACTED] to police.¹³ Furthermore, Applicant fails to show that Tindal ever denied she had moved in with Applicant at trial. Finally, the statement was not material. Tindal

¹³ This information was also available on Tindal's audio statement to police. According to the transcript of that statement, Tindal admitted that she had basically moved in with Applicant, and indicated that she moved out after he requested her to do so. {Applicant's 73, at p. 5}.

never indicated at trial that she did not move in with Haselden, or that she rented her trailer to Summer.

During Tindal's cross-examination at trial, the following exchange occurred between Tindal and defense counsel:

Q: Now, Ms. Tindal, when you got back to 291 Pond Branch Road, Jeffrey asked you to get your stuff together and leave, right?

A: That morning?

Q: Yes, ma'am.

A: Yes.

Q: And that was the second time in two weeks that you had moved out of that house, isn't it?

A: I had not moved in again. All I had was a few things there to hold me over for the next two days.

Q: Well, let's get it straight – and I forgot to ask you about that first time, you said you left one Friday evening and came back the following Saturday morning?

A: That's correct.

Q: And that's when Jeffrey asked you to pick up your stuff and leave?

A: That's right.

Q: And you got there about 8:30 a.m. Saturday morning?

A: Yes.

{R. 1465-66}. Tindal went on to explain that she had her son with her at the time. {R. 1467}. She indicated she had not returned that Friday night because she was getting her son that Saturday morning. {R. 1467}. She also testified that she had gone out dancing with the girls. {R. 1467}. This testimony mirrored

Tindal's direct testimony regarding the earlier argument that led her to move out of Applicant's trailer. **{See R. 1361-63}**.

At the evidentiary hearing, Applicant presented notes from Shawn Graham's notebook from an interview with Summer Jo [REDACTED] taken on December 19, 2000. **{Tr. 553-56, Applicant's 40}**. The notes stated as follows:

A: It says, She, and then in parentheses, Rebecca, and the end of parentheses, Moved in, semicolon, Summer rented.

Q: And the next line after that?

A: The next line with another is a dash and it says, Rebecca moved out.

Q: And then the next line after that?

A: There's a dash. It says, At that time Rebecca not living there.

{Tr. 554}. Graham later testified that the defense was provided with Summer Jo [REDACTED] audio taped statement that was taken on May 15, 1999. He was certain the audio tape had been provided, and he believed the transcript was also provided to the defense. **{Tr. 585-87}**. On pages 24 and 25 of the transcript of Summer's statement, she discussed the argument between Applicant and Tindal that led Tindal to move out of Applicant's trailer. **{Tr. 587, Applicant's 18 at pp. 24-5}**. In the statement, Summer indicated that she was helping her mother remove items from Haselden's home that day after he told her to get her stuff and move out. **{Tr. 587, Applicant's 18 at pp. 24-5}**. Graham noted that Applicant's 18 was provided to the defense.

Summer Jo [REDACTED] also testified about Tindal's living arrangements at the evidentiary hearing.

To start with, she was, you know, kind of back and forth. She would stay there, you know, especially when he needed her to take care of the children and she was still living at home. Well, something happened with my living arrangement, so I moved out there with her. And then her and Jeff decided that she would move in with him and then I would just make the payments on the land and the trailer in Gaston. So then she fully moved in with him and I stayed there in Gaston until she moved out and then she came back, you know, to Gaston.

{Tr. 710}. Summer also indicated that Tindal moved out after Applicant asked her to do so. {Tr. 668, 705}. Summer stated that the reason she was looking for a new place to live around the time of Joshua's murder was because her mother had moved back into her trailer in Gaston.

This claim is denied. First, Applicant fails to establish that the statement was material. Applicant fails to show how Tindal's living arrangements with Applicant weeks before the murder have any bearing upon Applicant's guilt or innocence. The issue of whether Tindal had moved in with Applicant on a prior occasion is irrelevant to whether Applicant beat his son to death.

Furthermore, the alleged Brady material in this claim could not have been used to impeach Tindal. At no point in time at trial did Tindal deny that she once lived with Applicant. Her testimony clearly shows that she did, in fact, live with Applicant until they had the argument a few weeks before Joshua's murder. Her testimony also indicates she moved out, and that she went back to her trailer with Summer. Since Tindal never denied that she moved in with Applicant, or that Summer rented the trailer that Tindal owned, Applicant fails to establish Graham's notes were material in this regard.

Finally, the defense already had the information contained in the notes from Summer's audio statement to police taken on May 15, 1999. Graham's notes were merely cumulative to Summer's statement to police on this issue. In all, Applicant has failed to establish that he is entitled to relief upon this claim. As a result, this claim is denied.

Allegation #5: Applicant treated the children so good, and was partial to Felicia.

In Applicant's fifth claim in 10(h), he asserts the State failed to turn over information that Applicant had treated both of his children "SO GOOD" although he may have been partial to Felicia. This claim is denied because defense counsel already had this information through other discovery provided by the State. Further, Applicant fails to show how this statement was material.

At the evidentiary hearing, Applicant presented notes from Graham from an interview with Summer J. [REDACTED] that occurred on December 19, 2000. Graham testified that at one point during the notes, the notes say the following:

A: There's a dash. And it says, Jeff treated kids so good, more partial to Felicia, semicolon, but good with both.

Q: All right. Thank you, sir -- I'm sorry. Go ahead. I'm sorry. Complete that paragraph.

A: Jeff said had bought stuff for Josh, but Robin had it and not given back.

{Tr. 554, Applicant's 40}. Graham later testified that he defense was provided with Summer Jo [REDACTED] audio taped statement that was taken on May 15, 1999. He was certain the audio tape had been provided, and he believed the transcript

was also provided to the defense.¹⁴ {Tr. 585-87}. On page 23 of the transcript of Summer's statement, Summer indicated that she always thought Applicant was very good with his children, but Applicant was partial to Felicia. {Tr. 586, Applicant's 18}.

This claim is denied because the information in the allegedly withheld statement was already in the defense's possession. Both Graham and Littlejohn indicated that the audio statement and transcript were turned over to the defense. Summer's assertion that Applicant was good to his children and that he was partial to Felicia was clearly contained in her May 15, 1999 statement to police. Graham's notes are merely cumulative to that fact. Thus, Applicant cannot establish there was a Brady violation because the defense had the information.

Furthermore, Applicant fails to establish that the allegedly withheld notes were material. It appears that Applicant argues that the statement could have been used to impeach Summer's testimony at trial. Specifically, Summer testified that Applicant was very partial to Felicia. {R. 1526}. She further testified that Applicant took Felicia to the circus, but did not take Joshua, and Felicia had more toys, clothes, and pictures in Applicant's home. {R. 1526-27}. The solicitor's notes were not material to Applicant's guilt or innocence. At best, they could only be used to impeach Summer on her testimony about Applicant's partiality. Again, the notes were cumulative to Summer's statement to police on

¹⁴ Littlejohn also testified that he believed he would have received the transcript of Summer Jo [REDACTED] statement. {See Tr. 111-112}.

this issue. The statement clearly indicated that Summer thought Applicant was good with both of his children.

Further, the solicitor's notes were not inconsistent with Summer's testimony at trial. Summer never indicated in her testimony at trial that Applicant was not good with Joshua. She merely noted that it appeared Applicant was partial to Felicia. The solicitor's notes say nothing inconsistent with that testimony. In all, Applicant has failed to establish that he is entitled to relief upon this Brady claim. As a result, his fifth claim for relief in Ground H is denied.

Allegation # 6: Vivian Adkins

Applicant's sixth claim in Ground 10(h) asserts the State failed to disclose an interview done by law enforcement with Vivian Adkins. Applicant asserts that Adkins told law enforcement about what she may have heard or saw at Applicant's residence, both on the night of the murder and day-to-day neighborly encounters. Applicant indicates that Adkins told police that she would observe him placing his kids in their car seats and that they appeared to be well cared for. Further, she allegedly indicated that she would see Applicant playing with the children in their yard in the evenings, and she never observed Applicant act violently, angrily, or impatiently towards his children.

This claim is denied. Applicant has failed to establish by a preponderance of the evidence that the State was in possession of statement from Ms. Adkins, or that they even interviewed Ms. Adkins. Further, ^{APPLICANT DID NOT PROVE THAT} any alleged statement would ^{WAS} not have been favorable to Applicant. Finally, Applicant fails to establish that any alleged statement by Ms. Adkins would have been material.

At the evidentiary hearing, Adkins testified that she recalled speaking with law enforcement in May 1999. {Tr. 639}. She indicated that they asked her if she had heard anything next door, like arguing. {Tr. 640}. She did not know what they were talking about, and she told them she had not heard anything. {Tr. 640}. She noted that one could not hear anything inside of her house, and the bedrooms in the house were on the opposite end from where Applicant's mobile home was located. {Tr. 640}.

Adkins did not recall being asked about Applicant's interaction with his children. {Tr. 640}. She did note that she remembered observing Applicant with the children. {Tr. 641}. She would see them sometimes in the afternoons when she would be out watering the flowers. {Tr. 641}. She testified that sometimes he would be out there by himself with the children, but other times there would be other people. {Tr. 641}. She never saw Applicant yell at his children or strike his children. {Tr. 641}. She noted that she would also sometimes see Applicant in the morning when they were leaving for work. {Tr. 642}. Adkins testified that she also remembered Wilson coming out to talk with her a few months ago. {Tr. 643}. Adkins indicated that she never personally met Applicant. {Tr. 645}. She also believed that she never talked to him; instead, she just observed what was going on. {Tr. 645}. She noted he appeared to be a single father because she would see females coming and going. {Tr. 645}. She also testified that the only people who came out to talk with her were the two detectives after the accident. {Tr. 644}. She never heard from anyone else. {Tr. 644}. She would have talked with anyone who would have contacted her. {Tr. 644}.

Kevin Wilson testified that he remembered interviewing Mr. Adkins, and he remembered the interview note that was created from that interview. {Tr. 846}. He attempted to locate Ms. Adkins recently because there was some information out there that he had spoken with her earlier. {Tr. 846}. Wilson testified that he knew he did not speak with Ms. Adkins on that date, and he did not talk with Ms. Adkins in 1999. {Tr. 846}. That was why Applicant's 60, the interview note reflecting the talk with Mr. Adkins, only reflected that he talked with Mr. Adkins. {Tr. 846}. Wilson testified that he would not have hidden the fact that he talked with Ms. Adkins if he had talked with her. {Tr. 847}. His general practice was to put everything in the case file, whether it was good, bad, or ugly. {Tr. 847}.

Shawn Graham also testified that he did not recall receiving any information about Ms. Adkins. {Tr. 588}. Graham never interviewed an Adkins. {Tr. 588}. Since the PCR Application was filed, he understood that Wilson went to talk with her. {Tr. 588-89}. That was done recently, not at the time of trial. {Tr. 588-89}. Graham testified that no one ever said anything about Ms. Adkins saying Applicant was a good parent. {Tr. 589}. Had someone done so, he would have made them document it and it would have been turned over to the defense. {Tr. 589}. Littlejohn did not recall speaking with either of the Adkins. {Tr. 206}.

Applicant fails to establish by a preponderance of the evidence that he is entitled to relief upon this Brady claim. First, Applicant has not established that a statement or interview with Ms. Adkins was in the possession of or known by the prosecution. The testimony of both Assistant Solicitor Shawn Graham and

Investigator Kevin Wilson is credible. Applicant has not established by a preponderance of the evidence that an interview was done or that a statement was taken from Ms. Adkins in May 1999. Further, since Applicant cannot establish that a statement or interview notes were in possession of the State, he also fails to establish any such alleged statement or interview was suppressed. As a result, this Brady claim is denied.

Second, Applicant has failed to establish such a statement was favorable to the accused. At the evidentiary hearing, Ms. Adkins indicated that she was only asked about whether or not she heard anything like arguing from Applicant's home. Ms. Adkins testified that she told law enforcement that she had not and that she was unaware of what they were asking about. She specifically did not recall being asked about Applicant's interaction with his children. At best, if a statement was taken from Ms. Adkins, it appears that it would only indicate that she did not hear anything from Applicant's trailer on the night/early morning of the murder. This ^{DOES PROVE THAT IT WOULD BE} ~~was~~ not favorable to Applicant. ^{turn} Ms. Adkins also noted that Applicant's trailer was on the opposite end from the bedrooms in the Adkins' home, and one could not hear anything from outside while sitting inside her home. Her statement would have been of ^{LITTLE} ~~no~~ value to the defense because it does not establish anything substantive. As a result, this Brady claim is denied.

Third, Applicant fails to establish the alleged interview with Ms. Adkins was material to his guilt or innocence or was impeaching. Again, Ms. Adkins' statement, based upon her testimony at the evidentiary hearing, appears it would

have been limited to whether she heard anything on the night/early morning of the murder. She indicated she had not. Applicant fails to show how this interview is material. It has no bearing upon his guilt or innocence in this case. Further, it does not impeach anyone's testimony at trial. In all, any alleged statement made by Ms. Adkins would have been ^{OF LITTLE VALUE. ~~irrelevant~~} irrelevant. Applicant has not presented any probative evidence to establish that any such statement contained anything outside what Ms. Adkins claims she told police. As a result, this Brady claim is denied.

III.

For the foregoing reasons, Applicant's APCR is denied and dismissed with prejudice.

Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The application for post-conviction is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina for sentencing.

This 23rd day of Sept., 2010.

William P. Keesley
The Honorable William P. Keesley
Presiding Judge
Eleventh Judicial Circuit

Edified, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2005CP3200267

Jeffrey T Haselden vs. State Of Sc

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

PRESIDING JUDGE -

This judgment was entered on the 23rd Day of September 2010, and a copy mailed first class this 24th Day of September 2010, to attorneys of record or to parties (when appearing pro se) as follows:

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SCRPC APP-24/FORM 4

Beth A. Carrigg - Clerk of Court



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