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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COMMON PLEAS COURT
R. Lawton McIntosh, Circuit Court Judge

Case No. 2014-CP-37-0133
Court of Appeals Appellate Case No.: 2016-1099
Supreme Court Appellate Case No.: 2018_____

Matthew Hinton,..... Petitioner,

v.

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

APPENDIX VOLUME I

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The South Carolina Court of Appeals

Matthew Hinton, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001099

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc:
J. Falkner Wilkes, Esquire
Alan McCrory Wilson, Esquire
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Robert Clyde Childs, III, Esquire

FILED
May 23, 2018

Matthew Taylor Hinton, #345044
The Honorable R. Lawton McIntosh

The South Carolina Court of Appeals

Matthew Hinton, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001099

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. Based on the vote of the panel, the petition for a writ of certiorari is denied.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: J. Falkner Wilkes, Esquire
Patrick Lowell Schmeckpeper, Esquire
Alan McCrory Wilson, Esquire
The Honorable R. Lawton McIntosh
Matthew Hinton

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SC Court of Appeals

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Case No. 2014-CP-37-0133
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PETITION FOR REHEARING

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PETITION

Appellant submits that the Court's decision in this case overlooks points essential to the case as follows:

I. REDACTION OF EXCULPATORY INFORMATION FROM STATE'S EXHIBIT AND COUNSEL'S FAILURE TO PROVIDE THE JURY WITH THE MISSING CONTENT TO ALLOW THE JURY TO EVALUATE THE APPLICANT'S STATEMENTS IN CONTEXT.

During the applicant's criminal trial the state introduced evidence of text messages between the applicant and Ashley Bright on the day of the incident. A. 508; 776. Portions of their conversation through text messages were introduced by the solicitor first having Bright read a redacted version of the conversation and then by introducing a redacted version as a state exhibit. A. 508-510. Both Bright's testimony and the state's exhibit omitted a critical portion of the conversation, Bright's response to the applicant's statement about his not wanting Bright's mother to come over to the apartment. The state used the applicant's statement out of context as evidence that the applicant was trying to conceal the injuries to the child, arguing that there was no other reason for such a statement, and that it was completely "out of the blue".

Bright's response, which the state redacted, indicated a common understanding in their conversation that the applicant's statement was based on the mother's drug abuse issue. Showing a common understanding between Bright and the applicant, her response was essential to the jury understanding the meaning of the applicant's comments. When read in context with Bright's response, applicant's motivation for his comments could be easily understood as completely innocent, rather than evidence of a

sinister motive to cover up a crime, as the state repeatedly portrayed. Defense counsel failed to object to the introduction of the text conversation with the exculpatory portion removed. Counsel further failed to cross-examine Bright about the omitted portion of the conversation. Counsel further failed to question the applicant on direct about the missing portions of the conversations, or to have the applicant give an explanation for his comments.

Bright's response in the text message conversation was essential to understanding the basis for the applicant's comments. Redacting out Bright's response changed the entire complexion of the applicant's comments, and allowed the solicitor to repeatedly cast the nature of the applicant's statements as incriminating which, could not have been done but for the redaction. Counsel failed to object to the introduction of the redacted messages without the contemporaneous introduction of the omitted parts that were necessary for a complete understanding of the applicant's comments. [1]

The state offered the redacted text messages in attempt to show that the applicant was trying to keep the child's injuries from being discovered by Bright's mother. The state specifically asked Bright if the message about her mom seemed odd. 78. Bright testified that it did and explained that he never had a problem with her

---

[1]PCR Complaint, issue #24: "Trial counsel was ineffective and deficient in failing to object to testimony of Plaintiff tenting victim's mother regarding Plaintiff not wanting victim's grandmother to come over without a proper foundation and failing to cross-examine victim's mother on that issue." Order of Dismissal, A. p. 44; 1017.

PCR Motion Alter or Amend issue#10, page 2, addresses the PCR court's lack of specific findings as well as its ruling in regards to counsel's failures relating to the introduction of only the redacted text message conversation. A. 1052-1053.

coming over before. Bright testified that it was "out of the blue" and "very odd" and that the applicant "never had a problem with her coming over." A. 403; 426-427; 509; The clear message to the jury was that there was no other possible reason for the applicant not wanting Bright's mother to come over other than to conceal the injury and thus show a guilty mind, which the solicitor went on to argue in closing. A. 510. The underacted message, however, contained Bright's response indicating some understanding that the statement was based on the mother's drug or alcohol abuse. Contrary to a major part of the state's theory of the case, this showed a completely innocent reason for the applicant's statement, so the state simply redacted it out of existence. A. 403; 426-427; 509.

The redacted portion of the message was important to refute the state's theory of the case. The complete text contradicted Bright's testimony about her not understanding why the applicant did not want her mother coming over to the apartment. It clearly countered Bright's claim that the applicant's statements were odd or out of the blue. Without the introduction of the redacted portion of the conversation the only conclusion that the jury could come to would be that the applicant's statements were evidence of guilt. There was no other explanation apparent in the conversation from what the jury heard. The prejudice is obvious.

The prejudice was compounded by the state continuously referring to the text messages throughout its case. The jury was repeatedly drawn back to the text messages as being central to the state's case. A. 507; 508; 509; 510; 529; 531; 550; 558; 575; 600; 601.

In closing argument the state specifically went back to the text messages arguing that the statement about Bright's mom not coming over was evidence of guilt: "What innocent person says this to the mother of his child?" A. 821, l. 13-14.

Despite several opportunities, defense counsel failed to have the redacted portion of the text messages introduced to show an innocent basis for applicant's comments about Bright's mother. Procedurally, defense counsel had at least three different opportunities in which to introduce the exculpatory portion of the messages. First, the redacted portion was admissible under Rule 106, SURE, which provides: "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106, SURE. The party seeking to introduce the remainder of a written or recorded statement can require the remainder to be introduced at the same time the other part of the written or recorded statement is introduced. Notes to Rule 106, SURE. The right to offer the full substance of a conversation extends to oral communications as well. State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (S.C., 2004).

In Caber-Pena the supreme court held that where the state elects to use a witness to elicit portions of a conversation (and incriminating statements therein) made by a defendant, the rule of completeness requires the defendant be permitted to inquire into the full substance of that conversation. State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d

522 (S.C., 2004).

Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context. Interpreting Rule 106 the court stated: "Rule 106 [of the Federal Rules of Evidence] is a procedural device governing the timing of completion evidence; the Rule is 'primarily designed to affect the order of proof'. It means that the adverse party need not wait until cross-examination or rebuttal. As such, the Rule reduces the risk that a writing or recording will be taken out of context and that an initial misleading impression will take hold in the mind of the jury." Cabrera-Pena *quoting* State v. Taylor, 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998). Here, counsel allowed the state to introduce the applicant's statement out of context and create an initial misleading impression in the mind of the jury.

Rule 106 is specifically intended to clarify any misconceptions the admission of a partial statement would give. That portion of a statement which explains or clarifies the previously admitted portion should be introduced. *See* State v. Taylor, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998); *see also* State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001). Here, the redacted excerpt of Bright's response explains and clarifies the previously admitted portions of the applicant's comments. Without Bright's response in the conversation the jury was left with no innocent explanation for applicant's comments. Accordingly, the redacted portion of the text message conversation (Bright's response) was necessary for an understanding of applicant's statement and, in fairness to Hinton, should have been

admitted contemporaneously pursuant to Rule 106, SURE. Counsel failed to properly object or move to have the omitted portion introduced.

Counsel compounded the failure to immediately use Rule 106 to introduce the missing part of the text conversation by failing to cross-examine Bright about her redacted comments. This was his second opportunity to admit the missing portion of the text conversation. Proper cross-examination could have brought out Bright's response and would have put the applicant's statements in a non-incriminating light shortly after the jury heard the redacted version. As a third and last opportunity to provide the jury with an innocent explanation for the statement counsel could have examined the applicant, who took the stand and testified during the trial. Despite having heard the emphasis the state placed on the applicant's statement throughout the state's case-in-chief, counsel still failed to question the applicant about his reason behind the text messages. This was the last opportunity to allow the jury to hear an innocent basis for the statements. Counsel failed to give the applicant an opportunity to explain his comments. On at least three occasions counsel could have required the introduction of the redacted portion of the messages. Counsel's failure to offer any innocent explanation of the applicant's statements allowed the state to cast the applicant's statements as inculpatory. In light of no other explanation being apparent once Bright's comments had been redacted, this was a compelling part of the state's case.

At the PCR hearing defense counsel was questioned about the state's use of the

redacted text messages and Bright's testimony which was in essence that Bright didn't know of any reason why the applicant would say that he didn't want her mother coming over. A. 168-171; 605-606. Notes from the defense file indicated that prior to trial the applicant had explained that he didn't want Bright's mother to come over because she "was on pills." R. 542-543. Counsel therefore was clearly aware of the basis for applicant's statement prior to trial. What the applicant had told counsel prior to trial was consistent with Bright's response which was redacted from the texts. The underacted conversation shows that when the applicant told Bright that he didn't want her mother coming over Bright responded: "Even if she's sober?" A. 543-544, l. 9-112, l. 12. Bright's response shows not only her recognition of an innocent explanation for applicant's comment, but also shows that Bright's testimony about applicant never having had a problem with Bright's mother to be untrue. The value of the missing portion of the conversation therefore extended even further as a means of challenging Bright's credibility. Counsel failure to introduce the missing portions of the text messages prevented the defense from making challenging a critical part of the state's case. A. 372-373; 543.

At the PCR, neither the solicitor nor defense counsel could explain why Bright's response was redacted from the state's exhibit, or left out of Bright's testimony. A. 173; 405-406; 686-687. Defense counsel was unable to give any strategy for not introducing the underacted message to establish an innocent basis for the applicant's statement, or to use it in cross-examination to contradict Bright's testimony. A. 173. Counsel agreed

that Bright's response, which was redacted, would have refuted the state's allegation that the only reason applicant could have for not wanting Bright's mother over was to conceal the child's injuries. A. 232-233; 687-686. The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledges there was no trial strategy in mind. *See* Smith, 386 S.C. at 568, 689 S.E.2d at 633. Here, there was no strategy in allowing the state to keep out Bright's response, or not introducing it through cross-examination of Bright, or on direct with the applicant. Counsel's failure therefore constitutes error.

In the circuit court's order the court found that the applicant had sent "inflammatory text messages to the child's mother where he demanded that Ms. Bright's mother not visit or enter the apartment on the afternoon of the incident. He even threatened to leave if Ms. Bright's mother entered the apartment." A. 9. The PCR court completely ignored the effect the redaction of the text messages had on the complexion of the applicant's statements. Presumably, without knowing Bright's response, the jury interpreted the letter the same way, finding it as evidence of guilt. Absent some evidence of an otherwise innocent intent, the only conclusion the jury could draw was that it was inculpatory. As it was a direct statement from the applicant, the jury could only have given it a tremendous amount of weight. The prejudice is overwhelming. The two-prong test under Strickland is met.

II. THE GOLDEN RULE VIOLATION

The state closed in argument to the jury with "Today is the day to speak for

[victim]. I once read that children are our only hope for the future. But we are their only hope for their present and their future. Matthew Hinton robbed his daughter of her present. He robbed his daughter of a future, a future that was limitless. He took it all away. Today is the day for justice for [victim]. and the day of reckoning for Matthew Hinton." A. 823. At the PCR defense counsel testified that he did not think that the solicitor's statement was objectionable. A. 329-332.

At the PCR hearing the court initially reserved the Golden Rule issue for later comment. A. 408; 414-415; 420. When the court discussed the issue during the PCR hearing it stated that the solicitor's argument "was a clear violation of the golden rule" under State v. Reese, 359 S.C. 265, 597 S.E.2d 169. A. 422, l. 4-6. The court then went on to distinguish the case from Reese and deny relief based on a finding of overwhelming evidence in the present case. A. 422-428. In its written order the court minimized the issue finding that the solicitor's comment was only a "technical violation" of the golden rule. A. 50-51. The court went on to deny relief finding that there was overwhelming evidence of guilt. The court's reasoning is flawed.

Violation of the golden rule:

A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). A trial judge is allowed broad discretion in dealing with the range and propriety of closing arguments to the jury.

State v. Raffaldt, 318 S.C. 110, 114-15, 456 S.E.2d 390, 393 (1995). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (Ct.App.2003); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793-94 (Ct.App.2003). To warrant reversal, the appellant must prove both abuse of discretion and resulting prejudice. State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct.App.1999).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); *accord* Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *see also* State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding that because the solicitor's duty is not to convict the defendant but to see justice done, the solicitor's closing argument must be "carefully tailored" to not appeal to personal bias of juror nor calculated to arouse his passion or prejudice"); State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct.App.2003) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."). Specifically, the

solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error. State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884 (Ct.App.1995). This is known as the Golden Rule Argument.

The Golden Rule Argument "ask[s] the jurors to become advocates for the plaintiff or victim and to ignore their obligation to exercise calm and reasonable judgment." Black's Law Dictionary 700 (7th ed.1999); *see also* John W. Reis, Improper Jury Argument: Gilding the Lustre of the Golden Rule, 69-JAN Fla. B.J. 60, 60 (1995) ("The traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, holds that a lawyer shall not urge the jury members, either in a civil or criminal case, to imagine themselves or their family members or friends in the place of the offended litigant or victim and to render their verdict from that perspective."). Although the forbiddance of Golden Rule Arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has now been made applicable to criminal actions. 75A Am.Jur.2d Trial § 650 (1991); *see* Lucas v. State, 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976) (holding that "[t]he technique of asking jurors to place themselves in the position of the victim has been held to be improper in both criminal and civil cases").

"The "Golden Rule" argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of

personal interest and bias rather than on the evidence." 75A Am.Jur.2d Trial § 650 (1991). Regardless of the nomenclature used, any argument that importunes the jurors to places themselves in the victim's shoes is disallowed Golden Rule Argument. Johnson v. State, 263 Ga.App. 443, 587 S.E.2d 775, 781 (2003).

Golden Rule Arguments are generally improper and may constitute reversible error. State v. McHenry, 276 Kan. 513, 78 P.3d 403, 410 (2003); *see also* State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 476 (N.C.2002) ("Arguments that ask the jurors to place themselves in the victim's shoes are improper."); Velocity Express Mid-Atlantic, Inc. v. Hugen, 266 Va. 188, 585 S.E.2d 557, 565 (2003) (ruling "plaintiff's repeated requests to the jury that it apply the `Golden Rule' were prejudicial and constitute[d] reversible error").

Prejudice from the violation of the golden rule:

The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). In Tappeiner v. State, 2013-001885, addressing a golden rule violation, the supreme court stated: "In keeping their closing arguments within the record, solicitors additionally must tailor their remarks "so as not to appeal to the personal biases of the jury" or "arouse the jurors' passions or prejudices." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Accordingly, solicitors should avoid comments that ask jurors to place themselves in the victim's—or another party's—shoes, because those types of comments tend to "'completely destroy all sense

of impartiality of the jurors.'" Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (*quoting* State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006))." Here the solicitor called upon the passion of the jury, telling them to speak for the victim. The solicitor's comments were a clear violation of the golden rule. Defense counsel had no valid strategy for failing to object and at least requesting a curative instruction, if not a mistrial.

Calling upon the passions of the jury was prejudicial, the solicitor's timing made it even more so. The solicitor's violation of the golden rule was the last thing said to the jury. It was intended by the solicitor as the last driving punch, a crescendo, the grand finale, after which the solicitor rested. Under similar facts it was found important that the golden rule violation was the last thing heard by the jury: "Moreover, the emotional plea was the very last thing the jury heard before beginning its deliberations, and connected the jurors personally to the alleged abuse in the case. Thus, the comment was likely at the forefront of the jurors' minds when beginning their discussions." Tappeiner v. State, Opinion No. 27632 (SC May 4, 2016) at 11. *Cf.* Brown, 383 S.C. at 512, 517, 680 S.E.2d at 912, 915 (finding the solicitor improperly appealed to the jurors' emotions during closing argument when telling them to "speak up" for the child victim and "make sure that the perpetrator is punished"). Here, the last thing that the solicitor did was to call upon the jury to speak for the child. As in Tappeiner, this comment was burned into the forefront of the jurors' minds. The impact is apparent.

In determining whether relief from a golden rule violation is warranted under

Strickland the court must look to the record as a whole. In Tappeiner the court stated: "Indeed, in determining prejudice, we frequently consider whether there is other direct or circumstantial evidence supporting the conviction, notwithstanding trial counsel's deficient performance. *See* Brown, 383 S.C. at 518, 680 S.E.2d at 916 (finding that the solicitor's improper appeal to the jury's emotions was not prejudicial in light of the fact that there were four unrelated, adult witnesses to the defendant's rape of the child victim, as well as other direct evidence that a rape occurred); Simmons, 331 S.C. at 338, 503 S.E.2d at 166 (stating that appellate courts must consider the impropriety of the solicitor's argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt)."

Here the state made its case against Hinton by circumstantial evidence. Unlike in Brown, or other cases finding overwhelming evidence, there were no eyewitnesses, no confession, and no direct evidence. The applicant testified and gave an alternate version of the cause of injuries. In Tappeiner the court said: "Similarly, given the lack of physical evidence, the solicitor's emotional plea that Tappeiner was a bad actor and could not be trusted to watch the jurors' own family members is reasonably likely to have had a substantially stronger impact than would be the case in a trial where there was additional, independent evidence of the defendant's guilt." Tappeiner at 11. Here, the record fails to show overwhelming evidence of guilt to negate the impact of the solicitor's call upon the juror's to speak for the victim. Applying Tappeiner, the applicant was prejudiced by counsel's failure to object or request a curative instruction.

III. CUMULATIVE EFFECT OF CONSTITUTIONAL ERRORS

Applicant sought to have the PCR court consider the cumulative effect of prejudice in its Strickland analysis.[2] During the hearing the PCR court apparently considered there to be numerous issues that would constitute error as it discussed the question of whether the overall effect of cumulative errors could constitute prejudice. A. 420-428. These errors included counsel's failure to impeach Desmond Holland who concealed that he knew Bright from high school. A. 17; 142; 245-246; 292-293; 371. Counsel's failure to realize that the audio recording of Desmond Holland the state provided in discovery cut off halfway through his interview. A. 257-258. Counsel's failure to object to the testimony of Bright indicating that the applicant had a prior criminal history. A. 18; 42-43; 223-224. Counsel's failure to introduce evidence of the wet towel which corroborated applicant's testimony of an accident occurring during a shower. A. 606; 613-615.

Despite numerous issues, after a brief discussion the court stated "the pervasiveness of the alleged errors is not such as to make relief available to the applicant." A. 428, l. 5-7. In its written order the court subsequently declined to consider cumulative error stating only that the applicant had failed to meet his burden. A. 54. The written order fails to address the issues specifically and, appears to deny relief as a matter of law as it ended its analysis with its interpretation of the Fourth Circuit holding in Fisher v Angelone as holding that "a cumulative effect analysis is

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[2]PCR Motion to Alter or Amend, issue #45, A. 1019.

inappropriate." The court's interpretation of Fisher's holding as an absolute bar to a cumulative analysis is in error. The ruling expressly allows a cumulative analysis of constitutional error to establish prejudice under Strickland:

> [The petitioner] relies, in part, on cases considering the cumulative effect of matters actually determined to be constitutional error. In these cases, however, the courts in question merely aggregated all of the actual constitutional errors that individually had been found to be harmless, and therefore not reversible, and analyzed whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless. Thus, legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient.

Fisher at 852, n.9. As a result, the PCR court erred in failing to consider the cumulative effect of the issues presented herein in its Strickland analysis based on its reliance on Fisher.

In relying on its misinterpretation of Fisher the PCR court also overlooked more recent cases from our own supreme court. Four years after the ruling in Fisher, our supreme court held: "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. *Id.* at 197, 569 S.E.2d at 324-25. In addition, the court is not prevented from considering the cumulative effect of issues found to be prejudicial when making its Stickland analysis, under Fisher or South Carolina law.

In Simpson v. Moore, because the court found only one instance of error, there was no need to conduct a cumulative-error analysis. The record simply did not contain "several errors" for the judge to cumulatively assess. The court in Simpson therefore held that the PCR court did not err in failing to conduct such an analysis under the specific facts presented. Simpson's holding was based on the lack of multiple errors that would support a cumulative prejudice analysis. The court ruled simply that the facts did not support it, not that the law prohibits it. *See* Simpson v. Moore, 627 S.E.2d 701, 367 S.C. 587 (S.C., 2006). A reading of Green and Simpson indicate a willingness to consider a cumulative error analysis under the appropriate facts. This is consistent with the holdings of a majority of federal courts. The PCR court therefore erred in failing to consider the cumulative effect of error in the applicant's case in its overall Strickland analysis. This Court, in its analysis of prejudice, has overlooked the cumulative effect of all constitutional errors.

CONCLUSION

Based on the foregoing the Court should grant the petition and rehear the case or otherwise amend its decision based on the arguments above.

Respectfully submitted,

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April 8, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

RECEIVED
DEC 28 2016
S.C. SUPREME COURT

2014-CP-37-0133
Appellate Case No. 2016-001099

MATTHEW HINTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

I. Was counsel ineffective for allowing the introduction of redacted text message conversation where the redaction allowed the applicant's statements to be viewed out of context, making the applicant's comments to appear to be solely for the purpose of concealing the injuries of the child?

II. Was counsel ineffective for failing to cross-examine witness as to the redacted / omitted portion of text conversation which would have shown an innocent basis for the applicant's comments?

III. Was counsel ineffective for failing to ask questions of the applicant on direct about the missing portion of the text conversation, and to otherwise explain the basis for his comments to show the jury a non-incriminating reason for those comments?

IV. Was counsel ineffective for failing to object to the solicitor's violation of the golden rule when she called upon the jury to speak for the deceased child?

V. Did the PCR Court err in failing to consider the cumulative effect of constitutional errors in its application of the Strickland test?

RESPONDENT'S QUESTIONS PRESENTED

I. Did Hinton meet his burden to show deficiency or prejudice from the redacted portion of the text message regarding the victim's grandmother where his attorneys' focus on other aspects of his defense was reasonable; those specific text messages were cumulative to other evidence in the record; and the evidence against Hinton was overwhelming?

II. Is there any probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to object to the solicitor's argument where Hinton failed to meet his burden to prove any resulting prejudice where the improper argument consisted of only one comment and the evidence of guilt was overwhelming?

III. Is certiorari warranted to review the PCR Court's finding with respect to cumulative error where 1) cumulative error analysis is inappropriate in the context of a Strickland claim of ineffective assistance of counsel; 2) there was only one instance of deficient performance in this case; and 3) there is no resulting prejudice given the overwhelming evidence of guilt.

STATEMENT OF THE CASE

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

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

Hinton filed a PCR application on March 4, 2014, (2014-CP-37-0133), alleging he was being held in custody unlawfully due to over one hundred violations of his right to the effective assistance of trial and appellate counsel.

An evidentiary hearing was convened on February 9 and 10, 2015, at the Oconee County Courthouse. Hinton was represented by Robert C. Childs, III, Esquire. The Honorable R. Lawton McIntosh denied and dismissed the PCR application by order filed March 22, 2016.

Hinton filed a notice of appeal. J. Faulkner Wilkes, Esquire, submitted a petition for writ of certiorari and appendix on August 25, 2016. This return follows.

[1] Anders v California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. Hinton failed to meet his burden to show deficiency or prejudice from the redacted portion of the text message regarding the victim's grandmother where his attorneys' focus on other aspects of his defense was reasonable; those specific text messages were cumulative to other evidence in the record; and the evidence against Hinton was overwhelming.[2]

Deficiency

Given the high level of deference afforded his attorneys' decisions, Hinton clearly failed to meet his burden to show any actual error. In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

The record reflects that both attorneys had a reasonable general theory and understanding of how they wanted to try Hinton's case based on the evidence. According to Mr. Senerius

> [t]he theory of our case was that our client did not do anything intentionally to hurt the child. We tried to play it out that way. That's the only information that we had, the only theory that we could go on that he was not guilty. No one was pointing fingers at anybody else. Nobody had any alibi witnesses. Most of the fact

[2] Given the format and structure of Hinton's brief, Respondent construes his first three issues as a single claim regarding his attorneys' performance in failing to elicit testimony or introduce evidence which would have explained why he did not want the victim's grandmother visiting the day the victim was killed. To the extent these are treated as individual claims, Respondent submits the appropriate method of analysis would be to address prejudice as to each claim individually. See Cumulative Error, infra. Regardless, as discussed throughout this section, Hinton has failed to show deficiency or prejudice under either analysis given his attorneys' credible testimony and the overwhelming evidence of guilt.

> statements as to what occurred on the day of the injury were undisputed. You know, you go with what you've got."

App. p. 302, l. 4-12.

Additionally, given the lack of third party guilt evidence, Ms. Senerius emphasized that her strategy was not to be "extremely harsh" toward Ms. Bright – a very sympathetic grieving mother – but to try and bring out evidence and other issues through other witnesses and through other cross-examination. App. p. 146, l. 15-24.[3]

While acknowledging the potential corroborative value of the omitted text portion, Ms. Senerius explained she did not "specifically go into [whether the victim's grandmother was using pills] because she was not there that day. [The State was] focusing on the time line from that day. And there was no way that us introducing her being on pills proves that anybody else potentially did anything." App. p. 172, l. 2-8. There was also no factual basis for either attorney to challenge Ms. Bright's testimony that it was unusual that Hinton did not want the victim's grandmother coming over. Ms. Senerius testified that in her conversations with Hinton the victim's grandmother was "over there quite a bit." App. p. 171, l. 14-16.

Regarding Hinton's testimony at trial, Respondent again submits he did not meet his burden to prove counsel ineffective for failing to specifically question him about the text messages during direct examination. See Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 5 (2003) (When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect). Instead, Hinton has

[3] Hinton appeared to concede during the evidentiary hearing that counsel may not have wanted to cross-examine Ms. Bright about the text messages "as a matter of discretion." App. p. 173, l. 11-14.

merely alleged that there was *some* corroborative value,[4] and counsel should have taken advantage of it. Given the clear testimony as to their general focus and trial strategy, Hinton failed to meet his burden to prove either attorney was actually deficient.

Prejudice

Even assuming deficiency, there is ample probative evidence in the record to support the PCR Court's finding that Hinton was not prejudiced due to the cumulative nature of the evidence in question, as well as the fact that the state's case against him was utterly overwhelming.

The text messages were cumulative

Hinton's chief complaint about counsel's failure to request the omitted portion of the text message be introduced[5] appears to be that the redacted message improperly implied he was attempting to cover up the victim's injuries by keeping her grandmother from coming over. Even if, however, the omitted portion were introduced *and* the jury chose to make the appropriate inference in Hinton's favor – that he did not want her there because she was abusing prescription drugs – there was still a substantial amount of evidence that strongly suggested he was trying to cover up his involvement in the victim's injuries and death. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) ("We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward.") (citations omitted).

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[4] Certainly counsel could have concluded any corroborative value would have been outweighed by the detrimental impact of Hinton further shifting blame by accusing his daughter's grandmother of abusing pills. This would have been consistent with counsels' general strategy of focusing on Hinton's actions, rather than pointing the finger towards others.

[5] Including the failure to elicit such information from Ms. Bright or Hinton.

In addition to the text regarding the victim's grandmother, Hinton sent a separate text message to Ms. Bright asking her not wake him or the victim when she returned from work. Ms. Bright testified that the request seemed "odd" because Hinton "had never told [her] not to wake them." App. p. 510, l. 7-12. There was also evidence that Hinton ignored a concerned neighbor's attempts to speak with him sometime after the victim was initially injured. Desmond Holland, Hinton's downstairs neighbor, testified at trial that around 2:45 p.m. the day of the incident he

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

App. p. 632.

Testimony from law enforcement officers and Ms. Bright established that Hinton's story evolved over the course of their investigation of the victim's death, further indicating he was trying to cover up his involvement. Officer Ted Roundy testified that "as more information came out about the injuries of the child, [Hinton's] stories would . . . start matching the injuries." App. p. 555, l. 9-13. Hinton's initial statements to law enforcement, Ms. Bright, and the treating physicians did not reference any "falls or accidents." App. p. p. 518, l. 14 - p. 519, l. 8; 576, l. 16 - p. 577, l. 2. According to Ms. Bright, the "shower story" from Hinton's second statement to law enforcement, in which he disclosed that he dropped the victim in the bathtub, did not emerge until "probably four or five o'clock in the morning after we had talked to the detective." App. p.

519, l. 9-12.;[6] p. 550, l. 13 - p. 551, l. 2. Hinton told Paige Williams that the victim possibly hit her head on the sink while he was getting her out of the bathtub, and asked her "if the police were gonna make an arrest, when would they make the arrest." App. p. 588, l. 17 - p. 589, l. 4.[7]

The following night, Ms. Bright noticed Hinton looking up "stories that could be with similar injuries" that could have "medically explained what was wrong" with the victim. App. p. 520, l. 23 - p. 521, l. 10. Hinton told Ms. Bright at one point that "if [she] would take the rap for this, that [she] wouldn't get very much jail time because [she] had no previous criminal history." App. p. 521, l. 11-17.

Given the substantial evidence that Hinton was trying to cover up his role in causing the victim's injuries, particularly the suggestion that the victim's mother "take the rap," Respondent submits the probative value of the contested text message was too cumulative, from the State's perspective, to call the outcome of the trial into question.

The state's case against Hinton was overwhelming

The PCR Court also correctly found no prejudice where the evidence against Hinton was overwhelming. See, e.g., Harris v. State, 377 S.C. 66, 79, 569 S.E.2d 140, 147 (2008) (reversing PCR court's decision to grant relief where applicant unable to show prejudice due to overwhelming evidence of guilt); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 772 n. 3 (2001), *cert denied*, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result defendant's trial); Geter v. State, 305 S.C. 365, 367, 409

[6] Ms. Bright noted it would have been unusual for Hinton to shower with the victim. App. p. 519, l. 18-21. She said he had given her a bath, but "never a shower." Id.

[7] Hinton denied telling Ms. Williams the victim may have hit her head on the sink. App. p. 773, l. 18-20.

S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

The PCR Court noted that even if Hinton's story were believable, the State still presented "compelling and substantial evidence that he committed the offense of homicide by child abuse." App. p. 8-9. As recited above, there was substantial evidence that Hinton tried to cover up his part in the victim's injuries rather than seek medical care. Several experts testified that given the victim's injuries, the effect would have been immediate and readily apparent to a caregiver.[8] Hinton was alone with the victim from right before noon until sometime after five o'clock pm. App. p. 113, l. 21-23; 506, l. 25 - p. 9.

Hinton's version of events also had severe credibility problems at trial. The expert medical testimony thoroughly refuted his explanations of how the victim was injured. Dr. Earl Troup, one of the treating physicians,[9] classified each of the victim's injuries as "high-specificity injuries," noting that they were each hard to accidentally create" individually, but "when you put them all together, there is nothing other than an intentional child abuse that can cause this pattern of injuries together." App. p. 669, l. 2-7. He further testified that the injuries should not have been caused by a fall or accident in the shower. App. p. 669, l. 8-10.

[8] Dr. [Gwyn] testified that given the victim's injuries, the effect would have been immediate and readily apparent to a caregiver. App. p. 687, l. 2-9. He further testified that immediate medical attention may have changed the outcome. App. p. 668, l. 4-10. Dr. Woodard said the injury would have been "instantly" apparent, and it would be "obvious to a layperson that there is something seriously wrong with this child." App. p. 711, l. 23 - p. 712, l. 6. He said that once the injury occurred the victim would have gone quiet, and "would have been essentially unconscious, and within a short time period coma would occur where she would be unarousable." App. p. 711, l. 12-22.

[9] Dr. Troup was qualified as an expert pediatric neurosurgery. App. p. 657, l. 13-18.

Dr. Daryl Gwyn, another treating physician,[10] testified that the chest compressions – as demonstrated by Hinton – were "not even close" to the amount of force to cause the injuries to the victim's chest. App. p. 690, l. 24 - p. 691, l. 2. He said that nothing explained the "constitution of [the victim's] symptoms" other than "non-accidental trauma." App. p. 691, l. 8-12.

Dr. Brett Woodard conducted the victim's autopsy,[11] and testified that the injury to the victim's sternum was "most consistent with blunt force," and "very unlikely to have been a C.P.R. injury." App. p. 704, l. 20-24. He said it was not at all consistent with a sternum rub. App. p. 704, l. 25 - p. 705, l. 8. Dr. Woodard described "fingertip-like bruises" consistent with "an intentional very forceful gripping." App. p. 706, l. 9-17. Dr. Woodard said the victim's head injury would have required "some component of torsion or twisting of the head, coupled with a sudden blow to the head," or "some sort of rapid motion." App. p. 711, l. 1-11. Dr. Woodard testified that in his opinion the victim's injuries were not consistent with any sort of fall or mishap. App. p. 713, l. 10-12. He explained that her injuries would "require the baby to literally bounce during this accident. And babies don't bounce. The baby would have to strike itself on multiple body surface areas and produce injuries that take different mechanisms to be produced during this single incident." App. p. 713, l. 12-17. He said the victim's injuries were consistent with "inflicted trauma." App. p. 713, l. 21-24. Dr. Woodard testified it was very possible that immediate medical intervention could have changed the result. App. p. 714, l. 13-15.

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[10] Dr. Gwyn was qualified as an expert in the field of pediatric neurology. App. p. 683, l. 12-23.
[11] Dr. Woodard was qualified as an expert in the field of forensic pathology. App. p. 701, l. 17-22.

Given the medical findings with respect to the cause of the injuries, the immediate visibility of the resulting symptoms, and lack of any evidence of third party guilt, there was substantial evidence from which a jury could find Hinton, as the victim's sole custodian leading up to her death, guilty of homicide by child abuse. Taking further into account Hinton's evasive behavior and utterly discredited explanation for the victim's injuries, Respondent submits the evidence was overwhelming.

II. There is probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to object to improper argument where Hinton failed to meet his burden to prove any resulting prejudice as the improper argument consisted of only one comment and the evidence of guilt was overwhelming.

Hinton next argues counsel was ineffective for failing to object to the solicitor's "golden rule" -type argument. In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine "whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016).

While the court has indicated their strong disapproval of Golden Rule arguments, an applicant for post-conviction relief still has the burden to prove resulting prejudice. See Von Dohlen v. State, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004). Proper considerations in determining prejudice include the number of improper Golden Rule -type comments throughout the argument, as well as whether there was overwhelming evidence of guilt. Id. (finding that the solicitor's single comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process); c.f., State v. Reese, 370 S.C. 31, 39, 633 S.E.2d 898, 902 (2006) (*overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)) (applicant was prejudiced by multiple improper Golden Rule type comments during closing argument where the evidence of guilt was not overwhelming).

The PCR Court took into account both factors in determining Hinton was not prejudiced by counsel's failure to object to the solicitor's improper Golden Rule -type comment. First, it noted that there was only one such comment. App. p. 53. Additionally, as discussed above, the evidence against Hinton was overwhelming. Id.

Hinton argues the evidence was not overwhelming, citing specifically to Tappeiner. 416 S.C. 239, 785 S.E.2d 471. Tappeiner, which involved no physical evidence that an actual crime took place,[12] is clearly distinguishable from the case at bar. There is substantial evidence here that a crime took place – namely, the existence of a dead, infant child, as well as the fact that medical experts attributed her injuries to "intentional child abuse," and "non-accidental" or "intentional" trauma. Expert medial testimony, discussed supra. Further, there is clear evidence that Hinton, the sole caretaker throughout the vast majority of the window the injuries were shown to have occurred, was the perpetrator.[13] Taking into account Hinton's efforts to conceal the victim's injuries and deflect the blame away from himself, as well as the fact that his ultimate explanation for how the victim was injured – initially undisclosed to law enforcement, the victim's mother, *and the physicians treating his daughter* – was thoroughly refuted by expert medical testimony, there is no basis for determining that the solicitor's single inappropriate comment "so infected the trial with unfairness as to make the proceeding a denial of due process." Tappeiner, supra. The PCR Court therefore properly concluded Hinton failed to meet his burden to prove ineffective assistance of counsel. Certiorari should therefore be denied.

[12] Tappeiner was convicted criminal sexual conduct, second degree, rising out of her alleged sexual assault of a fourteen year old boy. 416 S.C. at 243, 785 S.E.2d at 473.
[13] There was no evidence of third party guilt presented at the trial.

III. Certiorari is not warranted to review the PCR Court's finding with respect to cumulative error where 1) cumulative error analysis is inappropriate in the context of a Strickland claim of ineffective assistance of counsel; 2) there was only one instance of deficient performance in this case; and 3) there is no resulting prejudice given the overwhelming evidence of guilt.

The PCR Court correctly determined cumulative error analysis was not warranted in this case. In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the Court expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis").

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the correct analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

> Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n. 2 (1993) ("[U]nder Strickland v. Washington, 466 U.S. 668 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to

assess claims under Strickland v. Washington." See, e.g., Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in Arnold v. Evatt, 113 F.3d 1352 (4th Cir 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 715 (1998), the Fourth Circuit recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See Id. at 1364 ("Based on the findings of this court concerning the individual claims of error, we reject this claim.').

> To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (footnote omitted). See also Meuller v. Angelone, 181 F.3d 557, 586n.22 (4th Cir. 1999) ("Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in Fisher, 163 F.3d [...at] 852-53 [...]"). Therefore, the Federal bench has correctly decided that prejudice must be considered on an individual, not a collective basis. Fisher, 163 F.3d at 852.

Respondent would also note that in this case, as in Simpson v. Moore, the PCR Court only found one actual instance of deficient performance. App. p. 51-53. Given the strong presumption that counsel's performance was reasonable, combined with both attorneys' credible testimony regarding their trial strategy, discussed supra, Respondent submits Hinton failed to meet his burden to show any additional deficiencies.[14] As a result, cumulative error analysis

[14] In making his argument for cumulative error review, Hinton has raised a number of additional alleged errors in this section, including "counsel's failure to impeach Desmond Holland who concealed that he knew Bright from high school," "[c]ounsel's failure to realize that the audio recording of Desmond Holland the state provided in discovery cut off halfway through his interview," [c]ounsel's failure to object to the testimony of Bright indicating that the applicant had a prior criminal history," and "[c]ounsel's failure to introduce evidence of the wet towel

would be inappropriate on these facts under any interpretation of the law. Because Hinton has failed to meet his burden to show deficiency and prejudice in any of his allegations, he is not entitled to relief in this forum.

In any event, no prejudice occurs, despite counsel's alleged deficient performance, "where there is otherwise overwhelming evidence of the defendant's guilt." Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010). Certiorari should therefore be denied, and the PCR Court's findings should be affirmed.

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which corroborated applicant's testimony of an accident occurring during a shower." PWC, p. 19. This approach mirrors that taken during the evidentiary hearing, where the PCR Court noted that post-conviction relief is not supposed be "a microcosm or a replay of the prior trial, play by play," but that instead there needed to be "a standard articulated," and "show deviation of that standard and prejudice suffered by the defendants a result of the deviation of the standard." App. p. 208, l. 6-14. In arguing this issue, Hinton has resurrected several allegations, stripped them of any context, and simply *stated* that they constitute deficient performance, without citing to any evidence or applicable standard. Such an approach blatantly ignores the applicable standard of review on PCR appeal.

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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December 28, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-001099
Lower Court Case No. 2014-CP-37-0133

MATTHEW HINTON, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

J. Falkner Wilkes, Esquire
114 Whitsett St.
Greenville, SC 29601

This 28th day of December, 2016

DEONNA ROGERS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 28 2016
S.C. SUPREME COURT

December 28, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Matthew Hinton v. State of South Carolina**
Appellate Case No. 2016-001099
Lower Court Case No. 2014-CP-37-0133

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General
SC Bar No. 102100

PS/dr
Enclosures

cc: J. Falkner Wilkes, Esquire (2 copies)
Trisha Allen, Victim Services

RECEIVED
AUG 26 2016
SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COMMON PLEAS COURT
R. Lawton McIntosh, Circuit Court Judge

Case No. 2014-CP-37-0133
Appellate Case No.: 2016- 001099

Matthew Hinton, ... Petitioner,

v.

State of South Carolina., ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Was counsel ineffective for allowing the introduction of redacted text message conversation where the redaction allowed the applicant's statements to be viewed out of context, making the applicant's comments to appear to be solely for the purpose of concealing the injuries of the child?

2) Was counsel ineffective for failing to cross-examine witness as to the redacted/omitted portion of text conversation which would have shown an innocent basis for the applicant's comments?

3) Was counsel ineffective for failing to ask questions of the applicant on direct about the missing portion of the text conversation, and to otherwise explain the basis for his comments to show the jury a non-incriminating reason for those comments?

4) Was counsel ineffective for failing to object to the solicitor's violation of the golden rule when she called upon the jury to speak for the deceased child?

5) Did the PCR court err in failing to consider the cumulative effect of constitutional errors in its application of the Strickland test?

STATEMENT OF THE CASE

Appellant was indicted by the Oconee County grand jury for the offense of homicide by child abuse. His case was called to trial before the Honorable Alexander S. McCaulay, and a jury on February 28, 2011. Gordon Senerius and Brittany Tye represented appellant. Lindsey Simmons was the assistant solicitor. At the conclusion of the trial on March 3, 2011, the jury found appellant guilty of homicide by child abuse. Judge McCaulay sentenced appellant to forty-one years imprisonment. The applicant appealed and after the filing of an Anders Brief, the appeal was dismissed. Appellate Case No.: 2011-187567; Unpublished Opinion No.: 2013-UP-104. Applicant timely filed for post conviction relief on March 4, 2014. A hearing was held on February 9 and 10, 2015, before the Honorable R. Lawton McIntosh. Robert C. Childs, III represented applicant and Walt Whitmire represented the State. An order was entered on March 22, 2016. Applicant timely filed a motion to alter or amend which was subsequently denied. A timely notice of appeal was filed and this petition follows.

PETITION

Relevant Facts Relating to the Offense Charged and Criminal Trial:

Ashley Bright was the mother of applicant's five-month-old child. He and Bright lived together. A. p. 500, 1. 2- p. 501, 1. 3. Bright was working at the Seneca Movie Theater on August 16, 2009, and appellant was staying home in their apartment, and taking care of the child. A. p. 501, 1. 11 - p. 502, 1. 16. Bright remembered that on that August 16, 2009 morning she left for work about 11:30, and she expected to be home between 5:00 and 5:30p.m. A. p. 504, 11. 20-22. Bright testified that on the 16th appellant sent her a text message during the day stating that the child had been "fussy all day and that they were going to lay down and take a nap, and not to wake them." A. p. 507, 11. 1 0-14. Bright testified that the appellant sent her a text message telling her that he did not want her mother coming by the apartment and that if she did, he would leave. A. p. 508-510. During Bright's testimony the jury was not informed that the text message conversation Bright read was redacted to take out Bright's response. A. p. 508-510. The redacted text message was then introduced as a state exhibit with the jury never being informed of the missing content of the text conversation. Bright was then questioned by the solicitor about applicant's statements about not wanting her mother to come over. In response Bright characterized it as odd, unusual and completely out of the blue, stating that the applicant had never had any problem with her mother before. A. p. 403; 426-427; 509.

Through text messages Bright told appellant to leave the door unlocked so she

could enter while they were sleeping. A. p. 509, 11. 1-22. When Bright got home she checked on appellant and the child every forty-five minutes while they were sleeping. A. p. 511, 11. 14-21. Bright said that when she checked on them at about 10:00 in the evening: "I noticed she was breathing a little heavy, but that wasn't uncommon, either." A. 516, 11. 17-24. She said between 10:45 and 11:00 that appellant woke up and told her: "[Child] wasn't breathing, for me to call 9-1-1." A. 516, 11. 21-23. Bright recalled that while she was on the telephone with 9-1-1, appellant was trying to do CPR. A. 517, ll. 1-17.

EMS transported the child to Oconee Medical Center and then to Greenville Memorial Hospital. While at the Greenville Memorial Hospital. Bright said appellant explained: "He was giving her [the child] a shower and she slipped, and when she did, he grabbed her by one leg and one arm across her chest and pulled her up into his chest and that her head hit his clavicle." A. 519, 11. 9-24. Bright's testified that appellant later told her if she would take the rap for this, that she wouldn't get very much jail time because she had no previous criminal history. A. 521, 11. 11-17. Bright maintained she told appellant she had "no idea how these injuries happened and I wasn't responsible and I was not going to jail for something I didn't do."1 A. 521, 11. 18-23.

Seneca police officer Ted Roundy testified that the investigation revealed the child "was suffering some head trauma in the brain." He offered that the child also had broken bones. A. 542, 1. 6- 543, 11. 1. 10. Roundy testified that appellant told him he was giving the child a bath and "she kicked and slipped out of my grasp. I caught her by, by

her leg and abdomen and jerked her up. She fussed for maybe three minutes." A. 549, 11. 10-20. On cross-examination Roundy acknowledged appellant appeared very upset at the hospital. However, appellant was arrested following the autopsy for child abuse in the death of the child. A. 555, ll. 9-23 ; A. 559, 11. 11-24.

Donna Eller, the child's grandmother, testified appellant told her he dropped the child in the shower while giving her a bath, "and he did say that she hit her mouth." Eller testified she did not ask appellant why he did not immediately seek help "because I was so mad at him I just tried to steer clear and stay away from him." A. 585, 11. 19-21. Desmond Holland was appellant's downstairs neighbor at the apartment complex. Holland maintained that on August 16, 2009, he heard a loud noise upstairs "and it sounded like a TV or something falling ... so I walked upstairs and knocked on the door and nobody came, so I knocked again. I stayed there for about three minutes. All I heard was the dog scratching and the baby whimpering." A. 632, 11. 12-15.

Doctor Brett Woodard, the pathologist, conducted an autopsy on the child on August 20, 2009. He testified the child had a large bruise on the center of her chest and bruises around the spine and the back part of the skull and the scalp. A. 701, 1. 2- p. 711, 1. 3. Doctor Woodard opined that: "Some component of torsion or twisting of the head, coupled with a sudden blow to the head, was how the injury was produced." Doctor Woodard said the child would have been unconscious, "and within a short time a coma would occur where she would be unarguable ... " A. 711, 11. 12-22. Doctor Woodard also said that it should have been apparent something was seriously wrong with the

child. A. 712, 11. 2-6.

Appellant testified in his own defense. He described to the jury how the child was injured. Appellant said he took a shower with the child and when he went to dry her off: "She kicked and turned, and everything after that just went in slow motion. It was, I grabbed her leg, grabbed her on her chest and just jerked up, I guess because I was scared. I didn't want her to fall completely down ... I just know when she fell I was, I was in shock, and I just, just remembered yanking her back ... the only thing I know is she struck her head ... on my collarbone because I had a bruise right there." A. 752, 1. 3- p. 753, 1. 21. Appellant testified he knew how to do CPR from being in the service. In this case the 9-1-1 operator told him how to do CPR on a baby. He later learned at the Oconee Hospital that the child had bleeding in the brain. A. 757, 1 - p. 760, 1. 25. Appellant explained to the jury that the whole situation was complicated because he had broken his right hand three weeks before this incident and it was still healing. A. 766, 1. 5 - p. 767, 1. 6. Appellant still had a half-cast on his hand at the time. A. 767, 11. 7-17.

In closing the solicitor argued the applicant's comments about Bright's mother as evidence of guilt. A. 389, l. 13-14. The solicitor closed her argument by calling on the jury to speak for the victim. A. 823, l. 17-24. The jury returned a verdict of guilty.

[Additional facts in Argument Section]

ARGUMENT

I. REDACTION OF EXCULPATORY INFORMATION FROM STATE'S EXHIBIT AND COUNSEL'S FAILURE TO PROVIDE THE JURY WITH THE MISSING CONTENT TO ALLOW THE JURY TO EVALUATE THE APPLICANT'S STATEMENTS IN CONTEXT.

During the applicant's criminal trial the state introduced evidence of text messages between the applicant and Ashley Bright on the day of the incident. A. 508; 776. Portions of their conversation through text messages were introduced by the solicitor first having Bright read a redacted version of the conversation and then by introducing a redacted version as a state exhibit. A. 508-510. Both Bright's testimony and the state's exhibit omitted a critical portion of the conversation, Bright's response to the applicant's statement about his not wanting Bright's mother to come over to the apartment. The state used the applicant's statement out of context as evidence that the applicant was trying to conceal the injuries to the child, arguing that there was no other reason for such a statement, and that it was completely "out of the blue".

Bright's response, which the state redacted, indicated a common understanding in their conversation that the applicant's statement was based on the mother's drug abuse issue. Showing a common understanding between Bright and the applicant, her response was essential to the jury understanding the meaning of the applicant's comments. When read in context with Bright's response, applicant's motivation for his comments could be easily understood as completely innocent, rather than evidence of a sinister motive to cover up a crime, as the state repeatedly portrayed. Defense counsel failed to object to the introduction of the text conversation with the exculpatory portion

removed. Counsel further failed to cross-examine Bright about the omitted portion of the conversation. Counsel further failed to question the applicant on direct about the missing portions of the conversations, or to have the applicant give an explanation for his comments.

Bright's response in the text message conversation was essential to understanding the basis for the applicant's comments. Redacting out Bright's response changed the entire complexion of the applicant's comments, and allowed the solicitor to repeatedly cast the nature of the applicant's statements as incriminating which, could not have been done but for the redaction. Counsel failed to object to the introduction of the redacted messages without the contemporaneous introduction of the omitted parts that were necessary for a complete understanding of the applicant's comments. [1]

The state offered the redacted text messages in attempt to show that the applicant was trying to keep the child's injuries from being discovered by Bright's mother. The state specifically asked Bright if the message about her mom seemed odd. 78. Bright testified that it did and explained that he never had a problem with her coming over before. Bright testified that it was "out of the blue" and "very odd" and that the applicant "never had a problem with her coming over." A. 403; 426-427; 509;

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[1]PCR Complaint, issue #24: "Trial counsel was ineffective and deficient in failing to object to testimony of Plaintiff tenting victim's mother regarding Plaintiff not wanting victim's grandmother to come over without a proper foundation and failing to cross-examine victim's mother on that issue." Order of Dismissal, A. p. 44; 1017.

PCR Motion Alter or Amend issue#10, page 2, addresses the PCR court's lack of specific findings as well as its ruling in regards to counsel's failures relating to the introduction of only the redacted text message conversation. A. 1052-1053.

The clear message to the jury was that there was no other possible reason for the applicant not wanting Bright's mother to come over other than to conceal the injury and thus show a guilty mind, which the solicitor went on to argue in closing. A. 510. The underacted message, however, contained Bright's response indicating some understanding that the statement was based on the mother's drug or alcohol abuse. Contrary to a major part of the state's theory of the case, this showed a completely innocent reason for the applicant's statement, so the state simply redacted it out of existence. A. 403; 426-427; 509.

The redacted portion of the message was important to refute the state's theory of the case. The complete text contradicted Bright's testimony about her not understanding why the applicant did not want her mother coming over to the apartment. It clearly countered Bright's claim that the applicant's statements were odd or out of the blue. Without the introduction of the redacted portion of the conversation the only conclusion that the jury could come to would be that the applicant's statements were evidence of guilt. There was no other explanation apparent in the conversation from what the jury heard. The prejudice is obvious.

The prejudice was compounded by the state continuously referring to the text messages throughout its case. The jury was repeatedly drawn back to the text messages as being central to the state's case. A. 507; 508; 509; 510; 529; 531; 550; 558; 575; 600; 601. In closing argument the state specifically went back to the text messages arguing that the statement about Bright's mom not coming over was evidence of guilt: "What

innocent person says this to the mother of his child?" A. 821, l. 13-14.

Despite several opportunities, defense counsel failed to have the redacted portion of the text messages introduced to show an innocent basis for applicant's comments about Bright's mother. Procedurally, defense counsel had at least three different opportunities in which to introduce the exculpatory portion of the messages. First, the redacted portion was admissible under Rule 106, SURE, which provides: "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106, SURE. The party seeking to introduce the remainder of a written or recorded statement can require the remainder to be introduced at the same time the other part of the written or recorded statement is introduced. Notes to Rule 106, SURE. The right to offer the full substance of a conversation extends to oral communications as well. State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (S.C., 2004).

In Caber-Pena the supreme court held that where the state elects to use a witness to elicit portions of a conversation (and incriminating statements therein) made by a defendant, the rule of completeness requires the defendant be permitted to inquire into the full substance of that conversation. State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (S.C., 2004).

Rule 106 is based on the rule of completeness and seeks to avoid the unfairness

inherent in the misleading impression created by taking matters out of context. Interpreting Rule 106 the court stated: "Rule 106 [of the Federal Rules of Evidence] is a procedural device governing the timing of completion evidence; the Rule is 'primarily designed to affect the order of proof'. It means that the adverse party need not wait until cross-examination or rebuttal. As such, the Rule reduces the risk that a writing or recording will be taken out of context and that an initial misleading impression will take hold in the mind of the jury." Cabrera-Pena *quoting* State v. Taylor, 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998). Here, counsel allowed the state to introduce the applicant's statement out of context and create an initial misleading impression in the mind of the jury.

Rule 106 is specifically intended to clarify any misconceptions the admission of a partial statement would give. That portion of a statement which explains or clarifies the previously admitted portion should be introduced. *See* State v. Taylor, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998); *see also* State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001). Here, the redacted excerpt of Bright's response explains and clarifies the previously admitted portions of the applicant's comments. Without Bright's response in the conversation the jury was left with no innocent explanation for applicant's comments. Accordingly, the redacted portion of the text message conversation (Bright's response) was necessary for an understanding of applicant's statement and, in fairness to Hinton, should have been admitted contemporaneously pursuant to Rule 106, SURE. Counsel failed to properly object or move to have the omitted portion introduced.

Counsel compounded the failure to immediately use Rule 106 to introduce the missing part of the text conversation by failing to cross-examine Bright about her redacted comments. This was his second opportunity to admit the missing portion of the text conversation. Proper cross-examination could have brought out Bright's response and would have put the applicant's statements in a non-incriminating light shortly after the jury heard the redacted version. As a third and last opportunity to provide the jury with an innocent explanation for the statement counsel could have examined the applicant, who took the stand and testified during the trial. Despite having heard the emphasis the state placed on the applicant's statement throughout the state's case-in-chief, counsel still failed to question the applicant about his reason behind the text messages. This was the last opportunity to allow the jury to hear an innocent basis for the statements. Counsel failed to give the applicant an opportunity to explain his comments. On at least three occasions counsel could have required the introduction of the redacted portion of the messages. Counsel's failure to offer any innocent explanation of the applicant's statements allowed the state to cast the applicant's statements as inculpatory. In light of no other explanation being apparent once Bright's comments had been redacted, this was a compelling part of the state's case.

At the PCR hearing defense counsel was questioned about the state's use of the redacted text messages and Bright's testimony which was in essence that Bright didn't know of any reason why the applicant would say that he didn't want her mother

coming over. A. 168-171; 605-606. Notes from the defense file indicated that prior to trial the applicant had explained that he didn't want Bright's mother to come over because she "was on pills." R. 542-543. Counsel therefore was clearly aware of the basis for applicant's statement prior to trial. What the applicant had told counsel prior to trial was consistent with Bright's response which was redacted from the texts. The underacted conversation shows that when the applicant told Bright that he didn't want her mother coming over Bright responded: "Even if she's sober?" A. 543-544, l. 9-112, l. 12. Bright's response shows not only her recognition of an innocent explanation for applicant's comment, but also shows that Bright's testimony about applicant never having had a problem with Bright's mother to be untrue. The value of the missing portion of the conversation therefore extended even further as a means of challenging Bright's credibility. Counsel failure to introduce the missing portions of the text messages prevented the defense from making challenging a critical part of the state's case. A. 372-373; 543.

At the PCR, neither the solicitor nor defense counsel could explain why Bright's response was redacted from the state's exhibit, or left out of Bright's testimony. A. 173; 405-406; 686-687. Defense counsel was unable to give any strategy for not introducing the underacted message to establish an innocent basis for the applicant's statement, or to use it in cross-examination to contradict Bright's testimony. A. 173. Counsel agreed that Bright's response, which was redacted, would have refuted the state's allegation that the only reason applicant could have for not wanting Bright's mother over was to

conceal the child's injuries. A. 232-233; 687-686. The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledges there was no trial strategy in mind. *See* Smith, 386 S.C. at 568, 689 S.E.2d at 633. Here, there was no strategy in allowing the state to keep out Bright's response, or not introducing it through cross-examination of Bright, or on direct with the applicant. Counsel's failure therefore constitutes error.

In the circuit court's order the court found that the applicant had sent "inflammatory text messages to the child's mother where he demanded that Ms. Bright's mother not visit or enter the apartment on the afternoon of the incident. He even threatened to leave if Ms. Bright's mother entered the apartment." A. 9. The PCR court completely ignored the effect the redaction of the text messages had on the complexion of the applicant's statements. Presumably, without knowing Bright's response, the jury interpreted the letter the same way, finding it as evidence of guilt. Absent some evidence of an otherwise innocent intent, the only conclusion the jury could draw was that it was inculpatory. As it was a direct statement from the applicant, the jury could only have given it a tremendous amount of weight. The prejudice is overwhelming. The two-prong test under Strickland is met.

II. THE GOLDEN RULE VIOLATION

The state closed in argument to the jury with "Today is the day to speak for [victim]. I once read that children are our only hope for the future. But we are their only hope for their present and their future. Matthew Hinton robbed his daughter of her

present. He robbed his daughter of a future, a future that was limitless. He took it all away. Today is the day for justice for [victim]. and the day of reckoning for Matthew Hinton." A. 823. At the PCR defense counsel testified that he did not think that the solicitor's statement was objectionable. A. 329-332.

At the PCR hearing the court initially reserved the Golden Rule issue for later comment. A. 408; 414-415; 420. When the court discussed the issue during the PCR hearing it stated that the solicitor's argument "was a clear violation of the golden rule" under State v. Reese, 359 S.C. 265, 597 S.E.2d 169. A. 422, l. 4-6. The court then went on to distinguish the case from Reese and deny relief based on a finding of overwhelming evidence in the present case. A. 422-428. In its written order the court minimized the issue finding that the solicitor's comment was only a "technical violation" of the golden rule. A. 50-51. The court went on to deny relief finding that there was overwhelming evidence of guilt. The court's reasoning is flawed.

Violation of the golden rule:

A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). A trial judge is allowed broad discretion in dealing with the range and propriety of closing arguments to the jury. State v. Raffaldt, 318 S.C. 110, 114-15, 456 S.E.2d 390, 393 (1995). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of

discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (Ct.App.2003); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793-94 (Ct.App.2003). To warrant reversal, the appellant must prove both abuse of discretion and resulting prejudice. State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct.App.1999).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); *accord* Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *see also* State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding that because the solicitor's duty is not to convict the defendant but to see justice done, the solicitor's closing argument must be "carefully tailored" to not appeal to personal bias of juror nor calculated to arouse his passion or prejudice"); State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct.App.2003) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."). Specifically, the solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error. State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884

(Ct.App.1995). This is known as the Golden Rule Argument.

The Golden Rule Argument "ask[s] the jurors to become advocates for the plaintiff or victim and to ignore their obligation to exercise calm and reasonable judgment." Black's Law Dictionary 700 (7th ed.1999); *see also* John W. Reis, Improper Jury Argument: Gilding the Lustre of the Golden Rule, 69-JAN Fla. B.J. 60, 60 (1995) ("The traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, holds that a lawyer shall not urge the jury members, either in a civil or criminal case, to imagine themselves or their family members or friends in the place of the offended litigant or victim and to render their verdict from that perspective."). Although the forbiddance of Golden Rule Arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has now been made applicable to criminal actions. 75A Am.Jur.2d Trial § 650 (1991); *see* Lucas v. State, 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976) (holding that "[t]he technique of asking jurors to place themselves in the position of the victim has been held to be improper in both criminal and civil cases").

"The "Golden Rule" argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." 75A Am.Jur.2d Trial § 650 (1991). Regardless of the nomenclature used, any argument that importunes the jurors

to places themselves in the victim's shoes is disallowed Golden Rule Argument. Johnson v. State, 263 Ga.App. 443, 587 S.E.2d 775, 781 (2003).

Golden Rule Arguments are generally improper and may constitute reversible error. State v. McHenry, 276 Kan. 513, 78 P.3d 403, 410 (2003); *see also* State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 476 (N.C.2002) ("Arguments that ask the jurors to place themselves in the victim's shoes are improper."); Velocity Express Mid-Atlantic, Inc. v. Hugen, 266 Va. 188, 585 S.E.2d 557, 565 (2003) (ruling "plaintiff's repeated requests to the jury that it apply the `Golden Rule' were prejudicial and constitute[d] reversible error").

Prejudice from the violation of the golden rule:

The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). In Tappeiner v. State, 2013-001885, addressing a golden rule violation, the supreme court stated: "In keeping their closing arguments within the record, solicitors additionally must tailor their remarks "so as not to appeal to the personal biases of the jury" or "arouse the jurors' passions or prejudices." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Accordingly, solicitors should avoid comments that ask jurors to place themselves in the victim's—or another party's—shoes, because those types of comments tend to "'completely destroy all sense of impartiality of the jurors.'" Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (*quoting* State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006))." Here the

solicitor called upon the passion of the jury, telling them to speak for the victim. The solicitor's comments were a clear violation of the golden rule. Defense counsel had no valid strategy for failing to object and at least requesting a curative instruction, if not a mistrial.

Calling upon the passions of the jury was prejudicial, the solicitor's timing made it even more so. The solicitor's violation of the golden rule was the last thing said to the jury. It was intended by the solicitor as the last driving punch, a crescendo, the grand finale, after which the solicitor rested. Under similar facts it was found important that the golden rule violation was the last thing heard by the jury: "Moreover, the emotional plea was the very last thing the jury heard before beginning its deliberations, and connected the jurors personally to the alleged abuse in the case. Thus, the comment was likely at the forefront of the jurors' minds when beginning their discussions." Tappeiner v. State, Opinion No. 27632 (SC May 4, 2016) at 11. *Cf.* Brown, 383 S.C. at 512, 517, 680 S.E.2d at 912, 915 (finding the solicitor improperly appealed to the jurors' emotions during closing argument when telling them to "speak up" for the child victim and "make sure that the perpetrator is punished"). Here, the last thing that the solicitor did was to call upon the jury to speak for the child. As in Tappeiner, this comment was burned into the forefront of the jurors' minds. The impact is apparent.

In determining whether relief from a golden rule violation is warranted under Strickland the court must look to the record as a whole. In Tappeiner the court stated: "Indeed, in determining prejudice, we frequently consider whether there is other direct

or circumstantial evidence supporting the conviction, notwithstanding trial counsel's deficient performance. *See* Brown, 383 S.C. at 518, 680 S.E.2d at 916 (finding that the solicitor's improper appeal to the jury's emotions was not prejudicial in light of the fact that there were four unrelated, adult witnesses to the defendant's rape of the child victim, as well as other direct evidence that a rape occurred); Simmons, 331 S.C. at 338, 503 S.E.2d at 166 (stating that appellate courts must consider the impropriety of the solicitor's argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt)."

Here the state made its case against Hinton by circumstantial evidence. Unlike in Brown, or other cases finding overwhelming evidence, there were no eyewitnesses, no confession, and no direct evidence. The applicant testified and gave an alternate version of the cause of injuries. In Tappeiner the court said: "Similarly, given the lack of physical evidence, the solicitor's emotional plea that Tappeiner was a bad actor and could not be trusted to watch the jurors' own family members is reasonably likely to have had a substantially stronger impact than would be the case in a trial where there was additional, independent evidence of the defendant's guilt." Tappeiner at 11. Here, the record fails to show overwhelming evidence of guilt to negate the impact of the solicitor's call upon the juror's to speak for the victim. Applying Tappeiner, the applicant was prejudiced by counsel's failure to object or request a curative instruction. He has therefore met his burden under the Strickland analysis.

III. CUMULATIVE EFFECT OF CONSTITUTIONAL ERRORS

Applicant sought to have the PCR court consider the cumulative effect of prejudice in its Strickland analysis.[2] During the hearing the PCR court apparently considered there to be numerous issues that would constitute error as it discussed the question of whether the overall effect of cumulative errors could constitute prejudice. A. 420-428. These errors included counsel's failure to impeach Desmond Holland who concealed that he knew Bright from high school. A. 17; 142; 245-246; 292-293; 371. Counsel's failure to realize that the audio recording of Desmond Holland the state provided in discovery cut off halfway through his interview. A. 257-258. Counsel's failure to object to the testimony of Bright indicating that the applicant had a prior criminal history. A. 18; 42-43; 223-224. Counsel's failure to introduce evidence of the wet towel which corroborated applicant's testimony of an accident occurring during a shower. A. 606; 613-615.

Despite numerous issues, after a brief discussion the court stated "the pervasiveness of the alleged errors is not such as to make relief available to the applicant." A. 428, l. 5-7. In its written order the court subsequently declined to consider cumulative error stating only that the applicant had failed to meet his burden. A. 54. The written order fails to address the issues specifically and, appears to deny relief as a matter of law as it ended its analysis with its interpretation of the Fourth Circuit holding in Fisher v Angelone as holding that "a cumulative effect analysis is

[2]PCR Motion to Alter or Amend, issue #45, A. 1019.

inappropriate." The court's interpretation of Fisher's holding as an absolute bar to a cumulative analysis is in error. The ruling expressly allows a cumulative analysis of constitutional error to establish prejudice under Strickland:

> [The petitioner] relies, in part, on cases considering the cumulative effect of matters actually determined to be constitutional error. In these cases, however, the courts in question merely aggregated all of the actual constitutional errors that individually had been found to be harmless, and therefore not reversible, and analyzed whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless. Thus, legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient.

Fisher at 852, n.9. As a result, the PCR court erred in failing to consider the cumulative effect of the issues presented herein in its Strickland analysis based on its reliance on Fisher.

In relying on its misinterpretation of Fisher the PCR court also overlooked more recent cases from our own supreme court. Four years after the ruling in Fisher, our supreme court held: "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. *Id.* at 197, 569 S.E.2d at 324-25. In addition, the court is not prevented from considering the cumulative effect of issues found to be prejudicial when making its Stickland analysis, under Fisher or South Carolina law.

In Simpson v. Moore, because the court found only one instance of error, there was no need to conduct a cumulative-error analysis. The record simply did not contain "several errors" for the judge to cumulatively assess. The court in Simpson therefore held that the PCR court did not err in failing to conduct such an analysis under the specific facts presented. Simpson's holding was based on the lack of multiple errors that would support a cumulative prejudice analysis. The court ruled simply that the facts did not support it, not that the law prohibits it. *See* Simpson v. Moore, 627 S.E.2d 701, 367 S.C. 587 (S.C., 2006). A reading of Green and Simpson indicate a willingness to consider a cumulative error analysis under the appropriate facts. This is consistent with the holdings of a majority of federal courts. The PCR court therefore erred in failing to consider the cumulative effect of error in the applicant's case in its overall Strickland analysis. This Court, in its analysis of prejudice, should consider the cumulative effect of all constitutional errors.

CONCLUSION

Based on the foregoing the Court should grant the petition and allow briefing in this case.

Respectfully submitted,

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August 25, 2016.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
AUG 26 2016
SC SUPREME COURT

APPEAL FROM OCONEE COUNTY
COMMON PLEAS COURT
R. Lawton McIntosh, Circuit Court Judge

Case No. 2014-CP-37-0133
Appellate Case No.: 2016-

Matthew Hinton, ... Petitioner,

v.

State of South Carolina., ... Respondent

CERTIFICATE

I certify that on August 25, 2016, I served the Appellant's PETITION FOR WRIT OF CERTIORARI and CERTIFICATE OF SERVICE on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, as indicated below:

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August 25, 2016.

RECEIVED
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APPENDIX VOLUME I

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	FOR THE TENTH JUDICIAL CIRCUIT
	)	
Matthew Hinton, S.C.D.C. No. 345044,	)	C.A. No. 2014-CP-37-0133
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

FILED OCONEE COUNTY, SC
BEVERLY B. WHITFIELD
CLERK OF COURT
2015 MAR 22 A 11:54

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

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

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the State cut off during his interview?
A. I think I talked about this a second ago. I think part of my issue was that the State's CD referenced what the written statement was and that was pretty much the end of the written statement. So I don't know that I specifically was concerned about that, no.
Q. So you don't want to hear the rest of the interview with Desmond Holland?
A. I don't really know how to answer that.
Q. Well, yes or no, did you want to hear the rest of the interview ---
THE COURT: No, sir. That's not a proper question. You can play it or not; okay, sir?
MR. CHILDS: I'm going to play the CD of Ashley Bright. But I was asking her if she -- whether or not she wanted to hear the rest of the audiotape of Desmond Holland's interview.
THE COURT: I'm sorry. I misunderstood your question.
MR. CHILDS: Okay.
THE COURT: Go ahead.
A. I don't know that there was an additional piece to that. That's why I was referencing his written statement, which seemed to encompass the information

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

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

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

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

[2] Strickland v. Washington, 466 U.S. 668 (1984).

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

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

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

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

> Q: Specifically what did [Applicant] tell you?
> A: He told me he was giving her a shower and she slipped, and when she did, he grabbed her by one leg and one arm across her chest and pulled up into his chest and that her head hit his clavicle.
> Q: Was it unusual that he would have showering with your five-month old?
> A: It was, he had given her a bath, but never a shower.

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

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

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

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

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

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

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

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

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

[3] Discussed Infra, "Overwhelming Evidence of Guilt."

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

Ineffective Assistance of Counsel

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

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

Overwhelming Evidence of Guilt

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

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

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

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

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

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

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

Tr. p.200 (emphasis added).

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

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

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

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

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

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

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

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

Tr. p. 282-83. (emphasis added). Dr. Woodard testified that the head injury would have occurred eight hours or less from when EMS was contacted around 11 p.m. on the night of the incident. Tr. p. 283.

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

Failure to Investigate

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

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

Failure to Review Discovery

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

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

Failure to Thoroughly Interview Applicant

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

Failure to Prepare Applicant for Trial Testimony

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

General Failure to Develop a Trial Strategy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Failure to Request a Change in Venue

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

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

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

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

Failure to Excuse Jurors for Cause

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

> 7. "Trial counsel was ineffective and deficient in failing to excuse Juror Makinson for cause, including but not limited to Juror Makinson's daughter was good friends with the victim's mother and Juror Makinson had read articles in the newspaper concerning the case and Makinson was not challenged for cause."
>
> 8. "Trial counsel was ineffective and deficient in failing to excuse Juror Todd for cause, including but not limited to, Juror Todd's daughter worked for the Solicitor's Office, was not challenged for cause, trial counsel failed to request additional voir dire of her and this resulted in a defense strike being used on this juror."

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

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

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

Failure to Raise Batson[5] Objection

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

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

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

Failure to Object to State's Opening Statement

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

> 11. "Trial counsel was ineffective and deficient in failing to object to prosecutor's injection of her personality into the case during the opening statements."
>
> 12. "Trial counsel was ineffective and deficient in failing to object to the prosecutor's testimony on evidence in opening statement."

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

[5] Batson v. Kentucky, 476 U.S. 79 (1986)

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

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

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

Failure to Call Witnesses

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

> 81. "Trial counsel was ineffective and deficient in failing to call Melinda Nicholson, who collected the wet towel."
>
> 87. "Trial counsel was ineffective and deficient in failing to call Desmond Holland's fiancé to the stand, including but not limited to, in that Desmond Holland's fiancé may have contradicted his testimony."

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

Failure to Assert Third Party Guilt

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

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

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

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

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

Counsel's Opening Statement

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

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

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

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

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

Failure to Object to Leading Questions

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

> 26. "Trial counsel was ineffective and deficient in failing to object to leading question that Plaintiff's behavior was "odd" on multiple occasions."
>
> 28. "Trial counsel was ineffective and deficient in failing to object to leading questions about the child's sleeping behavior."
>
> 29. "Trial counsel was ineffective and deficient in failing to object to leading question that child's breathing was "odd."
>
> 32. "Trial counsel was ineffective and deficient in failing to object to leading question regarding victim's breathing."
>
> 33. "Trial counsel was ineffective and deficient in failing to object to victim's mother's statement saying that the Plaintiff woke up and the child was not breathing."
>
> 34. "Trial counsel was ineffective and deficient in failing to object to leading questions about CPR on the child."
>
> 37. "Trial counsel was ineffective and deficient in failing to leading and inflammatory question ("what point did the shower story emerge")
>
> 38. "Trial counsel was ineffective and deficient in failing to object to leading question using the term "odd."
>
> 41. "Trial counsel was ineffective and deficient in failing to object to continued leading questions by the prosecution."
>
> 47. "Trial counsel was ineffective and deficient in failing to object to hearsay and leading question, "Did you investigation reveal that the child had been in

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

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

> 60. "Trial counsel was ineffective and deficient in failing to object to the continued leading questions that plaintiff's behavior was "odd." "

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

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

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

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

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

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

Failure to Object to Irrelevant Testimony

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

> 16. Trial counsel was ineffective and deficient in failing to object to the relevance of Plaintiff's employment status.
>
> 17. Trial counsel was ineffective and deficient in failing to object to the relevance of the victim's mother's family helping the couple's financial condition and the Plaintiff's family not helping with that condition.
>
> 66. "Trial counsel was ineffective and deficient in failing to object to the relevance of the Plaintiff being unemployed and the victim's grandmother helping with the couples bills."
>
> 90. "Trial counsel was ineffective and deficient in failing to object to Desmond Holland's irrelevant testimony.

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

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

Failure to Object to Hearsay

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 75. "Trial counsel was ineffective and deficient in failing to object to hearsay regarding the Officer corroborating victim's mother's story."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Failure to Object to the Criminal History

Applicant's next allegation deal with his criminal history.

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

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

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

Failure to Properly Cross-Examine Witnesses

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

> 20. "Trial counsel was ineffective and deficient in cross-examining the victim's mother. Including but not limited to, by failing to establish the third party guilt of this witness, failing to cross-exam her about her journal entries indicating anger over birth of child interfering with her relationship with Applicant, failing to cross-exam her about her visit to Walgreens, failing to cross-exam her about who brought her home, failing to cross-exam her about how she was with [redacted], failing to cross-exam her about the reasons [redacted] mother was not permitted to care for the child, failure to cross-exam her about her refusal to speak with the police without an attorney, failing to cross-exam her about her opportunity to pick the child up while the Applicant slept nor the frequency of her doing so, failing to cross-exam her about the alleged timing of the incident, failing to cross-exam her about her change in beliefs about the Applicant's guilt, failing to cross-examine her about the coroner's report, failing to cross-exam her about not going into the room on the day of the incident, failing to cross-exam her about the Netflix account not being hers, failing to cross-exam her about her inconsistent statements and generally failing to establish or even attempting that she had motive and opportunity to commit the crime Applicant was accused of."
>
> 21. "Trial counsel was ineffective and deficient in failing to effectively cross-examine the victim's mother about her scenario of the events surrounding the child's death."
>
> 22. "Trial counsel was ineffective and deficient in failing to thoroughly cross-examine the victim's mother

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

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

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

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

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

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

62. "Trial counsel was ineffective and deficient in failing to properly cross examine the investigating officer, including but not limited to, as set forth on page 124, l.6-129 l.18 of the transcript."

68. "Trial counsel was ineffective and deficient in failing to review the cell phone records regarding the phone call to the victim's grandmother and not cross-examining [Ms. Bright] about the alleged phone call, including but not limited to, as set forth on page 152, l.17 – 20 the timing and duration of the call to Donna Eller was a relevant point of investigation by the trial attorney."

69. "Trial counsel was ineffective and deficient in failing to cross-examine Grandmother about he told the victim's Grandmother about the shower incident."

70. "Trial counsel was ineffective and deficient in failing to cross-examine Paige Williams concerning the shower incident statement and her statement to the police."

72. "Trial counsel was ineffective and deficient in failing to use Paige Williams' statement to police for cross-examination."

85. "Trial counsel was ineffective and deficient in failing to properly cross-examine the investigator"

86. "Trial counsel was ineffective and deficient in failing to properly question the witness regarding the timing of noise from the apartment."

92. "Trial counsel was ineffective and deficient in failing to properly effectively cross examine the Doctors"

94. "Trial counsel was ineffective and deficient in failing to question the doctor about alleged rib bruises."

98. "Trial counsel was ineffective and deficient in failing to dispute in Desmond Holland's testimony in cross-examination of the doctors."

99. "Trial counsel was ineffective and deficient in failing to question the doctors about the leg injury occurring before the incident and mother's frequent checking of the child."

100. "Trial counsel was ineffective and deficient in failing to question the doctors about the leg injury occurring before the incident and mother's frequent checking on the child."

101. "Trial counsel was ineffective and deficient in failing to point out that victim's mother testified she

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

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

104. "Trial counsel was ineffective and deficient in failing to challenge the victim's mother's testimony."

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

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

[8] "Trial counsel was ineffective and deficient in failing to properly cross-examine [Ms. Bright]."

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

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

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

Failure to Challenge Voluntariness of Applicant's Statements

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

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

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

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

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

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

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

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

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

Failure to Challenge Search Warrants

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

> 27. "Trial counsel was ineffective and deficient in failing to object to the validity of the search warrants and allowing all photographs into evidence with objection or foundation; including but not limited to, in that the probable cause for the search warrants had expired, was not current, was insufficient and generally subject to a motion to quash along with the photographs that were introduced without a proper foundation"
>
> 76. "Trial counsel was ineffective and deficient in failing to challenge the probable cause for the two searches."

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

Failure *Voir Dire* Witnesses

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

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

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

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

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

Failure to Object to Closing Argument

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

Cumulative Error

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

> 106. Counsel was ineffective and deficient in failing to generally, adequately and reasonably prepare for the trial, prepare the Plaintiff to testify, interview witnesses, and challenge the improper and irrelevant testimony. as reflected by the trial testimony.
>
> 107. Counsels for the Plaintiff failed to render adequate assistance and to exercise reasonable professional judgment in making all significant decisions in his case, as reflected by the trial testimony and allegations of Applicant's application.
>
> 108. Trial counsel for Plaintiff failed to interview potential witnesses and make and independent investigation of the facts and circumstances of the case, as reflected by the trial testimony and Applicant's allegations and the failure to call or even interview witnesses an Applicant's behalf.

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

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

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

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

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

Ineffective Assistance of Appellate Counsel

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

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

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

ALL OTHER ALLEGATIONS

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

[*Signature follows*]

CONCLUSION

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

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

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 16 day of March, 2016.

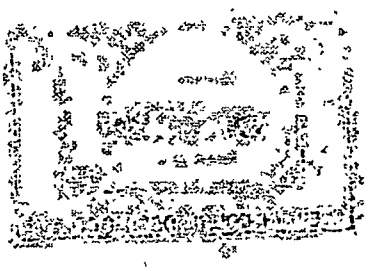
(RLM note: ORder receiv 3-16-16.)

R. LAWTON MCINTOSH
Presiding Judge
Tenth Judicial Circuit

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 MAR 22 A 11:54

_____, South Carolina

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Appendix 58

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

MATTHEW HINTON, #345044 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

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

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

This 28th day of March, 2016.

JOHANNA C. VALENZUELA
Attorney for Respondent

SWORN to before me this 28th day of March, 2016.

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

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

MATTHEW T. HINTON, PLAINTIFF, -VS- STATE OF SOUTH CAROLINA, DEFENDANT.	2014-CP-39-00133 FEBRUARY 9-10, 2015 TRANSCRIPT OF RECORD

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, JUDGE

A P P E A R A N C E S:

ROBERT C. CHILDS, III, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

WALT WHITMIRE, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

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DEFENDANT'S EXHIBITS

	(NONE)		

COURT'S EXHIBITS

	(NONE)		

February 9, 2015

(WHEREUPON, court convened with all parties present and the following proceedings were had.)

(WHEREUPON, Plaintiff's Exhibit Numbers 1 through 39 were marked and admitted into evidence.)

THE COURT: All right. Mr. Whitmire.

MR. WHITMIRE: May it please the Court, Your Honor. The first matter of the term is Matthew Hinton v. State of South Carolina, 2014-CP-37-133. We are here currently this morning for a pre-hearing matter. At our last term of PCR Court, Judge Long presided and granted a discovery order allowing opposing counsel to at least look into possible DSS files, not authorizing any release. The custodians of those files are here and present and at this time, I turn matters over to opposing counsel and to the DSS representatives.

THE COURT: Okay.

MR. CHILDS: Your Honor, this is a homicide by child abuse case where DSS had investigated portions of the case against the applicant in this case. And one of the allegations of the application in this case is that defense counsel should have investigated the DSS file. And I have marked as Exhibit Number 1 a notice that was sent to Mr. Hinton notifying him that he'd been indicated pursuant to

DSS's findings. And my position is once you're indicated, of course, the law allows you to look at the DSS file. And so I subpoenaed the DSS file for the purpose of establishing whether or not the defense counsel's failure to review the DSS file was ineffective assistance of counsel.

THE COURT: Okay.

Are you the representatives from DSS?

MS. WELCHEL: Yes, Your Honor. My name is Kim Welchel. I'm the attorney for DSS. This is Tammy Allen. She's the director of Oconee DSS.

THE COURT: I see. What would be DSS' position with regard to this matter?

MS. WELCHEL: Your Honor, we did have an indicated case. This is our entire case file here. We did not provide any services because we did not have any other children in the home. And the case that the case was indicated on, of course, is the victim in the case. I've looked through out file, Your Honor. We do have the determination fact sheets. The rest of the file essentially is medical records, newspaper clippings and police reports. So I'm not sure what, if anything, could be beneficial to either side. But the file has been retrieved from archives if the Court wishes for us to turn that over.

THE COURT: So you're basically taking no position one way or the other?

MS. WELCHEL: No, Your Honor. The only thing that we would ask, of course, pursuant to our confidentiality statutes, the name of the reporter is always protected. So we would ask that that remain in place.

MR. CHILDS: I have no objection to that. I mean, I think the reporter was the person who called 9-1-1. So that's not a problem. And I have all of the medical records already from defense counsel's file.

THE COURT: All right. I'm going to order that they be discovered by the applicant in this matter with the redaction of any confidential material. Is there anything else in there I need to be concerned with, with regard to redacting out?

MS. WELCHEL: Your Honor, as I stated, I've reviewed the file. There were conversations, of course, with myself as counsel. Those would, of course, be protected as well. But that would be all.

THE COURT: Okay.

Other than those, any objection to attorney/client matters being held back as well?

MR. CHILDS: Well, as long as they don't

involve any statements made -- you know, what I'm looking at is what statements were made to DSS during the course of their investigation primarily. And as long as those disclosures don't recite what was said to them as far as the victim's mother or the father, then I don't have any objection to that.

THE COURT: I think what counsel is referring to is her work product or communications with her own clients?

MR. CHILDS: Yeah. And so I have no problem pulling that out at all.

THE COURT: Is that a correct statement?

MS. WELCHEL: Yes, Your Honor.

THE COURT: Okay. With those exceptions, I'm going to go ahead and make it discoverable. Could you make those available?

MS. WELCHEL: Yes, Your Honor.

MR. CHILDS: Maybe her and I could just go through it and you can pull out without showing me what you...

MS. WELCHEL: The only thing that we would ask is we would just ask that something be sent to us on letterhead just noting who we're turning the file over to so if there's ever any question later on as to who we gave the file to.

MR. CHILDS: So you can just put my subpoena in the file.

MS. WELCHEL: That would be fine too.

THE COURT: As well, it seems to me so that you don't lose your actual possession of the documents, identify what's there, you copy it. How big is your file?

MS. WELCHEL: This is it.

THE COURT: Okay. Why don't you just make copies of what's in the file instead of trying to take her originals?

MR. CHILDS: Oh, yeah. That would be my plan. I just have to find somewhere to make copies.

THE COURT: And then you can place the subpoena in there and that should be enough. Anything else you think you need in the file?

MS. WELCHEL: No, Your Honor.

THE COURT: Okay. Great. Thank you so much. Thank you for being here.

MS. WELCHEL: Thank you, Your Honor.

MR. CHILDS: Thank you, Your Honor.

MR. WHITMIRE: I just want to put on the record that the Oconee County representatives have been incredibly courteous with their time in coming here today. And Anderson is set for tomorrow. The

AG's office certainly appreciates that. And also the victim's mother in this case is present here to observe this motion hearing and I believe will be here for the remainder of the case this week.

THE COURT: All right.

MR. CHILDS: Thank you, Your Honor.

THE COURT: Thank you.

MR. WHITMIRE: Thank you, Judge.

THE COURT: Certainly.

(WHEREUPON, court stood at recess in this case at approximately 9:56 a.m.)

THE COURT: All right. Let me -- I'm looking at a complaint filed in this matter that articulates a hundred and seven different grounds.

MR. CHILDS: Yes, sir.

THE COURT: And I understand that this is going to be a lengthy hearing. But at the same time, if there are grounds which you do not have testimony, I want you to identify those for me at this juncture, please. If you're going to make an argument as to grounds, that's fine. But I want to find out which ones the testimony's directly related to and you have a witness with regard to.

MR. CHILDS: I would say every one.

THE COURT: You're sure?

MR. CHILDS: No, I'm not sure.

THE COURT: I need you to be sure. I mean, this is your complaint. You filed it. You adopted it as yours. And for a hundred and seven different grounds, if they're legitimate, fine. But this is your case. I want you to tell me which ones you're -- that you're putting the witnesses with regard to the ones you argue by, just legal argument, please, sir. And if not, be ready to tell me that tomorrow. I understand this case is coming back up tomorrow; correct?

MR. CHILDS: Yes, sir. And ---

THE COURT: For example -- let me ask you. For example, I was about to write all of these down and then I realized there was a hundred and seven of them. Are you going to take any testimony on your grounds for Julia Makinson?

MR. CHILDS: Yes, sir.

THE COURT: You're going to have testimony on that?

MR. CHILDS: I'm going to ask defense counsel about why they didn't excuse that juror, excuse the juror for cause.

THE COURT: Okay. Isn't there some cases about extrinsic versus intrinsic jurors, assuming

you're saying juror misconduct?

MR. CHILDS: No. I'm not saying juror misconduct.

THE COURT: Then what are you saying?

MR. CHILDS: That particular witness indicated that she was -- Makinson indicated some knowledge of the case. And also, in addition to that, indicated that he was -- read newspapers about the incident and also that his daughter was good friends with one of the witnesses. And so our argument is that he should be -- the defense attorneys should have moved to strike him for cause.

THE COURT: All right. Look, I know I'm catching you off guard over here. The obvious point is I know that sometimes people have a tendency to throw the kitchen sink in their allegations, and I want to get this down. If this is going to be a two-day hearing ---

MR. CHILDS: Yes, sir.

THE COURT: --- ir longer, I want to make sure that we get the issues that are truly issues in this case.

MR. CHILDS: Well, and I basically, in pleading this complaint, went by the transcript of the trial.

THE COURT: I understand.

MR. CHILDS: In addition to the ---

THE COURT: But just because you see it in the transcript and write it down as an issue doesn't necessarily mean it's an issue at this juncture, is what I mean?

MR. CHILDS: Yes, sir. And I will say that probably there are issues about the search warrant that I don't think are relevant to proceed upon because I can't see a basis for challenging some of those. And I went through each individual one in preparation for this. So I cannot rule out any in particular, aside from the issue on the search warrants that I would be not asking the witness directly about.

THE COURT: Well, I guess -- let me see. Here's what I'm thinking in terms of -- say, you said you intend to ask the attorney. Why?

MR. CHILDS: Yeah.

THE COURT: And is there going to be any -- is there going to be any testimony from this particular juror?

MR. CHILDS: No, sir.

THE COURT: At all?

MR. CHILDS: No.

THE COURT: Could that ever meet the standards?

MR. CHILDS: Well, I think there's a consummation ---

THE COURT: Or a totality test?

MR. CHILDS: Huh?

THE COURT: Or a totality test?

MR. CHILDS: Yes, sir.

THE COURT: All right. I'm not trying to keep you from trying your case, I want you to understand.

MR. CHILDS: I understand, Your Honor.

THE COURT: I just don't want to get into extraneous stuff out here that's unnecessary.

MR. CHILDS: And I'm not -- I certainly want to par it down as much as I can and may. And overnight, I'll be glad to look at some more. I think you'll see with the first witness that, you know, that we have those multiple issues that we need to address.

THE COURT: All right. So at this juncture there are a hundred and seven grounds are the grounds before the Court. All are, all are essentially under the category broadly as ineffective assistance of counsel?

MR. CHILDS: Yes, sir.

THE COURT: Okay.

MR. CHILDS: There's no ---

THE COURT: Anything else, other than ineffective assistance?

MR. CHILDS: No, sir.

THE COURT: Okay. Do you have any expert witnesses who are coming to testify in this trial?

MR. CHILDS: No, sir. No, sir.

THE COURT: Okay. All right. Are you ready to proceed?

MR. WHITMIRE: Yes, sir.

THE COURT: Okay.

MR. WHITMIRE: May it please the Court? I'm going to call this case a little differently than usual. Mr. Hinton was indicted and convicted of homicide by child abuse. He did file a notice of appeal. It was pursuant to Anders. The Court of Appeals ultimately dismissed that appeal. In parsing through the triple digit allegations, I've submitted Miranda law to Your Honor.

Section one is the summary of testimony from the trial transcript from the State. Because it was an Anders brief no one from the State's had the opportunity to do that yet. Section two -- or section three are allegations against the defense team

collectively for failure to investigate the case by either attorney. Section four are allegations specifically related to lead counsel, Gordon Senerius. And I've split those up in a manner where he cross-examined all the medical experts. He did the voir dire. Did the opening and closing. And he did the direct examination of applicant in defense's case in chief. So allegations relating to trial strategy, failure to object, at that juncture in the trial, I believe, could most appropriate be answered by him. And I've put them all there and tried to get them categorically grouped by different types of allegations. Also, the following section, section five, are allegations against Ms. Senerius. She handled the victims's mother ---

THE COURT: Ms. Tye, I believe, her name is.

MS. SENERIUS: Your Honor, that has been changed. It is now back to Senerius.

THE COURT: I stand correct.

MR. WHITMIRE: It was Tye at the trial. --- against the lay witnesses, against the victim's mother. And I would ask this Court that in terms of relevance that the allegations be directed to the actual attorney who handled that witness at trial.

SAnd then last, section six, regards -- there's

one allegation against Appellate Counsel. It was an Anders. I've submitted standard substantive law, along with Strickland law and under Miranda. Obviously, there's no record of this matter yet, so I'm not addressing anything that may or may not develop in the next two-day hearing.

THE COURT: Do me a favor. Since we have so many allegations, just raise your objections at the time so we can keep the record consistent instead of me trying to anticipate.

All right. Would you call your first witness?

Is there anything else for the record?

MR. CHILDS: No, sir, Your Honor. And what we've agreed to do, since Ms. Senerius is not a -- well, initially, we didn't believe she was going to be available tomorrow. And she would ostensibly be the respondent's witness in response to our allegation. And Mr. Whitmire and I discussed that. And I'm going to call her as an adverse witness, basically as my first witness.

THE COURT: Okay. And let me make sure. Mr. Hinton, would you raise your right hand?

MR. HINTON: (Complied.)

THE COURT: Do you swear or affirm to tell the truth, the whole truth and nothing but the truth?

MR. HINTON: Yes, sir.

THE COURT: Okay, sir. And this only with regard to venue; okay?

MR. CHILDS: Okay. Yes, sir.

THE COURT: This is an Oconee County case, Mr. Hinton, but for the sake of the fact that we were already here today and Ms. Tye is an Anderson County lawyer or Ms. Senerius is an Anderson County lawyer, you were the only one who really was outside the county. Everybody decided to have the case here. Do you have an objection to this aspect of the case being heard in Anderson County?

MR. HINTON: No, sir.

THE COURT: And you waive venue here to Anderson County for purposes of taking Ms. Senerius's testimony?

MR. HINTON: Yes, sir.

THE COURT: Any other witness's testimony you anticipate today?

MR. CHILDS: No, sir.

THE COURT: All right. Thank you, sir.

All right. One thing before we get started. Have y'all stipulated to exhibit to the extent that you can?

MR. CHILDS: Yes, sir.

MR. WHITMIRE: Yes, Your Honor. I believe there are thirty-nine applicant's exhibits. I'm, without objection, with the understanding they would be authenticated from one of the two attorneys. And it did, in fact, come from the attorney's files just to expedite matters.

THE COURT: Okay.

MR. WHITMIRE: And, also, Your Honor, opposing counsel did request that we obtain some of the trial exhibits. And just like any other part of the record, this is a part of the record before you. The exhibits he specifically requested, Beverly Whitfield was very kind. She made photocopies of it. So I produced three copies of ---

MR. CHILDS: And we'll refer to those by their original trial exhibit numbers.

MR. WHITMIRE: May I approach? This is probably misappropriated. He got his packet anyways. So these are for Your Honor.

THE COURT: What are your exhibit numbers on those? I know you're saying you're going by the original trial exhibit numbers?

MR. CHILDS: Yes, sir.

THE COURT: Then if you do probably ---

MR. CHILDS: Those would be State's and Defense.

THE COURT: They're State's and Defense?

MR. CHILDS: Yes, sir.

MR. WHITMIRE: Your Honor, they're labeled which they are. This is just for your ---

THE COURT: Great. Just so that we have it in the record, I would prefer that y'all read them out, the numbers. That way we don't have to keep doing it over and over and we don't have the appellate court looking as to whether or not they were admitted.

MR. WHITMIRE: Okay, Your Honor. The only thing I requested was exactly that, that we just refer to it as state trial exhibit versus this is a PCR exhibit.

THE COURT: All right. All right. Call your first witness.

MR. CHILDS: Ms. Brittany Senerius. You might want to bring your file with you just in case you need to refer to something.

THE CLERK: Do you solemnly swear or affirm the testimony you give this court in this case be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Take the witness stand, please.

BRITTANY SENERIUS,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. CHILDS:

Q. Ms. Senerius, could you state your full name for the record?

A. Brittany Dreher Senerius.

Q. And are you a practicing attorney here in Anderson County?

A. Yes.

Q. And what kind of practice do you have?

A. Currently, my father and I have a general practice here in Anderson. I would say for the last three or four years, I've focus mainly in Family Court DSS actions.

Q. Now, you were admitted to practice in November of 2008?

A. Yes.

Q. And after you were admitted to practice you did a clerkship?

A. I did.

Q. And what Judge was that?

A. Judge Macaulay.

Q. And how long was that?

A. It was a year. From August of 2008 until August of 2009.

Q. Okay. And the incident in this case occurred

August 15th, 2009; is that correct?
A. I don't have any reason to object to that. I can't remember exactly right now.
Q. And so do you recall seeing this on the news?
A. I personally do not, no. But I'll be honest with you, I don't necessarily try to watch the nightly news. And we're in Anderson, so we don't always see everything in Oconee.
Q. And do you recall when in 2010 that you were, with your father, appointed to represent the Defendant?
A. I do.
Q. Okay. When was that?
A. I believe it was toward the springtime of 2010.
Q. Okay. And at that time, how many criminal trials had you handled yourself or participated in?
A. Well, less than a month earlier -- or less than a month before -- do you mean this trial or do you mean just at that time when we got the case?
Q. Just at that time when you got the case, how many?
A. At that time when we got the case, I had not actively participated in the trial of a case from an attorney's perspective. I had been with Judge Macaulay for a year and had seen a number of criminal

trials.
Q. Okay. All right. Now, you were initially -- the file was transferred to you from Chip Price; is that correct?
A. Well, I believe Mr. Price actually filed a motion to be relieved.
Q. Right.
A. And then Mr. Hinton applied for a public defender and we had a contract essentially through the public defender's office in Oconee and that's how we received the case.
Q. Okay. And do you recall it being about February of 2010 maybe?
A. Yeah, that would be about it.
Q. And did you received Mr. Price's file then?
A. He did provide us with his entire file at that time, including the information that he had previously discovered and/or requested.
Q. Let me show you what's been marked Plaintiff's Exhibit Number 1.

MR. CHILDS: May I go around this way?

THE COURT: Yes, sir. You don't need to ask.

Is that Applicant's number 1?
Q. And do you recognize that as something that y'all

received from Mr. Price?
A. I do believe I've reviewed this before, yes, sir.
Q. Now, in that letter, Exhibit Number 1, it indicates that he was asking if the natural mother of the child, Ashley, could visit Matthew in the detention center?
A. Yes.
Q. And to your knowledge is that something that went on for a while prior to your involvement?
A. I cannot tell you exactly what happened before us, but talking to our client, I believe, yes, that did happen. I believe there was phone contact also.
Q. And is it correct that she visited him twice a week up until the time that Mr. Hinton made bond?
A. I wouldn't be able to testify to that. I honestly don't know.
Q. And let me show you Exhibit Number 2.
THE COURT: Just so the record is clear. You are referring to the Applicant's Exhibit Number 2 ---
MR. CHILDS: Yes, sir.
THE COURT: --- as opposed to the State or Defense at the trial?
MR. CHILDS: Yes, sir, Plaintiff's Number 1 and Number 2.

A. Did you want me to keep both or did you want this one back?
Q. I'll take that one back.
MR. CHILDS: I would move in Number 1.
THE COURT: Any objection?
MR. WHITMIRE: No, Your Honor, just for purposes at a later date ---
THE COURT: My understanding 1 through 39 were admitted without objection anyways.
MR. CHILDS: Based on those ---
MR. WHITMIRE: So I don't need to say that.
THE COURT: All right. I thought they were. That's fine.
Q. All right. And let me show you Plaintiff's Exhibit Number 2 in this case.
A. Yes.
Q. And did you receive also that from Mr. Price from the prosecutor's file?
A. I believe so. Let me look at this real quick. I believe this is a copy of a letter that we received from Mr. Price when the case was -- when the file was physically transferred to us.
Q. And in that letter, the State objects to Ms. Bright visiting Mr. Hinton after he's released on bond; is that correct?

A. No, I read it as saying she does not believe she can object to Ms. Bright visiting.

Q. In the jail ---

A. In the jail.

Q. --- before he satisfies the term of the bond.

A. Yes, yes. I apologize.

Q. However, the State's position that after bond it's a violation of the order?

A. Yes.

Q. All right. Now, so do you recall when you first met with Mr. Hinton?

A. I do not off the top of my head recall when I first physically met Mr. Hinton. No, sir.

Q. Do you recall any information about him -- about her visiting him in the detention center twice a week up until he made bond?

A. I honestly don't recall that specific issue. I apologize.

Q. Did you check to see with the jail system how often she visited with him until he made bond?

A. I personally did not. I don't know that we as an office did. Based on how things had changed between the two of them, I don't think there was -- I don't think there was any confusion as to the fact that she had visited before, but she was not at the time that

we started really being active in that case.
Q. Right. And explain that to the Court, why she was -- what happened in the interim?
A. The autopsy reports came back, is my understanding, and she met with the solicitor's office around the time that the autopsy report came back. And after that, she was no longer, I guess, for lack of a better word, an ally for Mr. Hinton.
Q. All right. Now, would it surprise you that the autopsy report came back within a couple of weeks of August the 15th?
A. That wouldn't surprise me. I'm just telling you that that was my understanding of the reasoning she gave.
Q. Okay. Let me show you Plaintiff's Exhibit Number 3. See if you can identify that?
A. Yes.
Q. And what is that?
A. Those are some of my handwritten notes from the file.
Q. Okay. And do you know when you made these notes or ...
A. I don't. It looks like from the information involved that it was potentially during an actual face-to-face consultation with Mr. Hinton.

Q. Okay.
A. But I don't have a date on there unless it's been cut off by a copier or something. I don't have a date on there that I can see.
Q. All right. And in those notes, it goes through a list of witnesses?
A. Yes.
Q. And they are Alex Hood?
A. Yes.
Q. Ronnie Craig?
A. Yes.
Q. William Fowler?
A. Yes.
Q. Danny Stevens?
A. Yes.
Q. And Denise Richardson?
A. Yes.
Q. And Randy Bargill?
A. Yes. I believe that's ---
Q. Do you know what they would testify to?
A. Based on the information that I have here, and from my memory, all of those were witnesses regarding Mr. Hinton's abilities at work and his -- basically, character witnesses. I think Ronnie Craig, I noted, observed two or three incidents where the minor child

was crying. And I think the reason that was important was because Mr. Hinton was the one that would normally console the minor child when she became upset.

Q. And so did you interview any of those witnesses?

A. We attempted to reach out to, I know, Danny Stevens and one of the other co-workers from Pizza Hut. They were no longer at that location. And Mr. Hinton was unable to give us specific contact information for the ones that we could not reach. I don't remember off the top of my head about the other few. As I mentioned, they were mainly focused on being character witnesses.

Q. All right. And Denise Richards is his mother?

A. Yes. We did, obviously, speak with her. She was involved in coming in and out of the office during that time because I believe Mr. Hinton was actually living with her at that time.

Q. So you interviewed her?

A. We spoke to her. I don't know if you could call it a formal interview, but we did speak to her throughout this process.

Q. All right. And did you ask her her knowledge of the occurrences following his arrest?

A. I don't remember off the top of my head if that was a specific question that I asked her.

Q. Do you know if she would have testified that she took Ashley Bright to the detention center twice a week up until February of 2010?

A. As I mentioned, I don't have really any memory of Ashley going to and from the detention center before we received the case, specifically.

Q. Would that be important concerning the issue related to her reading the autopsy?

A. You mean the fact that she -- I don't understand your question. I apologize.

Q. We'll get to the autopsy later. Now, it apears there's a note, a statement from Dixie Gravely, crack in '07 breach of peace?

A. Yes.

Q. Tell the Court about that?

A. I believe it was something that was on Mr. Hinton's record that I wanted to speak with him about. And so he gave me that information.

Q. Was that information something to do with a lie pattern or something where he had had a previous relationship with this lady and she alleged that he was violent toward her or something of that nature?

A. I believe when I initially got it, I was just attempting to make sure that we looked back through his history. Obviously, if that had come up, I don't

believe his history from that specific incident became a focal point. But I tried to look back through and see what potential issues we might be facing. So I asked him about that and that's what he told me.

Q. In fact, didn't the State disclose the incident reports, statements from them, back in '07, in their discovery responses?

A. I believe so. The discovery responses are voluminous and I attempted to review back through them before today, but I cannot promise you that that's in there, but I believe it was, yes.

Q. Was there ever some concern about an attempt for them to testify about that incident of 2007?

A. That's kind of a -- what time period are you talking about? Were we concerned about ---

Q. About the breach of peace in 2006 that you have -- 2007 breach of peace, the note there that you have?

A. My only memory of the reason that I got this specific information was because we did review something about it and I wanted to make sure that we had our client's version or side of that story with the information about it from him.

Q. And did you ever discuss with Mr. Hinton the possibility of having those records -- that conviction expunged from his record?

A. I don't remember talking to him about having that expunged, no.
Q. All right. Would that be a type of offense that one could expunge after three years?
A. I would have to look back at that specific thing. I honestly don't know off the top of my head.
Q. All right. And it was a breach of peace from 2007?
A. Yes, I understand. I just -- off the top of my head, I don't know if that's something that he could just have expunged. I don't know that he attempted to.
Q. Did y'all discuss that with him or have any concerns about doing that, to your knowledge?
A. I don't have a memory of it. He seemed to explain the incident from his side of the story, so that's why we attempted to get that information so that we could deal with it if it came up because it was listed there as something on his record.
Q. Right. Wouldn't it assist the client to have a cleaner record at the time ---
MR. WHITMIRE: Objection. Irrelevance. They were not appointed to represent the Defendant on an expungement.
THE COURT: What would be the relevance of

the ability to expunge an incident report with some prior friend?

MR. CHILDS: Well, my next ---

THE COURT: I'm asking you?

MR. CHILDS: Yeah. Well, the point is that it would look better for the client when he comes to court that he wouldn't actually have a record if it were expunged at that point.

THE COURT: I sustain the objection. Let's go forward.

MR. CHILDS: All right.

Q. Now, did you ever have a discussion with him about calling character witnesses?

A. I believe that's one of the things that we talked about on this date, the notes that we are referring to in Plaintiff's Exhibit Number 3.

Q. Did the existence of this 2007 incident have an impact on your decision about doing that?

A. About calling them or about talking about them?

Q. About calling them?

A. Well, we spoke to our client repeatedly throughout this process about witnesses that he wanted called on his behalf, what we thought those witnesses could provide for trial and whether or not we were going to call them. So he was an active part of that

discussion throughout this case.

Q. And so you -- the second part of Exhibit Number 3, you're making a note about Ashley checking in?

A. Yes. I believe he and I started to kind of moved forward to the topic of the alleged incident and what happened that day and what he remembered. Basically, this was just, from my memory, a day that I was just trying to gather some information with him based on some information in this -- in these notes. I believe we were probably reviewing discovery.

Q. Okay. And the allegations, am I correct, were that he was at home with the child for a period of time on August 15th, 2009?

A. Yes.

Q. And while Ms. Bright, his girlfriend, was at work; is that correct?

A. Yes, I believe she was alleged to be at work for a period of time that day.

Q. And that she got home about five thirty?

A. Approximately.

Q. That's what the note says here?

A. Correct, yeah.

Q. And I think that's what the evidence would be at the trial, as well?

A. Yes.

Q. And then she got home, him and the child were laying down sleeping?
A. That's my understanding, yes.
Q. And then it says here in the note, A woke him up, moved [redacted] turned her head away from him?
A. Yes.
Q. And so is that what he's telling you?
A. Yes.
Q. And later, woke them, blanket, he did, and she woke up about ten something?
A. I believe the dash, woke up about ten something is a new note. But it's my understanding that there was a second incident that Ashley woke him up and that because the blanket was up over [redacted] face, Ashley wanted it moved down. And so that was what the blanket -- he did move the blanket down. I may not have finished the rest of that. I apologize.
Q. And then he woke up at ten something and the child was no longer breathing?
A. That's what he told me, yes.
Q. And that's where the series of events ensued from there?
A. Correct.
Q. All right. Now, you've got a note here about a stern rub or a bruise. We'll get into that a little

bit later, but that was some evidence and information that y'all had?

A. That's what he provided us, yes, sir.

Q. And there's a note here about unwrapping a pink blanket from the child's legs which he did not placed around her legs?

A. Yes. He mentioned that when he woke up and noticed that she was not breathing, he had to remove a pink blanket that he did not remember placing around her legs.

Q. All right. Now, it also indicates here that the child had had -- ever couple of days she would have fits?

A. I believe that was right after she was born.

Q. Okay. And the doctors were told about this and Ashley, Ashley's mother and Ashley's brother saw it?

A. Yes. It's my understanding they observed those fits, so to speak.

Q. All right. And then got a note there about the doctor's name?

A. Yes.

Q. And did y'all ever get the doctor's records, the pediatrician's records?

A. I don't believe so. Those fits were supposedly right after she was born and that they had stopped,

according to both parents, is my understanding.

Q. So you never got the pediatrician records?

A. Not that I remember off the top of my had, no.

Q. And the next day it says Ashley was impatient with the child every time B -- is what you say there -- was crying and A would hand her off to -- and I assume that would be Matthew?

A. Yes. That's what he told us.

Q. And the second part is Ashley was twenty-three, twenty-four when [redacted] was born. Defendant was twenty-two?

A. Yes.

Q. And it says -- and I'm paraphrasing because you've A and M, and I assume you mean Ashley and Matthew?

A. I do.

Q. Ashley and Matthew's mother talked a lot during the time Matthew was in jail?

A. That is what he told me, yes.

Q. Do you ever remember interviewing Matthew's mother about those conversations?

A. I think I remember briefly speaking to her about it, but was more along the lines of she was a bit surprised that Ashley was no longer believing Matthew. And I think it was based on the conversations that

she'd had with Ashley before. She was surprised to see the change, was the majority of that conversation.

Q. And there's a note here with a star, Ashley never showed any emotion?

A. That's what Mr. Hinton advised us.

Q. And that was also indicated -- and we'll get to that a little later -- in the actual incident reports, the investigation notes?

A. Yes. I believe we brought that out on cross-examination on one of the police officers.

Q. And then there's a note about the shower?

A. Yes.

Q. Fell, dropped. He grabbed her and pulled her back up. She may have hit her head or her collar bone. She bit her tongue and was fussy for approximately an hour and a half?

A. Yes. That was the information that Matthew and I talked about that day.

Q. All right. And two broken legs. Actually it only has one. I don't know what you meant by that.

A. For some reason, there was a notation somewhere I think that said that there were two broken legs. And we talked about the fact that, no, there was only one break.

Q. Do you remember that actually what was diagnosed

was a classic metaphyseal lesion?

A. I believe that's correct, yes.

Q. Do you know what that is?

A. Off the top of my head, I could not define that. No, sir. I apologize.

Q. All right. And you didn't do the cross-examination on the doctors?

A. I did not.

Q. Y'all didn't discuss what that was or research what it was?

A. I'm sure we did. There's actually a lot of research here. I'm just telling you as of today I actually couldn't define that for you. At the time of the trial we were both very versed in trying to find out what all of those things were, especially if they were going to come up during the trial.

Q. All right. And the last page, going on from that, is that he had an honorable discharge from the military?

A. Yes.

Q. And he was a heavy weapons specialist?

A. Yes.

Q. And, let's see. Graduated from Travelers Rest High School in 2004?

A. Yes.

Q. Played baseball for eight years, football for one year?

A. Yes.

Q. All right. And there's a note here about his prior girlfriend?

A. Kendra Kirkland, yes.

Q. Can you explain that to me?

A. I believe we were looking at that as potentially if she was going to be testifying, to maybe make a motion in limine on that issue.

Q. Okay. Because he had actually allow his parental rights to be terminated for her child?

A. For the child that they had, yes.

Q. Because she was adopted by the step-father?

A. Yes. That's my understanding.

Q. All right. Now, based upon what your client told you about the pink blanket ---

A. Yes.

Q. --- do you know who else could have put the pink blanket on the child's legs?

A. I would just be -- I mean, the testimony said that only two of the people were there that day, Matthew and Ashley, other than [redacted]

Q. All right. Do you recall either yourself or your father asking Mr. Hinton about the routine with the

child, about how he cared for the child before the incident and how the mother was with the child?

MR. WHITMIRE: Objection. Relevance if the question is directed to how the witness was examined at trial about pre-trial intervention.

THE COURT: Say that again, please, sir.

MR. WHITMIRE: Objection. Relevance. If the question -- the question concerns how Mr. Senerius examined Mr. Hinton. But if they're talking about just their pretrial interviews with the applicant, then I'll withdraw it.

THE COURT: Why would that not be relevant?

MR. CHILDS: I think he just withdrew it.

MR. WHITMIRE: So I would withdraw it ---

THE COURT: Oh. I missed that. Okay.

MR. WHITMIRE: I apologize, Your Honor.

THE COURT: I'm sorry.

Q. Did you discuss with Mr. Hinton or do you recall discussing with Mr. Hinton the routine between him, the child and the mother as far as the care of the child prior to this incident on August 15?

A. Yes. We went over that with him quite a few times.

Q. Do you recall what that testimony -- what that information was?

A. Based on my memory, especially close to the incident, Mr. Hinton was not working. Ashley was working part-time. So Mr. Hinton advised us that he was the one that cared for [redacted] most of the time. That he was the one that was capable of calming her down if she was upset. I believe that was also testified to at trial, that Ashley seemed to be frustrated with [redacted] if she was not being calm. And so that Matthew was the one that would calm her down and that Ashley would kind of hand [redacted] off to Matthew. He talked about when she was awake that she would be in her crib or he would be playing with her, that he -- a lot of times if she was in her crib playing with her toys, he'd be playing with his x-box. I think nothing out of the ordinary, just a general routine of them, him bathing her and feeding her, etcetera, throughout the day, that he had developed a routine since he was not working.

Q. All right. So in respect to the girlfriend, what was the information that you generated about her involvement with feeding and bathing the child prior to the incident?

A. Well, Matthew expressed that she was a good mother, that she was attentive. She just would sometimes get frustrated with the minor child. Based

on the discussions with him, they seemed to be a relatively normal group of three family. They split some of the power of doing things for the minor child. And while she working and while he was not, he tried to take over during the late night hours to allow her to get some sleep since she was working.

Q. And did you discuss with him who cared for the child that morning and that night before?

A. We did. He gave us the information that he was asleep that morning, I believe when Ashley left, that the minor child was also asleep at that time. But I think Ashley woke him up before she left for work sometime that morning. And that he cared for her throughout the day.

Q. Any indication when the child was fed that morning?

A. Not from my memory, no, not specifically that morning.

Q. All right. Now, we've already kind of discussed real briefly the situation where Mr. Hinton talked about or told you about slipping in the shower earlier that day?

A. Yes.

Q. I'm going to show you what's Exhibit Number 4 and see if you can identify that?

A. Yes.
Q. And can you identify that letter?
A. This is a letter that Mr. Price had delivered to us when he delivered his file. And he goes through and details a number of things that he had had a chance to review, and just different notes about the case. I guess he was attempting to give us as much information as he could.
Q. And he discussed the fact that y'all -- that they'd done an independent pathology on the child. I mean, were you aware of that?
A. Yes.
Q. And discussed the issues or the injuries to the child?
A. Yes.
Q. And did he also discuss with you that the incident in the shower was not a possible explanation for the injuries?
A. That is what the note says, yes, sir.
Q. And would you agree with that?
A. Would I agree that the incident in the shower was not a possible cause of the injuries?
Q. Yes?
A. I would agree that it was what our client advised us happened. And so that's what we put forward

because that's what our client told us happened that day. He was very consistent about that. I can't speculate as to whether or not that's possible to cause the injuries.

Q. Well, what I'm getting at is, wasn't it unlikely that any medical doctor was going to say a slip in the shower caused these injuries to the child?

A. It seemed so, since at this time and throughout the case, the medical doctors did not say that that incident in the shower was what caused these injuries.

Q. All right. And so the issue really would have been -- for the defense would it not be, as far as you're concerned, would be did the mother do something with the child after she got home from work?

A. That potentially could have been a -- was one of the issues. Part of the problem that we had at that time was that we did not have any information about -- from our client as to waking up and hearing something. There was no other evidence that we could point to regarding that based on third-party guilt issue.

Q. Did you ask him if he was a sound sleeper?

A. I believe we talked about the level of his sleep actually quite a bit. There was issues regarding him breathing while he was asleep and that he was a heavy-deep breather while he was asleep. We talked about

issues about whether or not he was somebody that you had to rouse really hard to wake up. From my memory, he was a pretty sound sleeper, but he does have memories of waking up that afternoon after Ashley got home.

Q. Because he says Ashley woke him up a couple of times?

A. Correct.

Q. All right. Now, did you recall discussing with him whether or not Ashley had ever retrieved the child from the bed that he was in with the child previously?

A. Like previously that day?

Q. Anytime?

A. I believe he said that when he woke up the minor child was still there next to him. He doesn't know if Ashley removed that child from the bed. The only thing about that was the pink blanket that he wondered if she maybe wrapped the child's legs up in a blanket.

Q. What I'm asking is, did you ask him about whether or not she, in the past, had gotten the child out of bed without him knowing it?

A. I don't have a specific memory to that. No, I'm sorry.

Q. All right. Let me show you Plaintiff's Exhibit Number 5. See if you can identify that.

A. These are Greenville Hospital System records.
Q. And are those the records you received in the course of discovery?
A. Yes, I believe so.
Q. And those are records relative to -- let me ask you this. Initially, the child was taken to Oconee Memorial?
A. Yes.
Q. And then transferred to Greenville Hospital?
A. Yes.
Q. And these are one of the records from the day following, which is August 17th, where the child was transferred to Greenville Memorial; correct?
A. Yes.
Q. And in that there's a little dictation in about mid-page in the history of the present illness that says, at five-thirty mom came home from work, found both the dad and the baby asleep in the bed with patient breathing, looking normal?
A. Yes.
Q. However, when dad woke at eleven, he found the infant beside him not breathing?
A. Yes.
Q. All right. And so -- it also indicated that the child was at eighty-nine degrees when the child was

seen at the ER, which I assume was Oconee?
A. I would assume so, yes.
Q. And did you or your father look at the issue of the child's temperature when she arrived at Oconee?
A. I did not. I don't know that we specifically looked at that. I honestly don't know. I don't remember that.
Q. Just to be clear, the allegations were that the mother had checked on the Defendant and the child every forty-five minutes from five-thirty until he woke up and said the child's not breathing?
A. Yes, he also awoke at least twice during that period of time.
Q. When she came in and did something with the child?
A. Correct.
Q. And the child arrived at the emergency room in Oconee, appears to have eighty-nine degrees is his temperature?
A. Yes.
Q. And you didn't investigate the issue of the child's temperature relating to the allegations?
A. I don't have a specific memory of that, no.
Q. Now, the note here that the child, the baby was asleep in bed with the patient, the child was -- the

patient breathing, looking normal?

A. Yes.

Q. And that was obviously a history that was given at the hospital, by the mother, I assume?

A. I assume so. But I don't know who gave that history.

Q. And was the testimony at trial different than that that the condition of the child would be readily apparent to anyone after the injuries were inflicted on the child?

A. I believe one of the doctors was talking about the broken leg specifically and said the minor child would be very fussy about the broken leg. But it's also my memory, and I think it was Dr. Troupe -- I could be mistaken in that -- that referenced the fact that once the minor child -- once and if the minor child was going into a coma that she wouldn't necessarily be fussy, that she would be more quiet.

Q. Would be in a coma by then?

A. Right.

Q. And we'll get into that in the transcript. So Exhibit Number 6 is another record from the hospital system?

A. Yes, Greenville.

Q. All right. And that was, again, a consultation

note. I think that's from Dr. Henderson. And it talks about the father indicated -- told law enforcement about the shower incident. In the second paragraph?

A. Oh, sorry. Yes. Yes.

Q. And also indicates that -- at the bottom of the second paragraph -- mother returned home from work approximately five thirty, found father and baby. Seemed to be doing okay. Mother continued to check on father and baby periodically throughout the night?

A. Yes.

Q. Mother continued to be on the computer. I am unsure why the infant was not awoken to be fed during that period?

A. Yes.

Q. Did you look into the feeding schedule of the child?

A. Based on the testimony and the information we received, the minor child's schedule somewhat varied, especially since she had started teething. The minor child was more fussy and was not sleeping through the night the way she had been before that. And so it was -- the information that we got was that they were essentially letting her sleep when she was sleeping and would try to feed her when she woke up so that she

wasn't waking a sleeping baby.

Q. Well, wasn't generally though that the child fed every two or three hours?

A. Yes, generally. But it was my understanding that because of the issues with her -- I think she had had a particularly tough night the night before. And so they were allowing her to sleep. It's my understanding that Mr. Hinton told Ashley not to wake them, that they were going to try to sleep since she had not slept real well that night before.

Q. So the mother comes home at five thirty and doesn't attempt to feed the child or -- up until the time that he woke up and found the child not breathing?

A. Yes. That's the information we received?

Q. Which was ten -- was eleven o'clock?

A. Yes. That was the information that we received from our client as well.

Q. I'm going to show you Number 7. And that's another report from Greenville Hospital System, I believe?

A. Yes. It looks like it was a consult, I think, by Dr. Henderson again.

Q. And in that it also notes that mom came home and periodically checked on the baby and dad. Dad awoke

around eleven, and that's when -- doesn't say it here -- but that's when he discovered the child wasn't breathing?

A. Yes.

Q. So I think that the information that you had was the child was fed around three thirty?

A. Yes, I believe so.

Q. And did you ever check and ask who fed the child earlier that day, in the morning?

A. No. As I testified just a minute ago, I don't specifically remember about the feeding that morning. However, the minor child's mother was, according to both our client and then the testimony at trial, was asleep until very soon before she had to go to work. So I don't know that she would have had time to feed the minor child that morning.

Q. So the evidence was that she got home the previous night at five thirty and didn't get up the next day until eleven?

A. Well, I don't know what time she went to bed that night before, but, yes, that she got up approximately eleven, eleven fifteen.

Q. And went straight to work?

A. Yes.

Q. And then never fed or touched the child?

A. Well, I don't know about touching the child. But I don't know that, based on her testimony and the information we have, that she would have had time to feed the child that morning.

Q. Do you know if anybody checked to see if there was an empty or partially filled bottle of formula that might have been used in the home when the police searched the residence?

A. I don't believe there was anything on the return to the search warrant that said that. We did not have a chance to go into that home specifically because by the time we got the case they were no longer living in that apartment. But I don't know that there was anything specifically -- that there was a partially used bottle. Our client did give us the information that the minor child did not eat as much at the three, three-thirty feeding as she normally did.

Q. And so from the police report you don't recall them mentioning any baby bottles they saw?

A. Not off the top of my head, no.

Q. And did you ask Mr. Hinton what he did with the baby bottle after he fed the child at three-thirty?

A. I personally did not, no.

Q. And do you know if anybody asked him? Did you hear your father ask him that?

A. Specifically about what he did with the baby bottle after he fed at three-thirty?
Q. Right?
A. No.
Q. If there were a partially filled bottle of formula in the master bedroom that the police saw after the incident and that was a location that the -- Mr. Hinton did not normally place a baby bottle, would that be important?
A. If there was a baby bottle in the bedroom and that's not ---
Q. In the master bedroom. There's two bedrooms involved, just for the court's ---
A. Yes.
Q. We're kind of talking because we know this so much, but there were two bedrooms involved?
A. Right.
Q. There was the front bedroom where the father and the baby were. And then there's a master bedroom where the father and mother and the child slept in a crib?
A. Correct.
Q. And if there were a partially filled baby bottle in that room, would that cause you to investigate it further?

A. (No verbal response.)
Q. I mean the issue would be whether or not the mother had the child up in the middle of the night trying to feed her?
A. It is possible that that happened. I don't know that I specifically looked into that issue. I apologize, I don't have much more on that. We didn't look into the baby bottle in the bedroom issue.
Q. The prosecution's case generally turn on the proposition that the mother could not have done this; is that correct?
A. Their case, I think, less focused on that the mother couldn't have done it and more focused on the fact that they believed that Mr. Hinton was the one that was with the child during the time line that they developed.
Q. Well, we're going to get to that in a little bit from the trial testimony. But I think the opening statement in that case was she was eliminated as a suspect?
A. Right. Based on the testimony or based on the time line that they had developed.
Q. Which was the child's injuries occurred eight hours or less from the time of eleven o'clock?
A. Right. That's my understanding that they were

claiming that the injuries occurred to the child around two-thirty, but I'd have to look back specifically at that.

Q. We'll get to that. But the testimony, as you might recall, was eight hours or less?

A. I'd have to look back specifically. I remember -- two and two-thirty stuck out in my mind. That's why ...

Q. All right. Let me show you Exhibit Number 8 and ask you if you recognize that as another one of the medical records?

A. Yes.

Q. And in that is an exam, a skeletal survey?

A. Yes.

Q. Do you remember this document?

A. Yes.

Q. And first of all, it says it was done on a portable -- according to the State, it was done portably? Did you notice that in this record?

A. Can you point me to ---

Q. It's down here at procedure at the bottom, first paragraph?

A. Yes.

Q. The procedure was done portably?

A. Yes.

Q. Did you look into the reliability of portable x-rays?

A. Not off the top of my head, I don't think there was any question about that there were pretty specific injuries.

Q. Well, that there was the rib fracture ---

A. Correct.

Q. --- that was not discernable in earlier medical records ---

A. Right.

Q. --- x-rays? And was, quote, reasonably discernable on this portable x-ray?

A. Right. And then I believe it was also followed up by the autopsy that confirmed that as well.

Q. And there was a classic metaphyseal lesion?

A. Correct.

Q. Which I believe was testified to at trial, almost routinely as a fractured of the left leg?

A. Yes. That's my memory.

Q. Now, let me show you Number 9. And I know I probably shouldn't go into too much of the medical with you. But you were involved in the investigation of some of it?

A. Yes.

Q. And from that perspective did you do any research

on the metaphyseal lesions?

A. No. No, my focus was more the lay witnesses.

Q. There was, I think, testimony about a collapsed lung?

A. Yes.

Q. And did y'all look into the issue about the collapsed lung? It's evidence on Exhibit Number 9?

A. When you say did we look into the issue of it, you mean the issue that it existed?

Q. What caused it?

A. What caused it? I looked through the records that we had. I believe there was some testimony about different things, but I don't know that I specifically remember exactly what they said caused the collapsed lung. I know our client mentioned part of it when he was talking about the CPR, that that was one of the things he was worried about, that he was trying not to do, was harm one of the lungs.

Q. Do you know if the child was intubated?

A. I honestly don't remember. I would assume so.

Q. And you don't know whether or not the collapsed lung was caused by the intubation, the hyperventilation?

A. I do not know off the top of my head, no.

Q. Let me show you Number 10. This is the statement

of Frederick Glenn Mitchell?

A. Yes.

Q. Do you recall that from your file?

A. Give me just a moment. Let me look at it.

THE COURT: That's the statement of who?

MR. CHILDS: Number 10.

THE WITNESS: Number 10. A statement of Frederick Glenn Mitchell.

A. I vaguely remember this. I believe he was one of the EMS or one of the people with EMS.

Q. Okay. And did you see on the second page of that statement from EMS where he mentioned that the room where the baby was found was so darkly lit that they had to use flashlights to see?

A. I remember that testimony. I remember our client saying that was one of the reasons he laid down in that room because it was darker. He was hoping to be able to allow them both to sleep.

Q. Were you interested in that aspect of the case as far as your cross examination of Ms. Bright as far as her ability to see in that room when she allegedly checked on the child routinely?

A. I believe I did specifically ask her about what she did when she checked on the child? Did she go in the room? Did she turn the light on? To try to find

out, especially since as longer or later as it got in the evening, the darker it would be anyways, because they had windows. But I don't know that I specifically said, is it too dark to see anything?

Q. Let me show you Number 11. See if you can identify that?

A. This is information that the solicitor provided to us. I believe these were some of the notes that she took, that she specifically labeled discoverable material when she spoke with Ms. Bright.

Q. And so that was -- she disclosed the statements of the defendant?

A. No, these were, I believe, notes that she took when she spoke to Ashley.

Q. Right. But also it was in the interest of disclosing the statements of the Defendant they intended to introduce at trial?

A. Some of them, I think. From my memory this was specifically just because Lindsey Simmons always has, at least in the trials that I've dealt with with her, provides you as much information as she can. She's not trying to hold back or hide anything. So she was trying to make sure that we knew what information she'd been provided.

Q. In this note that you're provided by her it

states at the bottom that GMH Monday a.m., Defendant told Ashley that the potential charge carried about twenty years, but told her she'd only do a couple of years if she did it?

A. Yes, I do see that.

Q. Is that what she testified to at trial?

A. I don't know that that specific issue came up at trial.

Q. Do you recall her testifying at trial that the Defendant allegedly told her that if she took the rap for what happened, took responsibility for what happened, that she would get less time because she didn't have a prior record?

A. I do remember that issue. I didn't remember him saying that she would specifically get a certain number of years. I just didn't remember the trial transcript being that specific about what she said. I apologize.

Q. So the statement disclosed by Ms. Simmons to you was different at trial?

A. Not different just less specific.

Q. Well, he said the potential charge would carry about twenty years ---

MR. WHITMIRE: Objection. Asked and answered.

THE COURT: Overruled.

Q. All right. In addition to that it states here that she told prosecutors she thinks the Defendant was using drugs during the summer of 2009?

A. Yes. There is that listed here. That was not something that -- from my memory, that was not something that came up as an issue, that he was on drugs. Everybody said that he had been a good father.

Q. Right. But she told the prosecutor that the Defendant was on drugs in the summer of 2009?

A. Yes. Apparently she did.

Q. And that the Defendant had used marijuana and alcohol since the child's birth. And the child was five months old; right?

A. Yes. I see that here, yes.

Q. And this incident occurred on August the 15th; am I correct?

A. That's my understanding, yes.

Q. Let me show you Plaintiff's Exhibit Number 12. Do you recognize that?

A. Yes. This is a drug screen that looks as if it was collected on August 17th of 2009, taken from Mr. Hinton.

Q. All right. And so this was the day -- actually the next day after this on August 7th, this was

collected; is that correct?

A. August 17th.

Q. Oh, okay. August 17th. I'm sorry. And it was a hair strand drug test?

A. It was a five panel hair strand test.

MR. CHILDS: And I don't if Your Honor's familiar with those. They're frequently used in Family Court.

A. They are.

THE COURT: Go ahead. I understand.

Q. And were those all negative on behalf of the Defendant?

A. Yes.

Q. And did you see this report?

A. I believe this was one of the reasons that we didn't count the previous interview that we were talking about as anything specific to this case because he had passed the drug screen. He was not -- did not show any levels for a THC metabolite or anything on this test.

Q. And that's a sixty day time frame?

A. Based on my understanding those test are potentially up to sixty days, but it depends on the length of hair and those types of issues. So I don't know that you can specifically say that, but ...

Q. Well, what that says on the report is zero dash thirty, sixty day time frame?
A. Right. Basically, the way I read that is approximately zero to thirty or zero to sixty time frame.
Q. And you understand that Ms. Bright told the prosecutor that he had used drugs during the summer of 2009?
A. Yes.
Q. Did you investigate this hair strand test that was conducted at the request of DSS?
A. What do you mean did I investigate the hair strand test?
Q. Well, if in fact a hair strand test indicated that he hadn't used drugs in the summer of 2009, wouldn't that be important?
A. Yes. But we have the drug screen that showed that he had not -- or that he had passed the drug screen, that he did not show anything.
Q. Right. But Ms. Bright's telling the prosecutor that he used drugs the summer of 2009?
A. Yes. But we had a test showing that he was clean as of August 17th, 2009.
Q. Right. And so -- but wouldn't you be able to use that to show that she lied to the prosecutor?

A. I don't know that the prosecutor specifically asked her on the witness stand about drugs. So I don't know that ---

Q. Well, you could have?

A. Yes, but I don't believe that came out on direct and I also don't believe that the statement that we received from the prosecutor was a specific written statement from Ashley. It was just the notes that the prosecutor took.

Q. Well, when the prosecutor said Ashley told her she thinks the Defendant was using drugs the summer of 2009?

A. Right. But it wasn't a written signed statement by Ashley specifically.

Q. So did you consciously think about that or just ---

A. We looked at the drug screen that we had that showed that he was clean so that if we -- if that issue ---

Q. And you would have had that if she had testified?

THE COURT: Just one second. Let her finish.

MR. CHILDS: I'm sorry.

A. We had the information there so that if that came up at trial that we were able to refute that and would

be able to impeach her on that issue, addressed it. But as a general rule during a trial, and especially this one, there were a lot of issues with just emotion. But we weren't trying to point the jury at anything potentially negative about our client. So we didn't want to bring up the fact that somebody was accusing him of doing drugs. If that issue didn't come up, we didn't want to bring it up.

Q. All right. Wouldn't that address or impeach her credibility or reliability?

A. Based on the discussions that we had as a trial team, the potential damage of pointing out the fact that she thought he was doing drugs outweighed the potential of saying that maybe she was lying about that one issue. We didn't want to bring up a negative thing specifically about our client, even though it was potentially negative about her because she wasn't the one on trial. We didn't want to make something negative for our client who was the one on trial.

Q. But the perspective was that she supported him until -- well, the indications would be until February of '09 -- of '10. And then you got this in discovery after y'all were -- and so wouldn't this be something where she's basically trying to throw him under the bus?

A. I don't know that we saw it that way from a trial point of view because that didn't come up at trial.
Q. Okay. We're going to get to that. You also -- received a copy of the private autopsy on the child?
A. Yes, I believe so.
Q. (Hands Exhibit to witness.)
A. Yes. I believe this is the one that Chip Price had that he also discussed in his letter when he sent us the initial file.
THE COURT: What's that Exhibit Number?
THE WITNESS: This is Exhibit 13.
MR. CHILDS: Exhibit 13.
Q. And in that autopsy they were unable to examine basically the alleged classic metaphyseal lesion on the leg because it wasn't there?
A. Can you point me to specifically where you're looking at? I apologize.
Q. Let's see. The entire right first rib -- the distal femur proximal tibia fibula, right side ---
A. Yes. It's my understanding ---
Q. There are some things that were missing in the second autopsy or pathology August 19th, 2009?
A. I don't know if they were missing. I believe they were removed at the first autopsy. So I think they were kept in the State's evidence, but I wasn't

involved at this time so I can't tell you exactly why some things got transferred and some things didn't.

Q. But you remember seeing the autopsy where certain items that the pathologist in Greenville when they were reviewed weren't with the child when he did the autopsy?

A. Yes, I do remember that.

Q. And do you know if there was any follow-up to try and get an examination of those items prior to trial?

A. Not that I'm aware of. Part of what we looked at in this report was that this report did not necessarily help, based on the information that we had. So I think we were trying to move forward and find something. I guess find a different issue. We, ourselves, we did not get a specific expert to look at the autopsy. We have a friend of ours that is a pediatrician that we submitted that confidentially to him to try to have him review to see if there was anything about either report that caused him concern. As an appointed case, I know you're aware, it's hard to get funding very quickly. So we wanted to make sure that we used the resources at our disposal before attempting to try to go through funding for something like that. But it was our understanding that he looked at the initial autopsy report and said there

wasn't anything from that that concerned him or that we needed to, I guess, stop and look at again.

Q. Okay. So the answer to that was that you decided not to pursue further the issue of the examination of those items that were missing from the August -- from the autopsy examination by Dr. Fulcher?

A. Right. We did not follow up on the second autopsy that was done; correct.

Q. Now, let me show you Plaintiff's Exhibit Number 14. Can you recognize that?

A. Yes. It looks like the statement of Lindsey Bond.

Q. And that was a statement given to the police in August of 2008?

A. Yes.

Q. And I assume that -- it says late April of '09 this individual was Ms. Bright's brother?

A. Sister.

Q. Let's see. Where is it -- my sister. I'm sorry. And it's a statement that she said that Ms. Bright said she was in love with him, meaning Matthew, but he said he was not in love with her. Do you know the circumstances about this statement?

A. I do not.

Q. Did y'all look into interviewing Ms. Bond?

A. We did not. Ms. Bright and her family were not, I guess, very open to wanting to speak to us. We were representing Mr. Hinton at that time. However, this was not something that we hadn't been able to see or talk to Mr. Hinton about before, so ...

Q. Well, I'm not sure that it's favorable to Ms. Bright?

A. I don't know that it's favorable or not favorable to either party or to Mr. Hinton or Ms. Bright.

Q. Let me show you Number 15. See if you can identify that?

A. This seems to be the statement of William Fowler.

Q. All right. Now, is that one of the witnesses that you initially had a note of?

A. Yes, I believe so.

Q. And it's basically a positive note from him about Mr. Hinton?

A. Yes. This follows up on what Mr. Hinton and the other -- when we talked to him about it, I believe this was a man that worked with him at Pizza Hut.

Q. And basically a negative connotation about Ms. Bright?

A. Yes. I'd have to re-read it again to be very clear, but this was not somebody that said that he'd ever seen the minor child in person.

Q. He happened to come forward and given a statement to the Seneca Police on August 18th?
A. It looks that way, yes.
Q. Did you attempt to locate or talk to Mr. Fowler?
A. He was one of the people that Mr. Hinton mentioned that we -- I don't know if he was one of the ones that we thought we had a number for but didn't, but we reached out to Pizza Hut and were unable to specifically find at least two of the people that Mr. Hinton asked us for or asked us to look into at Pizza Hut. During this entire time, we also attempted to have Mr. Hinton reach out and find some of these numbers or information himself as well. And I can't say he didn't, but I don't have any notes that specifically say that he gave us that direct information.
Q. Somewhere, I think, and I could be wrong, but didn't Mr. Fowler -- is dispatcher for the Seneca Police Department?
A. I don't remember that off the top of my head. I can't say he didn't.
Q. All right. And Number 16 --
MR. CHILDS: This for Your Honor, it'll be DSS finding of fact in respect to ---
MR. CHILDS: Where is number 16? I've got

it.

Q. Was the DSS indication against Mr. Hinton?

A. Yes. It looks like that's dated September 2009.

Q. You're aware of the fact that once an individual is indicated by DSS they're entitled to review the file of DSS?

A. Yes. Once they're -- well, I believe throughout process, at least in Anderson, they have an open file policy that the person that is a subject of it can go and review the file.

Q. All right. And did y'all ever go over and review the DSS file?

A. We didn't represent Mr. Hinton on the DSS action. So, no, we did not go review the DSS file. We spoke to him a little bit about the DSS case. But the main issue on the forefront for us was the criminal case. The DSS action was subsequent to that.

Q. Well, were you concerned that there were any statements given to DSS or any records that were given to DSS that weren't given to y'all in the criminal case?

A. Based on the volume of what we had and reviewing it with our client, there wasn't anything specific that we were advised that he was aware of that was different from the DSS action. The file for the

criminal case was voluminous.
Q. So the answer would be, no, you didn't think there would be anything there?
A. No, we did not believe there would be anything from the DSS case specifically that we did not have in the criminal case. And as I said, our client reviewed everything that we had in the criminal case. And we were not a part -- we were not representing him during that period of time. So it would have been more difficult for us to gauge whether there was something that he knew of at that time that wasn't in the criminal case.
Q. I think -- correct me if I'm wrong -- what happened was he was served at the jail with that notice of finding, basically. And that was the end of his involvement with DSS as far as you know?
A. As far as I know they did not go forward with a trial like a merits trial against him, at least not while we were involved.
Q. Do you recall if Mr. Hinton told you that as part of the DSS investigation he gave a statement to DSS?
A. I know he said that he went and talked to DSS, yes. And I think it was maybe the day after they went to the hospital.
Q. Did he indicate to you that they came and visited

him at the jail?

A. That DSS came to visit him at the jail? No, I don't remember him mentioning that.

Q. Did he indicate to you that they were favorable towards him as far as their discussions of what happened?

A. I don't remember him speaking too much about the DSS case. As I mentioned, even for him, the criminal case was on the forefront. And as they did not seem to be pursuing the DSS action, we were more focused on the criminal case.

Q. So you don't remember?

A. I don't remember specifically what you're asking, no, sir. I apologize.

Q. You don't remember him discussing it with you that DSS investigators talked to him and they had a conversation about the situation and they were favorable to him?

A. I don't remember anything in writing happening from any of those.

Q. How would you know without looking at the DSS file?

A. We asked our client specifically about those issues with DSS and we gave him all of the information that we received from the criminal case. Every time

we received anything, we sent it on to him. I don't know that I specifically said, is there something in writing in the DSS case that's not in writing in this case. But we provided all the information to him specifically for him to review as well so that he could hopefully help clarify.

Q. How do we know what was in the DSS case?

A. He was the one that was actively involved in that.

Q. He got served with a notice of finding while he was in the detention center; right?

A. He also spoke with them on his own.

Q. And so how would you know what they were beyond their file?

A. I would assume he would know what they wrote down at least in his presence. And I don't know that there was anything in writing that they used against him. They, I believe, closed their case soon after that. If the case does not go to court, it was my understanding that those files then do get closed and essentially that file gets ---

Q. Without a finding?

A. Right.

Q. And so despite the notice obviously, the lack of further proceedings indicates that DSS didn't pursue a

finding against Mr. Hinton?

A. Correct. They indicated the case but did not pursue it to a merits hearing and a finding, as far as we were aware.

Q. Okay. Now, let me show you 17. And you reviewed that document, also from your files?

A. Yes. This looks like a copy of a search warrant.

Q. Executed on August the 20th, I believe?

A. It says dated Monday, August 20th on the front.

Q. And so that was several days after the incident?

A. Yes.

Q. And at that time did they request a search warrant of Mr. Hinton's -- a photo of his palms and measurements of his hands, his left and right hands?

A. Yes.

Q. And do you recall ever seeing any of those photographs that they took?

A. I do not off the top of my head. I know there was testimony about them. I don't think they were entered into evidence at trial.

Q. Okay. And the purpose of the palm prints and the measurements was to -- an attempt by the prosecution to match those up stuff with bruises found on the child?

A. I would assume so, but I don't know exactly what

they were doing with that. This is something that the police did pretty early on in the case.

Q. All right. Would you know of any other reason they would be measuring his hands and taking photographs of them?

A. No. I just meant I can't speculate as to why the prosecutors do certain things.

Q. All right. You do recall testimony about the alleged fingerprints on the victim?

A. I vaguely remember the testimony about the ---

Q. Well, that was more of your father's kind of cross-examination of that?

A. I believe so when he was cross-examining maybe one of the doctors but additionally one of the police officers. I think that was involved in taking ...

Q. But my real question is, I've never seen a copy of those photographs and I asked for your whole file?

A. Yes, sir. I don't have a memory of specifically looking at the pictures of his hands.

Q. All right.

A. I can't -- we provided everything we possibly thought we could that was not just multiple copies of the same thing. But I don't remember specifically looking at the -- I did not go back through the pictures from the file. I went back through most of

the written stuff that I had in the file.

Q. You do recall the testimony ---

THE COURT: Hang on for a second.

MR. CHILDS: Yes, sir.

THE COURT: Let's take our afternoon break.

MR. CHILDS: Yes, sir.

THE COURT: If you don't mind. Are you in a position to stop at this stage?

MR. CHILDS: Yes, sir, I am.

THE COURT: All right. Let's take about a ten minute break and we'll be back.

Now, Ms. Senerius, you know you can't speak with anybody about your testimony; okay?

THE WITNESS: Yes, Your Honor.

THE COURT: Very good.

(WHEREUPON, court stood at recess for a short break.)

Q. All right. Let me show you Plaintiff's Exhibit Number 18. And this is more relevant to you. I believe you did the cross of Desmond Holland?

A. Yes.

Q. And this is a copy of his alleged fiancé, Jamira Robinson?

A. Yes. It looks like her work schedule.

Q. And are you familiar with that?

A. I'm sure I reviewed that, but I didn't look into specifically Jamira Robinson. I cross-examined Mr. Holland.

Q. Oh, you were specifically interest in Mr. Holland?

A. That was who I cross-examined, yes.

Q. Right. But Mr. Holland testified, I think that the girlfriend's work schedule confirmed his story about hearing a noise at two-thirty in the afternoon?

A. I don't know that he said that her work scheduled confirmed that. He said that's why he believed that there was something that happened at a certain time.

Q. Okay. And so that would be the last -- the week of August the 16th. And his fiancé was Jamira Robinson. Do you remember that?

A. I remember that names, yes.

Q. And indicates that on Sunday, which was, I believe the date of the incident, she was at work at three fifteen?

A. Yes, that's what it says.

Q. And the other dates indicates that she was at work at five fifteen. But the previous Monday she was at work at 2:30?

A. Yes. Monday the 10th, it looks like.

Q. And Mr. Holland came forth to the police several

days after the alleged incident; said he heard something?

A. I don't know that he came forward. I thought they were canvassing the area and spoke to him at that time, yes.

Q. And his testimony was that he heard a noise upstairs in Mr. Hinton's apartment about two-thirty as he was walking his fiancé to the door, basically? And the transcript will show it; won't it?

A. Yes, that is ---

Q. But your understanding of his proposed testimony was that his fiancé was there when he heard the noise.

A. No. My understanding was that his fiancé had left by the time he heard the noise.

Q. Okay. All right. And then did you ever talk to Jamira Robinson?

A. No.

Q. To find out if she'd heard anything or knew of anything when she got home?

A. No.

Q. Did you know that Desmond Holland was -- knew Ashley Bright from high school?

A. I thought he was specifically questioned about that on the witness stand. I did not know that he knew her from high school.

Q. Did you listen to his audio interview?
A. I'm sure I did but that was years ago.
Q. All right.
A. I apologize. My memory is more from the trial.
Q. All right. If you had listened to it and heard that he knew Ashley Bright from high school, would that have affected your cross-examination of him?
A. I don't think it would have changed it too much because I was more trying to find out from him what he thought he heard, if it was so important, why he didn't follow up with it and trying to figure out -- I guess trying to ask those questions and show that obviously the noise that he heard wasn't as extreme as he was making it out to be that day, since he didn't really follow up with it, other than just knocking on the door a couple of times.
Q. All right. And did you listen to the audio and hear the officer characterize the noise he heard from the apartment as a whimper to Mr. Holland?
A. I specifically don't remember listening to that. That's what I'm saying. My memory of Mr. Holland is from the trial.
Q. Did Mr. Holland -- and we'll get to that. It's in the transcript. But Mr. Holland testified he didn't know either one of these people?

A. Yes. He testified that on direct examination from my memory from the solicitor.

Q. And if the audiotape indicates that he knew Ms. Bright from high school and his girlfriend knew Ms. Bright as well, would that have affected your cross-examination of Mr. Holland?

A. His girlfriend, Ms. Robinson?

Q. Yeah. His fiancé?

A. His fiancé. I ---

MR. WHITMIRE: Your Honor. That's asked and answered. Objection.

THE COURT: Overruled.

Q. I would play that audio but we're having trouble with that.

THE CLERK: Well, I've got another source if we can take two minutes?

MR. CHILDS: Okay. Is that all right, Your Honor?

THE COURT: Sure.

MR. CHILDS: We can come back to that. We can come back to this if you want me to.

THE CLERK: Okay. Because now it's not giving me my password.

MR. CHILDS: I saw that.

Q. We'll get back to Mr. Holland.

MR. CHILDS: And, Your Honor, I apologize. Mr. Shirley has been real cooperative with me. He called me back Friday. We were talking about playing the audio. We feel like we could do it off the court reporter's system. This morning he's been helping us, trying to get us to play it.

THE COURT: Okay.

MR. CHILDS: We'll get back to it. But I wanted to say that he's been exceptional. And thank God we don't have a jury.

Q. So let me shift gears from Mr. Holland, and I'll get back to him. But as far as Jamira Robinson is concerned, y'all made no attempts or efforts to talk to her?

A. Not from my memory, no.

Q. And so even though it appeared she got -- she left work at seven, according to those work records?

A. Yes.

Q. All right. Now, let me show you what's been marked Number 19 and see if you can identify that. Is that another report that y'all received from the police as far as that's concerned?

A. It is. It looks like a supplemental incident report.

Q. Now, I know your father did most of the work on

the medicals. But that report indicated that Dr. Cromer talked about the bruising on the chest of the child and believed the bruise could be an old bruise?

A. Yes. That's what this says.

Q. And was there any testimony from Dr. Cromer at trial?

A. I would have to look back specifically. I remember there being testimony about the bruise, but I don't remember -- I think it may have been from more than one source that testified about the bruise.

Q. Right. But most of the testimony was about the bruise being relatively new?

A. Relatively new. I believe the time frame was discussed by a couple of different doctors.

Q. Now, I show you what's marked Number 20. And that's also another incident report?

A. Yes.

Q. From Officer -- Investigator Roundy?

A. Yes, sir.

Q. You didn't cross on Roundy; did you?

A. No, sir.

Q. In that report, however, it states, I've watched both couples while interacting in the E.R. and saw that while talking to the doctor, Ashley showed no emotion. And when she asked her husband for his phone

she called someone, started the conversation off like she was upset. When she hung the phone up and came to where we were still talking to her husband, she was dry-eyed and again showed no emotion or concern?

A. Yes. From my memory, there was testimony about that.

Q. Did you cross-examine Ms. Bright about it?

A. I did not cross-examine Ms. Bright about that specifically, no. That was testified to from someone else, one of the offices. I believe actually Officer Roundy.

Q. He testified as to that particular relation of events?

A. I believe ---

Q. That she had a flat -- just a flat affect.

A. I believe he testified about her affect that day. I don't know about a specific phone call, but he testified about her affect that day and about subsequent information that he'd discovered about it.

Q. All right. Number 21. That's another incident report or another page?

A. Yes.

Q. By Officer Roundy.

A. Yes, page five of ten is what it says.

Q. At the bottom it says during my interview with

Ashley, I observed at no time did she ask about the condition of the child, how the child was doing or when she could see the child. She also never inquired as to how the child could have been injured?

A. Correct.

Q. Did you cross-examine her about that?

A. No. That information was coming out through the officer.

Q. Well, did you ask her if she talked to the officer and never asked about the condition of the child or how the child was doing or if she could see the child?

A. I do not believe I specifically asked her about that, no. She was presenting as a grieving mother on the witness stand. And through trial strategy, we had discussed the idea of not being extremely harsh, I guess, specifically against her on the witness stand; to try to bring out evidence and other issues through other witnesses and through other cross-examination. Based on the sensitivity of the case, we were attempting to try to get that information through other sources, especially sources that did not have, you know, police officers or other sources that were a little bit further away from the victim.

Q. Well, she denied making those -- failing to ask

the officer about the condition of the child, how the child was doing or when she could see the child, and not inquiring about how the child was injured. Wouldn't that be relevant to the case?

A. Can you rephrase that again? I'm sorry. I didn't follow.

Q. Well, if she was interviewed by Officer Roundy and never asked about the condition of the child, how the child was doing or when she could see the child, and that she never inquired about how the child could have been injured, wouldn't that be important to bring out on cross so that Officer Roundy could be asked about that?

A. As I mentioned, we were trying to -- you had a grieving mother on the witness stand. And we were trying to get out evidence like that or other information to potentially poke holes in the State's case through other witnesses versus looking as if we were beating up on the victim's mother throughout the trial.

Q. Well, all right. Let me show you Plaintiff's Exhibit Number 22. That's another report of Officer Roundy.

A. Yes. It says page seven of ten.

Q. And in that report Matthew was indicating that

Ashley would sometimes get upset and frustrated with [redacted] when she wouldn't stop crying?

A. Yes. That was something that he had mentioned to me as well.

Q. Would put [redacted] down and walk away? Or give her to him and [redacted] would stop crying?

A. Yes. That's what he mentioned to me.

Q. Did you question her about that?

A. From my memory, we touched on that. I don't know that I repeatedly went into it. I think we talked about who would console the child and who was the primary caretaker and whether or not she would get frustrated. And I can't remember if it was a statement or if it was specifically at trial -- I'm trying to remember the things I've read -- but that she said she would walk outside or something of that nature.

Q. Do you remember a discussion from Mr. Hinton about whether or not she wanted the baby initially?

A. We talked about that and I think that was also somewhat drawn out or tried to be drawn out on Mr. Hinton's direct examination. From the perspective of our client, I think he believed that she was worried how she would be perceived since she was pregnant and not married. And I think she said that he was worried

how she would be perceived. So I think they both were kind of pointing the finger at each other on that one. But both of them said that once [redacted] was born that they both fell in love with her. I mean, I think that information was -- followed along with the information that we had.

Q. And after this section here, the third paragraph where it talks about [redacted] -- him bonding with [redacted] spending -- he wouldn't know what to do without her?

A. Yes.

Q. It indicates here that after the interview Sergeant Jones and I spoke, I was told Ashley had requested an attorney and refused to talk with me any longer on that?

A. Yes.

Q. Did you ask Ms. Bright about that?

A. About her choice of hiring an attorney?

Q. About her refusing to speak to the police at a certain point?

A. No. As a general rule when someone retains an attorney most defense attorneys will ask the person not to speak with police officers, so I didn't find that strange.

Q. Did you ask her, basically, why did you lawyer

up?

A. No.

THE COURT: Move forward. Isn't that a Doyle violation to ask that question?

MR. CHILDS: Excuse me?

THE COURT: Is that a Doyle versus Ohio violation if you ask that question.

MR. CHILDS: I'm not sure.

THE COURT: Commenting on the parties claiming the Fifth Amendment?

MR. CHILDS: Well, I'm not sure -- well, not in relationship to a person who is not a defendant.

THE COURT: She's a potential defendant?

MR. CHILDS: Yeah. Well, she certainly is. But it certainly would be an area of inquiry as least to whether or not she ---

THE COURT: I disagree. Move forward if you wouldn't mind, please, sir.

MR. CHILDS: Yes, sir.

MR. WHITMIRE: I object, Your Honor, I would ask that counsel's comment that she potentially is in the present tense a defendant be stricken from the record.

THE COURT: I said that. I said that in the case; okay? So that's just -- from what I'm hearing

from this question that's what I think. It doesn't mean anything in this hearing.

Okay. Go ahead.

Q. Let me show you Exhibit Number 23. And Exhibit Number 23 is another report by Roundy about -- and at the time that the child had died?

A. It's page eight of ten of the same report.

Q. And in that report, could you tell me what it says on the fourth paragraph?

A. The fourth full paragraph?

Q. Yeah. Where it starts with everyone.

A. Everyone showed emotion over this information, except Ashley who showed very little, if any. I spoke with the attending physicians who were present at the time the family was told of the condition of [redacted] and asked about the response from the family and Ashley. I was told it was flat-line and not normal.

Q. You didn't ask her about that; did you?

A. No. I did not specifically ask her if she had a flat affect when she was told that her daughter had died.

Q. Let me show you 24. And this is another report. It looks like page nine of ten of Officer Roundie's report ---

A. Yes.

Q. --- that you have. And I'll direct your attention to the middle paragraph where it says when Dr. Woodard -- could you tell me what that says?

A. When Dr. Woodard was asked if the child could have been able to be fed after the head trauma, Dr. Woodard said, no, as the child would have been unconscious immediately upon receiving the head trauma that she had received.

Q. And would that be contrary to Ms. Bright's testimony that she checked on the child and found the child breathing normally?

A. I don't know that it would be contradictory. I don't know that she, not being a medical professional, would know if somebody was unconscious or breathing. I don't know how close she got. I questioned her about it, but she said she didn't specifically enter the room. That she would basically peek her head in and go back out. So I don't know. They both testified that they woke up and she was breathing normally throughout at least some of that process. I don't know that either testified that the minor child actually woke up at any time during the time that the mother that was checking in. I think it was the father that woke up.

Q. I show you 25. And this is an indication of a

statement of Officer Jones, page two of three of his report?

A. Yes.

Q. And I direct your attention to the third paragraph down where it starts, about the middle of the paragraph, Ashley said Matthew had texted her to tell her approximately four thirty, four forty-five to lie down for a nap?

A. Yes.

Q. And from there the report said she arrived home after five thirty to find him still in bed asleep. Ashley said every thirty to forty minutes she would check on them, but noticed between the hours of eight and nine, that the victim's breathing was louder than normal?

A. Yes.

Q. And also that Ashley stated that the victim would usually take a nap anywhere from three-thirty to five for about two hours, and would normally eat three to five ounces of formula every couple of hours. And Ashley confirmed that the victim was not waking up and not eating. That was way out of the ordinary for her?

A. Yes.

Q. Did you ask her about the routine for feeding of the child?

A. I did not ask her about the routine for feeding. We did discuss the issue of the louder breathing. And we did talk about, I believe, that the minor child had not been sleeping very well the night before.

Q. All right. And Mr. Fowler, the witness we discussed earlier about potential witnesses, when we first started testimony?

A. Yes.

Q. Later on in this report it indicates that Mr. William Fowler, a Seneca City dispatcher, stated he worked with Matthew and Ashley before?

A. Yes.

Q. Did you ever attempt to check with the City of Seneca about the whereabouts of Mr. Fowler?

A. No, I didn't. It was not my understanding that he had any specific information regarding the incidents that day. So I think that was maybe part of the reason that I didn't look at that specifically.

Q. Let me show you Plaintiff's Exhibit Number 26. And that was a statement given to police on August the 17th at Oconee Medical Center by Ashley Bright; is that correct?

A. Yes.

Q. And that statement indicates that she would check -- she got home and checked on Matt and [redacted] And

thirty, forty minutes later, went and checked again. She was a little cold so I put another blanket over her legs. I continued to check in thirty to forty minute intervals; everything seemed fine?

A. Yes.

Q. Is there any indication in this statement about the alleged heavy breathing?

A. Not specifically, no.

Q. Well, is there anything in here about heavy breathing?

A. No, not ---

Q. That she testified to at trial?

A. There's nothing specific in this statement about heavy breathing, no.

Q. And did you cross-examine her about her statement to the police?

A. I talked to her a little bit about her statement, but I asked her specifically about the heavy breathing that she had said in another place or that she had testified to before that.

Q. Did you ask her why didn't you tell the police that on August 17th?

A. I would have to look back at the record to be sure.

Q. All right. She also says the blanket is pulled

up a little high so I pulled it back down near her armpits?

A. Yes.

Q. And am I correct that the State's position in this case was that it would have been difficult for her to get the child out of bed because she had to lean over Mr. Hinton?

A. It was my understanding that their position was that it would have been difficult for her to have removed the child without waking Mr. Hinton and then placing the child back without him knowing it.

Q. Okay. All right. Well, did you ask her about what kind of sleeper he was, whether he was a heavy sleeper?

A. I asked her about his breathing because of her talking about the minor child's heavy breathing. We asked her specifically -- I asked her specifically about, is it possible that she got that trait from her father.

Q. Did you ask her about his heavy sleeping?

A. I'd have to look back at the record.

Q. And did you ask her about her ability to reach over him and pull the blanket down near her armpits?

A. No, because at that time, that was one of the instances that Mr. Hinton had mentioned that she would

-- that he was also awake. So it wasn't, it wasn't an incident that during her testimony seemed to be consistent with what she'd said here; that he had woken up at that time too. I think one of them said that Matthew actually pulled the blanket down. And Ashley, I guess, in this statement says that she did. But they both agreed that that action happened, that the blanket was moved down below her face.

Q. Let me show you Number 27. Now, I believe Number 27 was a journal that was recovered by the police. Is that your recollection?

A. I think it was a spiral notebook that also included like math homework, things of that nature.

Q. And Exhibit Number 27 says, love Ashley?

A. Yes.

Q. And on the second page of Exhibit Number 27, this letter says that I'm stressed out because of the same reasons as you. Money, bills, your mom finding out about Bri. Was that an issue in the trial in her testimony?

A. What, specifically?

Q. About Mr. Hinton's mother not knowing about Bri?

A. She testified that it was Mr. Hinton's choice to not have his mother know. And Mr. Hinton testified that it was her choice not to have his mother know.

Q. Doesn't that statement in this letter indicate that was her concern?
A. Well, it says that I'm stressed for the same reasons as you. So it indicates to me that they both had a concern.
Q. All right. Wouldn't that be an efficient cross-examination of her issue saying she said Mr. Hinton didn't want his mother to know about the child. Mr. Hinton said she didn't want -- that it was Ms. Bright's idea not to tell her mother about the child. Ms. Bright testified that she wanted to tell him (verbatim).
A Yes.
Q. And so her being stressed over your mom finding out about Bri, wouldn't that be effective cross-examination of her?
A. I believe it was an issue that did come up through her testimony and his testimony. Many of the things that he contradicted or that Mr. Hinton was giving us saying that she was incorrect, we wanted to bring out on his direct and allow him to specifically address those issues versus just looking as if we were beating up on Ashley. We wanted to try to let him tell his side of the story and have that be something that he specifically spoke about. However, I know

that that issue was addressed on her direct examination, other than asking her if she believed that.

Q. And we'll get to that specifically from the testimony. So your idea would be -- would this letter, in your mind, confirm your client's testimony that it was Bri (verbatim) who was concerned about his mother knowing about the child? I mean, Ms. Bright?

A. No this letter to me says they were both concerned about it.

Q. All right. I show you Plaintiff's Exhibit Number 28. Is that another section taken from the journal recovered by the police?

A. Yes.

Q. And on the second page of that, there was an indication here, the first paragraph there says, I am scared you're going to leave me after I have this baby.

A. Yes.

Q. Did you ask her any questions about whether or not this child was interfering with her relationship with Mr. Hinton?

A. No. That portion of the letter was concerning because we thought it may lead the jury to believe that he didn't want the child, which I don't know -- I

wasn't in his head before the child came into this world, but he specifically talked about that once she got here, he fell in love with her. And that he bonded with her and was close with her. This was from 2008, so there had been a dramatic change in their lives that they had a minor child throughout this process, after that letter.

Q. Wasn't it a relevant inquiry that Ms. Bright's concern that the baby would come between him and her?

MR. WHITMIRE: Objection, asked and answered?

THE COURT: Sustained.

Q. Did you ask Ms. Bright about Mr. Hinton's broken hand?

A. I don't believe so, no.

Q. And why is that?

A. Well, as Mr. Hinton then testified to, that came not too long before the alleged incident here and was potentially -- could look to the jury as if he was -- had some aggression. And we were trying not to paint him that way.

Q. Well, that would be dealt with on a motion in limine; wouldn't it?

A. Well, but he testified to it himself.

Q. On direct he was asked about it by his own lawyer

A. Right.

Q. --- did you have a broken hand?

A. Right.

Q. And so the question was how did the hand get broken, whether or not that was relevant -- a relevant question by the prosecution; isn't that correct?

A. I'm sorry. Can you say that again?

Q. Your concern was that a question from the prosecution about how did the hand get broken?

A. No, my concern was that if Ms. Bright testified about that specifically, I didn't know exactly what she would say, that she could somehow make it look even worse, as if he had this aggression. And not knowing exactly what her answer was going to be, I didn't want to open that up. We wanted to let Mr. Hinton speak about it. Not open that up ---

Q. Right. But couldn't you have had a motion in limine say, I'm going to ask a question about the defendant's broken hand at the time of this incident. I expect that the witness will probably try to interject something about how the hand was broken. And it's not relevant, Your Honor. So I'd like your ruling on that issue.

A. But we specifically had -- he specifically

testified about it.
Q. I understand that. Later on he testified about it on direct examination. And then he got cross-examination exactly then and said, how did you break your hand? Nobody objected to the relevancy of it.
A. Right. Because we wanted to allow him to explain that.
Q. If it wasn't relevant, why would you want him to explain that?
A. We wanted him to be able to say his side of the story versus bringing it up to her?
Q. Well, why do you think it was relevant how he broke his hand?
A. I don't know that I can answer that right this second. I'm just telling you why I didn't bring it up to her. If it was relevant to him, and I definitely wouldn't have wanted to bring it up to her.
Q. Right. But my point is you could have asked her that question and asked the Judge to rule on whether or not it was relevant how he broke his hand?
A. I understand. I don't know that we knew exactly at that time how the case would play out and that we would specifically ask him about that in the future. So I didn't want to bring it up to her ahead of time if we weren't going to go into it. I mean, it was

something that ...
Q. Wouldn't her confirmation that the Defendant had a broken hand challenge the evidence that there were bruises from squeezing on the child?
A. I don't believe so because I believe he's -- I mean, his ---
Q. Wasn't the State's position that the child was squeezed with two hands?
A. I believe they speculated about that, yes.
Q. Yes. And so wouldn't at least Ms. Bright's confirmation that indeed he had a broken hand at the time of the incident help the defense in that case?
A. Well, he had use of the hand. It wasn't completely in a cast. So I don't know that that would have done anything but potentially allowed the door to be opened about how that got broken and to go into that in even more detail.
Q. Why do you think she would be allowed to testify about how the hand got broken?
A. If I asked her about it.
THE COURT: That's the question you asked. Let's move forward. This broken hand is not bringing up a lot; okay?
MR. CHILDS: All right.
Q. Now, I'm going to skip over some of that ---

MR. CHILDS: I'm sorry, Your Honor.

THE COURT: That's okay. I mean, you're doing your job.

Q. Let me show you Plaintiff's Exhibit Number 34.

A. Okay.

Q. And are those phone records that were subpoenaed or obtained by the police relative to Ms. Bright's phone?

A. Yes, I believe so.

Q. And on the last page there, there's a call to 9-1-1?

A. Yes.

Q. That was at eleven fifty-three?

A. Yes.

Q. I'm sorry, ten fifty-three?

A. Ten fifty-three.

Q. Now, below that are other phone calls that were made. One at ten thirty-four. Made or received. One at ten thirty-four, one at ten twenty-eight, one at eight forty-seven, one at eight thirty-two. One at six fifty-nine. Did you investigate these telephone calls?

A. I'm sorry, this list seems to be going backwards. Are you talking about the next morning?

Q. No. No. If you go down from the 9-1-1 call ---

A. Uh-huh (affirmative).
Q. --- you'll have another call there that was at ten thirty-four?
A. Yes.
Q. And then a call before that at ten twenty-eight?
A. Yes.
Q. And a call before that at eight forty-seven?
A. Yes. I don't know that -- I believe -- I was under the impression that some of those could be text messages.
Q. All right. Well, the 9-1-1 call is no text message?
A. Correct.
Q. Right. And that's -- according to the front sheet, it's the number of seconds involving the call, seven hundred and sixty seven from 9-1-1 call?
A. Right.
Q. And a hundred and sixty-eight seconds for the call before that. And the call before that was two hundred and two?
A. Yes.
Q. Does that seem to make more sense?
A. Yes.
Q. Did you look into those phone calls?
A. No. I did not specifically look into those.

Q. Do you know what she told the police about those phone calls?
A. Not to my knowledge, based on the information that I remember.
Q. Did you review those phone calls with Mr. Hinton?
A. I know everything was sent to him. I don't know that I specifically reviewed those phone calls with him. I don't know that -- like I said, I know there was a lot of material that was sent through, but I don't recall having a conversation specifically about those.
Q. And Donna Eller also testified; is that correct?
A. I believe so, yes.
Q. Were you the attorney that cross-examined her?
A. Is that the grandmother?
Q. Yes?
A. Yes.
Q. And you didn't cross-examine her at all with questions?
A. No. We did not ask any questions of her.
Q. And so you don't know if these phone calls to and from 882-3037 were to her mother?
A. I do not know.
Q. And you never investigated that?
A. Not from my memory. I don't believe we

specifically looked into that issue.

Q. Let me show you Plaintiff's Exhibit Number 36. Is that the alleged work record of Ms. Ashley Bright?

A. Yes. It seems to be.

Q. And was a custodian of records there to testify about that?

A. No.

Q. Who testified about her work schedule?

A. I believe she testified about her work schedule, and we did not have anything from our client that said that that was incorrect, him having been there that day.

Q. And the police officers testified about this schedule?

A. I think they'd gotten the information from her and then obviously potentially this.

Q. Did you ever question the accuracy of this work schedule?

A. No. I had no reason to believe that that wasn't correct. I mean, that includes in discussing the time frame with my client, he corroborated what was listed there.

Q. All right. Let me show you Plaintiff's Exhibit Number 38 -- 37, sorry.

MR. CHILDS: And I'm going to apologize to

the Court. There are bold markings on this that I made that say A.M. And two-oh-nine and two ten. I'm trying to figure out the times because I'm not good with military.

Q. But let me show you that.

MR. CHILDS: And just for the record, I added those to it.

Q. Do you recognize that?

A. Yes.

Q. What is that?

A. I believe these were calls, jail calls, I believe.

Q. These are text messages the night of the incident?

A. Oh, let me look at this.

Q. Am I correct?

A. Yes, you are.

Q. All right. And this is for the text phone number for Mr. Hinton; is that correct?

A. Yes. And Ms. Bright.

Q. Well, it looks to me like -- I'm not sure. But it looks like just Mr. Hinton was receiving these text messages and sending them?

A. Right. I meant I believe the text messages were between Mr. Hinton and Ms. Bright.

Q. Okay. But this is Mr. Hinton's phone records? Text message records?
A. I believe so, yes.
Q. And do you remember Ms. Bright testifying about it being unusual that Mr. Hinton did not want his mother to come over?
A. Yes.
Q. And do you remember the testimony -- basically, they introduced his text message records through her testimony?
A. That she corroborated that those were text messages back and forth between the two of them, yes.
Q. All right. And did you review the text messages?
A. Yes. The notes on this side here to the right were -- look to be my father, Mr. Senerius's, handwriting.
Q. But you did the cross-examine of Ms. Bright?
A. I did.
Q. And her testimony was that the -- him not wanting her mother to come over was unusual or out of the ordinary?
A. Yes.
Q. And Mr. Hinton told you that actually his (verbatim) mom was on pills, that's why he didn't want her over?

A. I would have to look back through my notes. I don't have that memory specifically.
Q. Well, the note here says by -- I don't want your mom coming over. The note says, Ashley's mom was on pills.
A. That's a specific note that my father wrote. That's what I'm saying, I don't remember him specifically saying that to me.
Q. Okay. Did you ask Ms. Bright if her mom was on pills?
A. No, I did not.
Q. Now, the second page of these text messages at the top is the reply to Mr. Hinton's text messages. And the answer to that was even if she's sober. That was Ms. Bright sending a text message to Mr. Hinton after he said he didn't want her mom coming over. And she texted back and said, even if she's sober?
A. Where are you specifically looking. I'm sorry?
Q. Second page, top left?
A. I'm just not seeing it, I guess.
Q. At the very top. Very, very top. I'm sorry. I was out of order on my sheet. After he said, just starting to think about shit. I don't want her coming over if she steps foot in the apartment for the next week, I will leave. And on the next page, her

response was what?
A. Even if she's sober, question mark.
Q. Okay. And did you cross-examine her about that?
A. No. We were trying to focus on that day and that indicates that the grandmother was not there.
Q. Okay. Well, explain that to me. She was saying his behavior was very unusual in not wanting his mother to come over there -- her mother to come over there. Her testimony was, that's very unusual that he didn't want my mother coming over?
A. Yes, which also was somewhat indicated by him saying he'd just started thinking about stuff ---
Q. Right.
A. --- it seems as if she had been over there. And I believe in my conversations with him, Ashley's mother was over there quite a bit.
Q. Right. But his response to that is, I didn't want her over there because she was on pills?
A. That's what he told us. That was not what he responded to her that day.
Q. But her response to his text, I don't want your mother over here, was even if she's sober?
A. Yes.
Q. And so doesn't that corroborate Mr. Hinton's testimony that he didn't want her mother over there

because she was on pills?

A. It does sound like it corroborates that premise, but what I was saying is we didn't specifically go into that because she was not there that day. They were focusing on the time line from that day. And there was no way that us introducing her being on pills proves that anybody else potentially did anything.

Q. She was saying that Mr. Hinton's behavior was unusual?

A. Yes.

Q. That he had no good reason to not want her mother over there?

A. I don't believe that's the language she used but ---

Q. Well, you look at her testimony. We'll get to that in a minute. But there's her response in her own words; okay?

A. Yes.

Q. Even if she's sober?

A. Yes.

Q. And you didn't ask her about that?

A. No.

Q. Let me show you State's Exhibit Number 9 from the trial. Can you look at that?

A. Yes.
Q. Can you tell me why the, even if she's sober response by Ashley Bright is marked out in that exhibit?
A. I don't specifically remember.
Q. Did you review that exhibit before it was admitted into evidence?
A. We -- the attorneys sat together and went through things. And I believe we looked at it. I don't, I just don't remember why that was marked out.
Q. Well, even though as a matter of discretion, you might not want to cross-examine her about it, you would certainly want that in evidence to corroborate your client's testimony; is that correct?
A. I don't see why I wouldn't, but I just don't remember off the top of my head why that was scratched out.
Q. You don't remember -- okay. And so you don't know why it was scratched out. You don't remember it being scratched out?
A. I just don't have a memory of -- I mean, that was in 2011 and I apologize, I just don't have a memory of that specifically.
Q. Okay. All right. Now, let me show you State's Exhibit -- Plaintiff's Exhibit Number 38. Isn't that

another incident report?

A. Yes. It looks like page one of two.

Q. Is that the search of the residence?

A. Yes. Looks to be a review of the search.

Q. And does it indicate at the top of that exhibit that the master bedroom was observed by the police officers?

A. Can you point to where you're referencing?

Q. If I can find my copy of my exhibit, I'll be glad to.

A. I think this may be your copy.

Q. Oh. I'm sorry. I got a copy. But on page -- it's highlighted. Sorry. On the second page of that, it indicates that certain items were observed in the other bedroom. Do you see that?

A. Yes. Bedroom number two.

Q. Would you read that to the Court?

A. The highlighted portions?

Q. Yes.

A. There was a sofa in the room. I saw a dirty diaper rolled up on the back of the sofa. I saw a baby bottle containing what appeared to be formula, a third full on the bottom shelf of the TV cart. I saw a baby crib in the far left corner of the room that had a broken mobile. The hanging part of the mobile

was lying inside the crib on the mattress. I noticed two of the mobile animals were missing.

Q. All right. Did you -- do you remember reading that portion of the incident report?

A. I don't have a distinct memory of reading that specific portion of the incident report.

Q. Did it indicate though that in the master bedroom there was a one-third filled infant bottle and a broken mobile over the baby crib?

A. Yes.

Q. And was -- according to your knowledge, that was the other bedroom, the bedroom that was not where the child was found?

A. I believe that's correct.

Q. Now, did you ask Mr. Hinton about that or Ms. Bright about that on cross-examination?

A. About specifically the baby bottle?

Q. The baby bottle and a broken mobile in the baby crib?

THE COURT: Are you saying mobile, M-O-B-I-L-E?

MR. CHILDS: Yes, sir.

A. No, I did not specifically ask them about that, from my memory.

Q. Did you think that was relevant information?

A. I don't know that I specifically thought about that as an issue for cross-examination.
Q. Okay. If the mother had gotten the child up during the evening and attempted to feed the child, would that be more a question to raise on cross-examination?
A. I don't believe that I had any evidence that supported that.
Q. Wouldn't the partially filled baby bottle in the other bedroom and the broken mobile in the crib support that?
A. I think there are a number of different things that that could support including that that had been there -- I mean, I don't know how long that had been there. I don't know that any of ---
Q. Wouldn't -- well, go ahead.
A. No, I'm finished.
Q. Wouldn't that be an important question then, of course, to ask the police about, about how long the bottle had been there? Did they check it to see and things like that?
A. I don't know that that was our specific focus.
Q. The broken mobile over the baby crib, did you ever ask Mr. Hinton about that?
A. No, not to my memory. I don't know that he ever

mentioned anything about the mobile.

Q. Now, were you -- how many times did you meet with Mr. Hinton, do you recall?

A. I honestly don't recall off the top of my head.

Q. Was it three or four times?

A. It would have been more than that. We were back and forth in communication, whether it was by letter, by phone or by personal meeting, there were different appointments that we had set up for him, etcetera. I know that there was at least one time that the numbers that we had, had been disconnected. So we were only able to reach him by letter. But we were in communication with him and, as well as, I believe his girlfriend or fiancé at the time.

Q. All right. Going back to Exhibit Number 23, I want to ask you about this. It indicates here from Officer Roundy, that Ms. Bright's mother called the police department on August 19th. Can you tell me about that?

A. What do you need from me? I'm sorry.

Q. What did she ask the police?

A. You just want me to read that paragraph?

Q. Yes, ma'am?

A. On August 19th, I was told Donna Eller wanted to speak with Sergeant Jones and me at the Seneca Police

Department. We went to her address at 205 Brentwood Drive and picked her up, bringing her back to the police department. Donna wanted to know if Matthew was telling us that Ashley had picked [redacted] up while the two of them were sleeping in the bedroom. And we wouldn't respond to the question.

Q. What else?

A. Do you want me to keep going? I'm sorry.

Q. Yeah. Keep going.

A. Donna told us that she was sure Ashley didn't pick up the baby while she and Matthew were in the bedroom sleeping and shake [redacted] and then put her back in the bed. She said Ashley loved [redacted] too much to hurt her.

Q. All right. Do you think that might have been something you would want to cross-examine Ms. Eller about?

A. I don't believe that -- I mean, we didn't have a specific statement from her, but I understand that that's what the police said that she was asking them questions about.

Q. Right. Don't you think that you should have asked her on cross-examination whether she called the police and asked them what Matthew was telling them about what her daughter did?

A. She in this is indicating that it was Matthew's fault, not her daughter's fault. We were not attempting to bring out any testimony that pointed the finger at Matthew in any way if we didn't have to. That information -- we were trying to make it so that it did not look like he had done this, like that there was evidence that was not there, trying to poke holes in the State's case. We were not trying to bring up evidence that potentially pointed the finger at Matthew.

Q. I don't understand how that would point the finger at Matthew?

A. Because this says that Ashley wouldn't have done it. That if Matthew was telling them those things that he was lying.

Q. The question before that. Had Matthew been telling the police that Ashley had picked the child up in the middle of the night?

A. Right. What I'm saying is the way this reads, she was pointing the finger at Matthew or saying that Ashley couldn't have done it, that it wouldn't have been Ashley. And those were the only two people that were reported to be there that day.

Q. Did it seem that the question was she was afraid that Matthew had told the police that her daughter had

picked the child up during the night?

A. She said she wanted to know.

Q. Yeah? Wouldn't that be kind of an unusual question?

A. Well, I don't know what she and her daughter had talked about or what she and Matthew had talked about, everything that they had talked about.

Q. Now, were you involved in the jury selection?

A. Yes, I was.

Q. And was your father principally involved in the jury selection? Was he responsible for drawing the jurors and selecting the jurors?

A. Yes and no. He was the one that specifically answered questions or specifically made the statement on the record about excusing a juror, but our process during this case and in all the cases that we try together is our client -- we have our client sit in the middle. We give our client a notepad and pen. And we have our client also review the potential juror list beforehand and then be active in it with us during the jury selection. And the three of us talked about the jurors.

Q. Do you have the transcript with you?

A. I do.

Q. Let me direct your attention to page 8 of the

transcript.

THE COURT: What page?

MR. CHILDS: Page 8.

THE COURT: I'm sorry. One more time?

MR. CHILDS: Page 8.

THE COURT: 80.

MR. CHILDS: 8.

THE COURT: I am sorry.

Q. Line 20 through 21.

A. Yes.

Q. Do you remember juror Mack Mackinson?

A. I don't have a visual memory of him, no.

Q. Okay. Do you remember that he stated that his daughter was good friends with Ashley Bright?

A. I read that when I read back through the transcript. That did not specifically stick out at that -- or in reviewing this case.

Q. Do you recall discussing with your client whether or not -- ask that he be excused for cause?

A. I don't believe we asked that he would be excused for cause.

Q. Do you recall discussing that with your client.

A. Not off the top of my head, no. Like I said, we gave our client a piece of paper and a pen. I believe we talked about the different jurors as they came

through, but I can't remember specifically discussing that one juror with Mr. Hinton.

Q. Do you remember -- let me direct your attention to page 12, line 8 through 17.

A. Yes.

Q. And that was a juror that knew Laura Moore, a potential witness?

A. Yes.

Q. Did a lot of the witnesses appear to know Laura Moore -- a lot of the jurors?

A. I don't believe there was any other juror that specifically said that they knew Laura Moore, no.

Q. Well, let me direct your attention to page 13, line 16 through 24 of the transcript?

A. Yes.

Q. Did that juror indicate they knew Laura Moore?

A. Yes. This is Oconee and while it's a big space size, it's not a huge -- I mean, the population all seems to know each other in some form or fashion.

THE COURT: Let me ask you this if you would, counsel, on page 12. Refer to -- you looked at Stacy Smith. Page 12 of the record.

MR. CHILDS: Page 12, juror Stacy Smith, correct.

THE COURT: Is there any information in this

PCR hearing, other than those lines of the transcript? Is there anything in this case other than this? Because what I see on its face does not amount to anything wrong; okay?

MR. CHILDS: Well, I don't understand your comment, Your Honor. What I'm trying to ask is trial strategy, whether there's a reasonable basis for it and ---

THE COURT: What I'm saying to you is in the voir dire of the trial court, Judge Macaulay ask this lady that's standing up says, I do know Laura Moore but we don't work close together. And if she's a potential witness, will that affect your ability to be fair and impartial in the trial.

MR. CHILDS: Oh, I understand. I'm not saying ---

THE COURT: Well, hang on. Please do not interrupt. This lady's trying to make a record over there. And she said, no, sir, it would not. Now, after that is there any other evidence in this PCR hearing, other than what's in this transcript? My question to you ---

MR. CHILDS: About jury selection?

THE COURT: --- questioning her about not striking her after she identified her as knowing her?

MR. CHILDS: No.

THE COURT: Okay. I'm going to overrule your petition on that. I note your objection. Move forward, please sir.

MR. CHILDS: As to ---

THE COURT: If you want to proffer what you intended to bring out based on that, I'll let you make a record. I don't think it's relevant. I don't think there's any standard of care that's been deviated or prejudiced from that. And, therefore, it could not meet the Strickland test. So I ask you to move forward.

MR. CHILDS: Yes, sir.

THE COURT: But if you want to proffer what you want to bring out, do so on a brief basis. And that way you're protected on the record.

MR. CHILDS: That's fine, Your Honor. And -- that's fine.

Q. I wanted to -- I might proffer that on page 15, which is juror Rhonda Todd. Line 7, which is a juror -- 7 through 9 -- which is a juror whose daughter used to work for the solicitor's office.

A. Yes.

Q. And did you challenge her for cause?

A. No. She used to work for the solicitor's office.

Did not work there at that time.
Q. Did you make any further inquiry about who that was or what relations they had?
A. Not from my memory.
Q. And the record will reflect that both Mackinson and Todd, you had to use strikes on them; is that correct?
THE COURT: Say that again, please, sir?
Q. Both Makinson and Todd you had to use strikes on them?
A. We chose to use strikes on them, yes.
Q. You used strikes on those two people? That was my point.
A. I believe so, yes.
Q. Now, was there a lot of publicity about this case?
A. There were some news articles at the time. We pulled most of them. We actually, I believe, signed up for one of the journal online things so that we could pull some of those records or some of the things. But we also got papers ourselves around that time. I don't know that we had much from before the trial.
Q. There was a lot of also television coverage, Fox News had a lot of video about this; isn't that

correct?

A. I did not specifically see any of that.

MR. WHITMIRE: I'm going to object on relevance, Your Honor, unless there's some evidence that counsel intends to show that this jury was, in fact, impartial. These questions are ultimately ---

THE COURT: That's been my concern about this jury inquiry. And frankly ---

MR. CHILDS: Well, Your Honor, ---

THE COURT: Just one second, please. I'm going to let you make a record. My concern is when the court asked the question during voir dire and they respond, I can be fair and impartial. In one of them, I think it was either Stacy Smith or Mackinson, said, I think so. The Judge said, no, uh-huh (affirmative). The standard is, you know, you've got to be. You go forward from there.

MR. CHILDS: Right.

THE COURT: And that's why I asked you earlier is there any other showing that you intend to make in this case. Because the mere fact that those people raised those issues without any further showing on the part of your client that there was some kind of bias, and I think it has to be extrinsic on the part of the jury, then I just don't think you -- it's not

relevant without that showing.

MR. CHILDS: Well, I'm off of that inquiry.

THE COURT: Sir?

MR. CHILDS: I'm off that inquiry.

THE COURT: Okay.

MR. CHILDS: My next inquiry is pretrial publicity and the question of whether or not a change of venue should have been asked for. And that ties into the judge's request to the jury panel, what he asked them.

THE COURT: That ties into what now?

MR. CHILDS: That ties into what the judge asked them, asked the jury panel. You know, he asked them if they had read anything in the newspaper, but he never asked them if they'd seen anything on television about this case. The perspective is there was extensive media coverage of this case on television. Nobody objected to that judge's inquiry, not from the defense. And then numerous jurors said they had, they had information about it. They'd read about it, including Makinson. And several said they couldn't give him a fair trial based on the publicity.

THE COURT: Were they taken off for cause or stricken?

MR. CHILDS: Yes, they were.

THE COURT: Okay. Is there any other evidence out there that there were people who were biased that were placed on the jury? People who had knowledge of this case and made a -- in your opinion?

MR. CHILDS: No, I don't think I can make an inquiry that way with the ---

THE COURT: Well, how can you establish your case then? That's the problem I have.

MR. CHILDS: Your Honor, ---

THE COURT: Hang on for a second, brother. And I'm asking. Because I seem to recall there being cases out there that they could go into a dichotomy to its extrinsic jury misconduct, intrinsic jury misconduct and it's a very, very high hurdle for you to get through and the threshold is way, way up there. And it seems like without anything more to this, you're trying to back door jury misconduct into this matter and just a clear question to her -- and I hear you. I'm going to let you talk. But I mean, just a question to her and whether or not you did anything further, without any anticipated further showing, still doesn't get you to any deficient performance nor to a prejudice on the part of your client under Strickland. And so that's my concern. And so now, I've cut you off three times. Go ahead and respond if

you would.

MR. CHILDS: Well, the point of inquiry in this case is that the judge specifically asked the jurors had they ---

THE COURT: What page are you looking at?

MR. CHILDS: I'm getting to that page.

THE COURT: Okay.

MR. CHILDS: Page 16, line 9 through 14, where the judge asks, has any member of the jury panel read anything, either online or in the newspaper or anywhere else about this case or Mr. Matthew Hinton? Mr. Matthew Hinton specifically, but not limited specifically to the Seneca Journal, or the Journal online, please stand. Let me say that I've read the record. I don't think there's any discussion by the Judge as to what the allegations in this case are. He simply is requesting anything familiar with his name, not the death of a five-month old in August of '09 in Seneca. And he doesn't specifically ask anything about video, television coverage over the case. So our contention is defense counsel should have objected to that as not appropriate protection for their client as far as the pre-trial publicity is concerned.

THE COURT: Well ---

MR. CHILDS: Particularly in line from

numerous jurors ---

THE COURT: From a totality of the voir dire conducted by the trial judge, wasn't there sufficient information, questions asked, to determine if anybody had any information about this case from any source and whether or not they could be fair and impartial to both the State and Defense; yes or no?

MR. CHILDS: I'm sure there is a statement to that.

THE COURT: So if there is in the record, when you try to isolate a particular question to set aside a jury verdict, there's no way you can do that, can you?

MR. CHILDS: Well, I think if counsel's deficient in not asking the trial judge to be more specific about what they may have heard and the media they heard it ---

THE COURT: And assuming for the sake of argument that there deficiency -- I'm not saying there is -- but assuming for the sake of argument there is, you've still got to get to the second prong of prejudice. And how could you ever do that in light of the totality of the voir dire conducted?

MR. CHILDS: I think that the responses of the jurors to that question established that there was

extensive publicity and numerous members could not give him a fair trial based on the mere mention of his name. And so had the trial court elicited more information, that more jurors may have stood up and said something. But I certainly can't subpoena jurors to establish that.

THE COURT: I mean, I know the standard and you're in a tough position. I know it's a tough standard. I just don't think you're going to have any grounds that I think are very -- or are going to get you to where this case -- let's do this. Let's move forward on this. If you want to present something on the record with regard to that, either by way of brief or some other way or do a proffer and tell me what you intend to prove, I'll let you do that. I just think that even if there is, in fact, deficient performance by not asking for more clear query of the jury, that you cannot get to the second prong and you're not going to be able to on prejudice; okay?

MR. CHILDS: Well, and I think the record reflects what I'm trying to argue. So I will rely on the record if you want me to.

THE COURT: And I'm not trying not to let you do your case. You're not going anywhere today with that.

MR. CHILDS: And I understand your position.

THE COURT: Okay.

MR. CHILDS: But I do need to establish, I think, from my perspective on the record the fact that there was a lot of, at least, television coverage of this incident aside from the print or the newspaper coverage or the online coverage. I need to ask her that question.

THE COURT: Well, I'll give you a little leeway. Go ahead.

MR. CHILDS: All right.

Q. Was television intimately involved in this case? Were they there at the hearings that you had?

A. Not that I remember. There were newspaper journalists there, usually sitting in the back, but I don't specifically remember a TV camera and I don't remember getting phone calls from a TV news reporter.

Q. And so you don't remember WSPA, Fox Carolina, and WYFF providing coverage of this case?

A. I just don't off the top of my head. I'm not saying they didn't. I just don't have a memory of it.

MR. CHILDS: Now, Your Honor, as I move forward, just to the end of jury selection, I have a issue relative to Batson versus McCall, why they did not challenge the State striking one juror. And if

your analysis holds the same, I'll just point it out to you and proceed on.

THE COURT: Well, let me ask you this, wouldn't the analysis be the same? Because wouldn't it be based on jury bias? It's just another way of uncovering it?

MR. CHILDS: Well, since defense counsel never raised a challenge to the strike of the juror, we'll never know.

THE COURT: Right. So that leaves me sitting here with a thousand pages or so of transcript and a lot of exhibits, and the position of being a speculator and that's not what I can do, especially in light of the jury verdict; don't you agree?

MR. CHILDS: Right.

THE COURT: Go ahead and say what you're going to -- just proffer that for me. And that way you're protected on the record. And that way we can go forward from there.

MR. CHILDS: Page 33, lines 1 through 6, which is the juror 157, Myra Panella (phonics). And excused by the State. And no Batson versus Kentucky challenge.

THE COURT: And why should a Batson have been requested at that stage, other than her ---

MR. CHILDS: Because every defendant has a right to challenge a strike, whether or not they're -- whether or not he was Hispanic. Every defendant has a right to challenge that strike.

THE COURT: I'm not saying that they shouldn't have. What was the basis they should have raised a Batson challenge is what I'm asking?

MR. CHILDS: As racially motivated.

THE COURT: Okay. Anything further on the record on that?

MR. CHILDS: No, sir.

THE COURT: Okay. Thank you.

Q. Now, you did not -- were you involved in the opening statements?

A. You mean on the record?

Q. Yes?

A. No.

Q. Were you the attorney that was supposed to object to opening statements? Or who was going to object to something that was said improperly by the prosecution?

A. I believe out of habit either one of us would have objected if -- but I don't believe -- I mean, that was something that Mr. Senerius was handling, opening and closing.

Q. All right. Page 159, line 1 through 3. Oh, I'm

sorry. 59.

THE COURT: Just before you go further, Danette, you okay?

MADAM COURT REPORTER: I'm fine.

THE COURT: You sure?

MADAM COURT REPORTER: Uh-huh (affirmative).

THE COURT: Richard, you okay?

THE CLERK: Yes, sir.

THE COURT: You okay? You have any little ones to go pick up?

THE WITNESS: No, I'm good.

THE COURT: All right. Go ahead. I'm just making sure everybody's okay as far as timing goes. We're after five, substantially. Go ahead.

Q. Were you involved in -- did you see there where the prosecutor asked -- indicates that -- she tells a little about herself to the jury.

A. That she grew up in Oconee?

Q. Uh-huh (affirmative).

A. Yes.

Q. And was any objection raised to her interjecting her personality to the jury?

A. No, I believe we also somewhat told a little bit about where we practice and who we were.

Q. All right. In her opening statement on page 62,

line 11 through 13, she stated that law enforcement will testify they did eliminate, I guess, the mother as a suspect?

A. Yes.

Q. Was that the crux of the State's case?

A. That they eliminated Ashley?

Q. Yes?

A. Their focus was on Matthew. But, yes, they then did seem to put information in or evidence in regarding their elimination of Ashley. I believe basically mostly because of the time line.

Q. Page 63, opening statement again, line 6 and 7, they narrowed the suspect pool to one person?

A. Yes, I see that. Yes.

Q. And so you understood that basically the State's case through their opening statement was that nobody else could have done it but Mr. Hinton?

A. Yes.

Q. I won't go into your father's opening statement. You were the responsible attorney for Ms. Bright's testimony?

A. Yes.

Q. Let me direct your attention to page 68, line 10 through 17.

A. Yes.

Q. The prosecutor asked Ms. Bright to tell a little bit about her relationship with the decedent?
A. Yes.
Q. And she went on a bit about she was the happiest baby. She loved to smile and just giggled and played with and went on and on about that. Did you offer an objection to that testimony?
A. To her referencing her child's happiness?
Q. Yes?
A. No, I did not.
Q. Do you know that the victim's character is not relevant?
A. I do understand that the victim's character is not relevant, yes.
Q. Do you think that testimony would be inflammatory to the jury ---
A. That the minor ---
Q. --- about what a wonderful -- I mean, she was a sweet child and she was wonderful. But wouldn't that tend to inflame the jury against the Defendant more?
A. I believe the Defendant also testified to that specifically.
Q. Well, yeah, but he hadn't testified yet. And y'all were the ones that asked him the questions on direct; right?

A. Yes.
Q. So that was your decision to put her character at issue in questions to him. My question to you is did you -- why did you not object to her portrayal of character at that point?
MR. WHITMIRE: Objection. Relevance, Your Honor. It's per se without merit asking. That's an improper question of the testimony on whether a five-month-old baby is happy or not?
MR. CHILDS: The State versus Langley.
THE COURT: Overruled. Go ahead. Just go forward. I've got your point.
Q. Now, Ms. Bright in page 69, line 5 -- line 4 through 5 is asked a question about how long she had been apart from Mr. Hinton; is that correct?
A. Yes.
Q. And she states that since I read the autopsy, [redacted] autopsy?
A. Yes.
Q. You've seen the autopsy report and you know it was issued in September?
A. Yes. I don't have it in front of it, but I don't have any reason to object to what you're saying.
Q. And you know that Ms. Bright continued to meet with Mr. Hinton some time after September?

A. Yes. But I don't know when she reviewed the autopsy.

Q. Isn't it true -- did you ever talk to Ms. Richardson about Ms. Bright's statement to her about the autopsy?

A. I don't have a memory of that.

Q. Having read the autopsy, do you think that Ashley Bright could have developed some type of information from reading it herself?

A. I couldn't speculate on that. I don't know Ashley.

Q. Is it more likely that somebody read it to her?

A. It was my understanding that she discussed it with the solicitor, that that's when they reviewed it together.

Q. But you didn't cross-examine her on the question or on her statement that since I read the autopsy, we've been apart?

A. No, I did not.

Q. And did you object to that question?

A. No, I did not.

Q. Did that question contain hearsay about the autopsy report?

A. That she read it?

Q. That she developed some type of information from

the contents of the autopsy report?
A. I don't believe there was hearsay in that question from my reading of it.
Q. All right. Page 70, line 5 through 8. Ms. Bright indicated that she thought the relationship was ending. Is that correct?
A. Yes. There she does say that -- well, that he'd said things that led her to believe that it was going to be ending soon.
Q. And did you discuss with Mr. Hinton whether or not that was true?
A. Did I ask Mr. Hinton whether or not he was going to be breaking up with her?
Q. Right. In your pre-trial discussion, do you recall discussing that?
A. I don't believe so. The indications that he gave us were that he was focused on his daughter and that he was there for his daughter. I know he said that things weren't perfectly necessarily with Ashley, but he was more focused on his daughter.
Q. She was asked a question about -- page 70 -- about the Defendant's family helping out with her?
A. Are you referring to the bottom of page 70?
Q. Yes?
A. Yes.

Q. And because she indicated on 71 they did not, they did not know he had a child?
A. Correct.
Q. Do you know why that was relevant?
A. Well, I guess they wouldn't have been helping out with the minor child if they didn't know about the child.
Q. Why is it relevant whether or not they helped or knew about the child?
A. I honestly believe she was just getting some back story. But I don't have an answer. I apologize.
Q. The whole line of inquiry evolved from there about him not wanting his mother to know about the child. Do you think that was relevant?
A. About him not wanting his family to know about the child?
Q. Yes?
A. I think they were trying to point to the fact that -- they're saying he didn't -- that there was something wrong with the relationship maybe.
Q. All right. So you thought that was relevant?
A. I didn't think it was relevant enough to continuously object to questions. As a general rule, I try to object, obviously, when I need to in cases. But I have a policy not to be somebody that bounces up

and down, trying to object every time there's a question that's potentially on a lying person, because that distracts jurors and sometimes they can really negatively affect you, especially if it's not a question that I thought was going to be harmful to my client.

Q. Well, wasn't that whole line of responses harmful to your client?

A. I believed he was going to be able to discuss that issue if he wanted to or that we would bring that out on direct examination through out case.

Q. And on page 71, line 25, line 1 -- through 72, line 2, the prosecutor asked her, did his family -- what did his family believe your relationship was with him?

THE COURT: Let me ask you a question. Is it your intention, counsel, to go through the entire examination of this witness line by line like you've been doing for the next twenty-five pages?

MR. CHILDS: Well, I have to ask ---

THE COURT: Yes or no? Yes or no?

MR. CHILDS: Yes.

THE COURT: I have a problem with that. We can't -- this is not a micro trial of the trial. So ---

MR. CHILDS: But I mean ---

THE COURT: I understand you're trying -- I think what I understood you to tell me at the beginning of this case, that you're trying to say ineffectiveness really from a totality of all the circumstances in this case.

MR. CHILDS: Yes, sir.

THE COURT: Okay. I'm going to let you go a little ways today. I think we're going to have to come up with a -- I want you to be able to -- your client, obviously, got forty-one years.

MR. CHILDS: Yes.

THE COURT: And I want you to make a record. I want to be able to hear the evidence and make a decision based on that evidence. At the same time, going back and do a play by play, strike by strike, swing by swing, replay of the prior trial is not what PCR's are all about.

MR. CHILDS: And I'm trying to avoid that, but ---

THE COURT: So far, I've not seen it. And I'm not questioning -- I'm not faulting you. You're doing your job. I'm saying with regard to this questioning about Ms. Bright. We went through a lot of Ms. Bright. Now we're going back and really asking

more questions about Ms. Bright. I mean, I want you to be able to make your record. But at the same time we're going to have to come up with a better procedure because, you know, what you and Mr. Whitmire told me today, this morning, was the reason why we're calling this lady out of order or in Anderson County because we need to get it here today. We'll be done today and taken care of. And we're not anywhere close to being done with her, no cross-examination. You don't seem to be anywhere close to the end of your direct examination. And it is now five-thirty in the afternoon; okay, sir? So, hey, listen I don't mind about time. I do mind about undue time.

MR. CHILDS: Well, I don't know how else to better address it other than asking the defense counsel, you know, why you didn't object to that because I think I have to establish that it was legitimate trial strategy as far as what ---

THE COURT: Let me ask this. Under a totality case, has there been a standard articulated yet? And Mr. Whitmire, feel free to join in. From a totality? I think I've seen something that there's been some ruminations, I guess, from the totality of all the facts you can have an ineffective assistance of counsel.

MR. WHITMIRE: State versus Reece, I believe.

THE COURT: Does that case say we go back ---

MR. CHILDS: No, I'm sorry.

THE COURT: --- and recount every trial, every word and every exhibit?

MR. CHILDS: No, no, it doesn't get into that. It says ---

THE COURT: I know.

MR. CHILDS: --- that they recognize -- that they seem to recognize a totality of the circumstances as an issue for ineffective assistance of counsel.

THE COURT: What's your position from the State?

MR. WHITMIRE: Page 11 through 13, Your Honor, my pretrial brief. It's silence in the circuit level, in the state circuit level currently. However, federally there's a split. The majority does not recognize cumulative error, what we call cumulative prejudice, because Strickland read to its intent is each error itself is looked at individually because there would be no way to consistently have -- apply a totality prejudice analysis. The Fourth Circuit does not recognize it and our federal courts do not

recognize it.

THE COURT: In our state level.

MR. CHILDS: Our state level has commented but not -- I think ---

THE COURT: It seems like there's an indication that there may be some kind of grounds for that, but there has not been a standard articulated or it's not been a finding that there is, in fact, a grounds for ---

MR. CHILDS: And let me find the case. And I've got it here somewhere. But, yes. I think by footnote on one case the court said maybe there is. We're not going to rule on that.

THE COURT: I'm a trial local judge. That's above my pay grade.

MR. WHITMIRE: What, Your Honor -- I'm sorry. I didn't mean to interrupt, Your Honor.

THE COURT: Well, the only thing I'm trying to say is, you know, listen, you know, and I'm not trying to prevent you from making law if that's what you want to do or if that's what you need to do. But at the same time if you're planning to go line for line, line for line, line for line, through the rest of this transcript and do that again tomorrow, I do have a problem. And I just don't see that we're going

to do that without coming up with some better laid plans to get through the evidence so you can supplement your record or have a record, but we're not going to go back and effectively retry this case again, which is not going to happen.

MR. WHITMIRE: Your Honor, to answer your question on a totality error, the Supreme Court last had this in State versus -- well, Walker v. State out of the Second Circuit this summer. ... core issues in the case and they punted on it and wouldn't touch it. They found one error and it's -- the client to go into it at this juncture of our jurisprudence.

THE COURT: Okay. Well, all right. How would you propose that we resolve this issue so that you have a record so that somebody down the line can look at it and say whether you're right or wrong or I'm right or wrong, more appropriately?

MR. CHILDS: Well, I don't know how I could make a proffer any shorter than -- you know, you're asking me to make a proffer on the issue. You know, I'll think about it and see what we can do to shorten it up, but ---

THE COURT: Well, that's kind of what you do before trial, not during the middle of trial.

MR. CHILDS: Well, I wasn't asked to shorten

it up before trial.

THE COURT: Nobody but me is going to tell you that. I would have.

MR. CHILDS: But, you know, you understand my perspective is ---

THE COURT: I understand what I'm sitting here watching is a microcosm or a replay of the prior trial, play by play, as if I'm hearing it on the radio. And that's not the way a PCR is supposed to be. You're supposed to have a standard articulated. You're suppose to show deviation of that standard and prejudice suffered by the defendant as a result of the deviation of the standard under the Strickland prongs; okay? And so even from what I'm hearing about, if you go through the totality, you may have a deviation from the standard, do you have anybody coming in to show prejudice or to show that this is a deviation from the standard or are you asking the Court to make that call?

MR. CHILDS: I think the law is the court makes that call. The experts aren't necessary for that issue. And I think after I finish presenting my case, it'll be obvious. You know, there's over a hundred issues relative to the trial of this case that are legitimate objections or ---

THE COURT: There's some question about the legitimacy of your issues, quite frankly, like the jury things. I think those are totally without merit, a waste of my time. And that's just -- I understand you've got to bring up everything else in there, but that's what I tried to get to at the beginning of this hearing, to narrow this thing down to legitimate issues.

Now, again, I'm not going to go through here and go through a line by line recitation of questions in this record. And I don't intend to do it again through each and every witness that you intend to call. I'm glad to let you make your record, but you've got to come up with some kind of plan or a system whereby you can make your record and then we go forward from there. I mean, I don't know how to do it otherwise. If we do it like you're proposing, our PCR courts will be backed up from years and years and years and years; okay? I know that doesn't seem -- indicating -- I see you flipping your hands and if that doesn't bother you, but it does me.

MR. CHILDS: Right. Well, it does. And quite frankly, I don't often see a transcript where I can find those kind of issues in it. I mean, usually, you've got a case where you've got three or four

issues in a transcript. And this one just had a lot. I mean, I wish it didn't.

MR. WHITMIRE: Your Honor, the State would disagree with that assessment. And would say at the appropriate juncture in closing argument. It's a very important case to the State. Very important case to the victim. I'm prepared if I need to answer a hundred questions -- hundred allegations if need be. Fortunately, the way the PCR code stands, there's really not much I can say; throw my hands up in the air, but ...

THE COURT: I'm going to let you go forward. I want you to give it some good thought. I'm going to tell you that I'm going to let you go forward today, but I am going to tighten this thing up. We're not going to go out here ad infinitum. I'm just not going to hear it. If you need to make a ---

MR. CHILDS: Well, ---

THE COURT: Stop for a second. Don't interrupt me, please, sir. If you need to make a record, make a record, make your questions and move on. You know, I just -- I have -- I just don't see this is what PCR's are about. I don't think this is consistent with the code and it's certainly not with the case law. Go ahead.

Q. Now, in respect to the testimony from earlier, we talked about the autopsy report and about the comment of what his family knew. And you didn't object to that because it wasn't hearsay?
A. Which specifically?
Q. What did his family believe her relationship was with him?
A. I did not believe that was hearsay because that was what her impression of it was. I don't know that -- she didn't say that the mother said anything in particular.
Q. All right. Now, she was asked about her mother being around that week; on page 73. And that was Donna Eller; right? Was that Donna Eller?
A. Yes.
Q. Skip that. Did they ask Ms. Bright about Mr. Hinton's employment or unemployment?
A. Yes. I believe so, briefly. They were referencing the fact that he was not employed at the time of the alleged incident.
Q. All right. And you didn't object to that?
A. No.
Q. And you didn't object to them asking how long it's been since he had a job?
A. No. She was testifying as to her knowledge. She

was living with him.

Q. Did you listen to Ms. Bright's audio of her statement to the police?

A. I believe I did, but I don't have a memory of it off the top of my head.

Q. Do we have the photos yet?

THE COURT: I'm going to -- let me just say this. I know I'm chaining your hands a little bit, but I'm going to make you be available tomorrow.

THE WITNESS: I had planned on it, Your Honor.

THE COURT: Okay.

THE WITNESS: I thought I had DSS all day tomorrow, but I don't, so I have every intention of being in Oconee approximately nine-thirty tomorrow morning.

THE COURT: Okay. Very good.

MR. WHITMIRE: For the record, Your Honor, this witness has been so kind with her time tomorrow. I didn't plan on crossing. I plan on recalling her in my case in chief.

THE COURT: Okay. Have you been able to get that audio up at all, Mr. Clerk?

THE CLERK: Not with y'all operating.

THE COURT: Okay. I'm going to reserve that

right for you to do that tomorrow.

MR. CHILDS: All right.

THE COURT: Okay, sir.

Q. Ms. Bright testified about her activities that morning?

A. Briefly.

Q. On page 72. She worked the weekend. From line 20 through 22?

A. Yes.

Q. Did you ask her any questions about what she did the night before?

A. I do not believe I did.

Q. Do the records indicate from the text messages that she texted Mr. Hinton at two a.m.?

A. I'd have to look that up. I apologize. There were a lot of things to go through. If you can point me just where you're ... Yes. It looks like it.

Q. Did you ask her anything about that?

A. No, I did not.

Q. The testimony was that her schedule of checking with the child was corroborated by her Netflix record; is that correct?

A. I don't know that it was corroborated by her Netflix record. I think she was just using that as kind of a time frame connection. I believe it was

somewhat corroborated eventually by the Defendant's testimony, that she woke him up at least twice. But I don't know that -- I know she testified about the Netflix shows that she watched.

Q. Right.

A. And that she was using, I think as a time reference for our benefit, that approximately at the end of an episode she would go in and poke her head in the room.

Q. Or checking every thirty to forty-five minutes?

A. Yes.

Q. Let me show you Plaintiff's Exhibit Number 39. Are those the Netflix records that corroborated her testimony?

A. Again, I don't know that they corroborated, but this is a list of the time watched and the length of time viewed during certain episodes. I know from my understanding that Netflix will continue to play for a certain period of time if you don't stop it. So I don't know if that was a continuous ...

Q. All right. Well, the officers testified that this corroborated her testimony?

A. I would have to look back at the officers' testimony about that, but I know she ---

Q. All right. Well, we'll look at the record to see

then?

A. Yeah.

Q. But I know she was questioned specifically about Netflix and she mentioned that there were some of them that she didn't maybe watch specifically. But I think she was trying to give an indication that she did go in approximately every forty-five minutes.

Q. And is this Netflix account even hers?

A. It looks as if it's in the name of a William Brettin, B-R-E-T-T-I-N.

Q. Did she testify that her Netflix account confirmed her checking with the child every thirty to forty-five minutes?

A. I believe she testified about it. I don't know that she specifically said that it was hers and not someone else's. I don't think we got into specifically whose account was signed up on the name of the account.

Q. The record will reflect what she said about the Netflix account?

A. Right.

Q. Does that Netflix account indicate that she checked with the -- that she took a break every thirty to forty-five minutes from five-thirty until ten o'clock?

A. Well, I don't know that she said she stopped the Netflix video. I know she said she got up every thirty to forty-five minutes to look in.

Q. Because of Netflix videos?

A. Well, but they will continuously play.

Q. Right.

A. So I don't know that she stopped them or restarted them specifically.

Q. Well, when's the last one on that record?

A. If you can somewhat help me. I'm not ---

Q. Does it say nineteen hundred?

A. Nineteen fifteen ---

Q. Nineteen fifteen?

A. --- it looks like is the last one that started playing. Played for approximately forty-one minutes, I believe.

Q. Would that be seven fifteen?

A. I'm horrible with military time, as well, so I don't know.

Q. Two from nine is seven?

A. Yes.

Q. And I've got the same problem. And so that really is not watching a Netflix episode up until ten o'clock. That's a Netflix episode that started at seven fifteen and ended at -- ended forty-one minutes

later at eight?

A. If that -- like I said, I am horrible with military time. I would actually have to sit down and look at it, but I don't have any reason to object to what you're saying.

Q. And the other entries on the Netflix -- actually, what this is is the length of the video, not how long she watched it. If you look the one before was at six twenty-eight?

A. Yes. She did mention that she either skipped some that she'd already seen before or that she'd gotten into them and realized she'd already seen before, so ...

Q. And the one before that was five forty-five. And the one before that was five forty-two. And then there was one at five thirty-three that was Sanctuary, not Law and Order SVU.

A. Okay. Yes. There was a Law and Order SVU somewhat before.

Q. And I don't know. Nobody asked any questions about this at the trial, but these maybe how long they were watched because these are shorter. These are two minutes.

A. Yes.

Q. But this record would have shown you that she

stopped watching Netflix by nine o'clock -- by eight o'clock?

A. I have no -- I don't object to the time frame that you're looking at there, no. I think those numbers indicate that, yes.

Q. And the police were called at ten something?

A. Yes.

Q. All right. And so you didn't ask her any questions about her Netflix account or the Netflix account of Mr. William Brettin?

A. No, I did not, not that I remember. There may be something in the transcript.

Q. And the Netflix testimony -- I'm not sure if they asked her if her Netflix -- let me check. She was asked did your Netflix -- on page 84, line 1 through 3 -- did your Netflix record actually indicate that you watched all the shows? And the answer was, it did.

A. Which line? I'm sorry.

Q. 84, line 1 through 3?

A. Okay. Yes. That's what the transcript says.

Q. And I believe, and I'll just refer to it on the record. I believe page 168, Officer Rory Jones testified, line 4 through 10, about the Netflix records?

A. Yes.

Q. And he's testified that we had a copy of her Netflix account?

A. Yes. I mean, I believe he was referring to the Netflix account information that you have there.

Q. And she indicated from her testimony that that's when she checked on the child, when the Netflix episode was over?

A. Yes, she did use that as a time reference. I do not have a memory of when she said -- what time exactly she said the last time she checked on the child was before the 9-1-1 call. I just don't have a memory of that.

Q. So why did you let her testify that her Netflix account corroborated her testimony?

A. Again, I don't believe she said it corroborated it. I believe she was just giving us as a reference to the time frames of approximately how long those episodes were that she would get up. That was her way of remembering approximately how often she checked on the child, was my understanding. Not necessarily that she looked in every single time the Netflix episode was over.

Q. The record will show what her testimony was about that timing, but wasn't it hearsay for her to testify about what her Netflix records show?

A. I'm a little bit confused by your question.
Q. She's testifying about what some document said; is that correct?
A. She was testifying about what happened. I believe she was maybe asked whether or not the information that she had on the Netflix account was similar to that, yes.
Q. All right. So she was asked, did your Netflix records actually indicate you watched all the shows and she said it did?
A. Yes.
Q. And that was part of the State's case, that she was checking every so often with the child and watching Netflix. And so she couldn't have been the one that inflicted these injuries?
A. Well, we were using it as that she was there also and that there was a time period that she was present in the home, continuously checking on the child, that the child was doing okay. But if the child had been as injured as they said -- this is my memory -- that she should have either done a better job at checking or that there was some way she was deficient that evening.
Q. Right. In other words, the theory would be that her testimony about checking the child and the child

appearing normal was probably false?

A. Either false or that she wasn't doing a good job checking on the minor child, if that makes any sense. We also did not believe that it was harmful to Mr. Hinton that she had spent approximately four to five hours, however long it showed, watching Netflix instead of being more attentive to her child, even though the minor child was sleeping.

Q. When the minor child hasn't eaten in hours and hours?

A. Correct.

Q. And you will admit that you didn't object to a lot of leading questions that were posed to her?

A. I will admit that here were some leading questions that I did not object to because I did not believe that they were harmful to my client at that time.

Q. Or where she was asked leading questions like, was his behavior odd?

A. Correct.

Q. Now, when she testified on page 89, line 14 through 17, you had already been disclosed by the prosecution the substance of Mr. Hinton's alleged statement to her, which was shown in the exhibit, which were the notes you provided from the

prosecution; is that correct?
A. Well, again, I don't believe that was a statement. What I believe was those were the notes. Like I take notes when I'm in a meeting, that those were the notes that the solicitor took, if that's the record you're referencing or the exhibit you're referencing.
Q. Well, do you believe you're entitled to disclosure or the substance of any statements the defendant makes in a criminal case?
A. Any statements?
Q. Yeah?
A. Yes.
Q. Okay. And so wasn't this disclosure to the prosecutor on Exhibit Number 11 the substance of a statement the Defendant made?
A. I believe it was the notes from the solicitor's conference with the Defendant or about the Defendant or relating to the Defendant -- or not to the Defendant, excuse me. That they were the notes from the prosecutor's meeting with Ms. Bright. But they were just the notes from that meeting, just as I took notes. She typed hers up. I did not.
Q. So you don't think the prosecutor had to tell you what the substance of his statements to be presented

by Ms. Bright were?
A. Anything that was going to be presented, I believe so.
Q. Okay. And so what they told you was that her testimony would be that the Defendant told Ashley the potential charge carried like twenty years. But told her she'd only do a couple of years if she did it; right?
A. Yes. That's one of the things that was in that note.
Q. That's Exhibit Number 11?
A. Yes.
Q. And it said, the testimony at trial was, in Greenville we were getting ready to leave and he told me if I would take the rap for this, that I wouldn't get very much jail time because I had no previous criminal history?
A. Correct.
Q. Did you object to that?
A. No.
Q. Do you find that objectionable?
A. I don't believe it was much different than -- I think it was less specific, maybe, than the statement that was previously written.
Q. You don't think that that's different than what

was written?
A. Not -- I think it's less specific. I mean, that one specifically talks about twenty years. And I think the focus of who ---
Q. You don't think that implied that Mr. Hinton had a criminal record?
A. No. That's not what I took from that at all.
Q. All right. So I wouldn't get very much jail time because I had no previous criminal history. That was what she testified to?
A. Yes. That's what she testified to.
Q. And your testimony is that didn't indicate to you that she was implying Mr. Hinton had a criminal record?
A. That's not -- no. At the time, that did not indicate that to me. I can understand what you're saying. But, no, at the time that did not indicate that to me.
Q. The statement to the prosecutor that it only carries like twenty years would have been objectionable, as well; wouldn't it?
A. Potentially, but she did not make that statement at trial.
Q. And you didn't cross-examine her about the difference in the two statements either; did you?

A. No, because that was not a statement. It was written notes from the solicitor. That was not a written statement that she gave to a police officer. That was not a statement that she -- that was notes from a solicitor's conference with her.

Q. Okay. Did the disclosure from the solicitor indicate that was the substance of oral statements made by the Defendant?

A. Can you say that again? I'm sorry.

Q. Did the disclosure where that information was provided to you did not indicate that was the substance of oral statements made by the Defendant?

A. If you'll give me a second and let me look back at it. Which exhibit was that again?

Q. There is no an exhibit.

A. I thought that was made an exhibit. I apologize. I must not understand your question.

Q. Hang on. Strike that. Now, we've already discussed earlier about her alleged statements to the prosecutor about the drug use and your decision not to ask her about those statements?

A. Yes.

Q. And she testified EMS got to the scene in five minutes?

A. Can you show me where you're ---

Q. Page 85. That may be nitpicking a little bit. So I'll strike it. She also testified on page 86 about statements made by Dr. Gwinn to her?
A. I believe she testified about the question that Dr. Gwinn asked.
Q. Correct. And so did you object to hearsay for that?
A. No. Because at that time there wasn't -- no, I did not.
Q. And so the inquiry was, at that point, that allegation was the Defendant had not mentioned the shower incident earlier; is that correct?
A. Well, this was Dr. ---
Q. That was the theory of the State's case. The Defendant didn't mention the shower incident earlier and he'd changed his story along the way?
A. I don't know that that was specifically the crux of the State's case, but I know that that was something that was discussed as to whether or not he gave that. He was pretty clear in his direct examination about when he told them certain things and was trying to remember back on when he was remembering certain things.
Q. I understand that. But the question before that was did the Defendant ever mention an accident or a

fall in the shower? And her answer was, he didn't until after he talked to the detective that met us at Greenville Memorial Hospital. And her question was did Dr. Gwinn ask you about a specific instance like that. And she said, yes. And that's hearsay; isn't it, what Dr. Gwinn asked her?

A. Yes. I guess technically that is hearsay if it's -- yes.

Q. And the prosecutor began to call the shower incident the shower story in her questions?

A. Yes.

Q. And did you object to the characterization of that as a shower story?

A. I do not believe so. Do you have a spot that you're referring to specifically?

Q. I'll let the record show that.

A. Thank you.

Q. Did you allow the prosecutor to lead her into making answer that indicated that his behavior was odd?

A. Yes. I believe I've testified about that specifically, but that she did ask some leading questions.

Q. She was asked questions about the funeral home and about people to put in the obituary, on page

ninety?

A. Yes.

Q. And line 1 through 6?

A. Yes.

Q. Do you know why that was relevant?

A. I believe they were trying to point out again that his family did not know about the minor child.

Q. And, again, why was that relevant?

A. They were ---

MR. WHITMIRE: Objection. Asked and answered for the previous reason on a separate question.

THE COURT: Overruled. Overruled. Go ahead.

A. Yes. I'm sorry. Can you repeat your question again? I apologize.

Q. Again, why was that relevant?

A. Why was is relevant that -- whether or not his family knew?

Q. Yeah?

A. I honestly don't know specifically why it was relevant, other than just a history of the relationship and of the minor child.

Q. Why was it relevant whether or not his family was put in the obituary?

A. That's what I'm saying is I don't know, other than just a history of ---

Q. A history that portrayed your client in a poor light?

A. A history that also could potentially portray her in a poor light by not referencing that information, not putting that in there, not making sure that his mother was aware, etcetera.

Q. Well, you really didn't ask her any questions on cross about that; did you?

A. I would have to look. Are you talking about the obituary specifically?

Q. In fact, that's what you asked her -- did you ask her any questions about that in your cross?

A. I would have to look at the record. Are you talking about the obituary specifically?

Q. Was the obituary issued after he was arrested?

A. I don't remember exactly.

Q. You asked questions about that in your cross-examination on page 92. You asked her specifically about, isn't it true you were concerned about how she would view you because the two of you were not married. And her answer was that he told me that she would look down on me. Again you were asking about why the family didn't know about the child?

A. Yes.
Q. But you never asked her about her journal entry where she had the same concerns, where she said she was stressed over whether or not they found out about the child?
A. But I did ask her if she -- if it was not true that it was actually her that was concerned, not him.
Q. But she denied it?
A. Correct. The ---
Q. And you didn't cross her with the journal?
A. No. Because the journal is a statement basically by her that shows that she's saying he has those concerns also. I was trying to point out that I believed it was just her, not him. The journal references that it's both of them, which would be against what I was trying to do.
Q. All right. Well, she says it wasn't her. And the journal entry says it was both of them?
A. Right.
Q. Did you ask her any questions about her second statement to the police?
A. Again, I'd have to just refer to the record.
Q. I think the record is clear. You didn't ask her about her statement to police not containing information she testified to at trial?

A. If the record -- I'll have to refer to the record on that. I mean, I did review the record, but I don't have a specific memory about that.

Q. So your strategy was that since she was the mother of the child, you would take a soft approach to her?

A. Not that we would take a soft approach, but we wanted to -- it's a very thin line there when you have a grieving mother on the witness stand of not wanting to essentially beat her up on the witness stand for the jury to see, especially as the opening witness in a case about her deceased daughter. It was a line that we were trying to walk carefully.

Q. Well, wasn't the only defense that you really had to it was that she had to have been the one that did it?

A. Well, I'll be honest, in talking to our client we attempted to gather information. He did not seem to believe that he did it -- that she did it, excuse me. He was really unaware of what happened. Based on our discussions with him, he didn't know what happened, so it was somewhat difficult to go into a trial saying that she did it when we didn't have evidence that said she did. And we were, like I said, attempting to poke holes in the state's case with the information that we

had.

Q. Okay. And I'm not sure what your answer was to that, but wasn't your only defense the defense that she did it instead of him?

A. I don't know that that was our only defense. I think our defense was that if any -- the statements that he had made regarding the shower incident, that if that could have happened, then it would have been something that the, you know, that the mother should have also noticed. Or, I mean, you're asking me to really think back and I apologize by I'm not explaining myself very clearly.

Q. So I'll leave it at that. The deletion of the response to Donna Eller -- to Matthew not wanting Donna Eller to come over to the house that day?

A. Yes.

Q. Where Ms. Bright testified that that was unusual?

A. Yes.

Q. The implication was that he was trying to keep her away from the house because he'd done something to the child; is that correct?

A. I believe that's one of the ones -- one of the implications they were trying to make, yes.

Q. So the fact that Ms. Bright responded back and said, even if she's sober would refute that

allegation; wouldn't it?

A. It would potentially cause some question to that allegation, yes.

THE COURT: You've been over that.

MR. CHILDS: Yes, sir.

THE COURT: I mean, I think you're protected on the record on that one. Is that the text you were referring back to?

MR. CHILDS: Yes, sir.

THE COURT: Okay.

Q. All right. Now, you did cross-examination also on -- we talked about Donna Eller. You didn't ask her any questions?

A. Correct.

Q. And the reason for that was you didn't think any of her testimony was damaging?

A. I would have to look at it specifically. But I think we were attempting to move on from the emotional testimony. The emotion was not going to help us in that case. You had a minor child that was deceased. And that was -- we were trying to be able to look at the other specifics and poke holes in the State's case.

Q. Well, Donna Eller again got to testify about the character of the decedent in this case; didn't she, on

page 151?

A. That it was a good child?

Q. She was just joy and happiness. I mean, a very happy baby?

A. Yes. She did testify about the minor child being happy.

Q. Okay. And so was that helpful to the defense?

A. I mean, I don't know that it was harmful to the defense that she was a happy minor child. I mean, it was a happy baby. There's a deceased child. Even if she was an unhappy child, it's a deceased child.

Q. Doesn't that go to character of the child?

A. I don't know that -- I didn't see it that way, no. I think the character of a victim in that issue is really more related to if there's an adult victim, but I understand what you're saying.

MR. CHILDS: I'll just refer back to State versus Langley, 515 S.E.2d 98.

THE COURT: I think we -- you've cited other references to that.

Q. But Donna Eller also made statements that your client allegedly made at the -- in Greenville; is that correct? Page 153.

A. Yes.

Q. And were you ever -- was that statement ever

disclosed to you?
A. I would have to look back at what came through. I have no reason to believe it wasn't, but I don't have a ---
Q. Do you have any reason to believe it was?
A. If it was a statement that was in writing anywhere, then, yes, I would believe it was disclosed to us.
Q. All right. And do you recall there being a statement of Donna Eller anywhere in the discovery?
A. I don't have a specific memory of that, no.
Q. If there was no statement to that effect in discovery, would you have objected to that testimony?
A. If there was no previous written statement?
Q. Yes?
A. No, because not everybody that testifies at trial gives a prior written statement.
Q. All right. Now, you took -- and so you asked no questions of Ms. Eller at all?
A. Correct.
Q. Even though she gave a statement that was different than what your client had made to the police about the child hitting her mouth on something?
A. (No verbal response.)
Q. Mr. Hinton's testimony about the incident in the

shower was that the child hit her head on his collar bone or something to that effect?

A. Right. The back of her head.

Q. Ms. Eller's statement was different to the point that she said there was a statement that she hit her mouth and, of course, the prosecutor, as you can see, page 153, reminded her that she hit her mouth inside on the shower stall?

A. Right.

Q. And so that was different than what your client said?

A. That was somewhat different, yeah. But I think she actually says that she assumes that. I don't think she says that -- at least initially she said she assumed that.

Q. But you didn't cross her at all?

A. No.

Q. And she also testified about the unemployment of the Defendant?

A. Yes.

Q. And about the helping with the household, whether or not his family helped with the household finances or she did?

A. I don't know that she specifically testified about his family, but she did say that she helped.

Q. That was Ashley that testified that his family didn't help?

A. Right. I don't believe Ms. Eller testified about his family. I believe she ---

Q. Would you object on relevance ---

MR. WHITMIRE: Objection.

THE COURT: Just one second. State your objection.

MR. WHITMIRE: The witness hasn't had an opportunity to answer the question.

THE COURT: Let her answer. Let's do this. It's six fifteen. The witness is coming back tomorrow. She's been on the stand for a good three and a half, four hours. I am going to call it for the night. I want to see counsel before we leave, up here at the bench, to come up with some strategy to move this case along, but protect the rights of the Applicant.

You're excused for the night. You may not speak with anybody. And I'll see you -- what time are we starting in the morning? Nine-thirty?

MR. WHITMIRE: Nine-thirty, Your Honor, in Oconee.

THE COURT: In Oconee, okay.

THE WITNESS: Thank you, Judge.

THE COURT: Thank you, ma'am.

Does she need to bring anything up there?

MR. WHITMIRE: I missed that?

THE COURT: Does she need to bring anything up there with her?

MR. WHITMIRE: What she has now. She's strictly coming on a voluntary basis.

THE COURT: No, she's coming because I asked her to.

MR. WHITMIRE: Oh, I'm sorry, Your Honor.

THE WITNESS: Your Honor, I have no problem bringing my box.

THE COURT: Okay. Thank you. I appreciate it. Thank you very much.

MR. WHITMIRE: What I meant to say, I didn't ask her beforehand.

THE COURT: Let me see the attorneys up here. And let me say this for the record. What I want to do is try to come up with some way to protect the Applicant's rights but move this case along. Anything we say at the bench we're going to put on the record; okay?

THE WITNESS: Your Honor, am I finished for the day?

THE COURT: You are.

(WHEREUPON, a bench conference was held off the record.)

THE COURT: All right. Just for the record, I met with counsel up here at my desk, for lack of a better ... I asked them to consider cutting down the time necessary in this case. Instead of going line by line by line or every other line in the transcript and asking minutia questions with regard to that, to have points that they bring up that they think are sufficient to warrant a reversal or a new trial or whatever relief they're asking for. And then bring up that point, bring up the references in the record to that or any exhibits in the record to that. Identify them on the record, bring them up to the witness and question them about it instead of going line by line.

I understand at this point that the Applicant's attorney has -- and this is a fairly new ground that he's treading and it's fairly comprehensive, so I understand it's not an easy job. But that's essentially the substance of what we've been saying and I asked the parties to think about that to come up with some system.

Anything you'd like from the Applicant's standpoint placed on the record about our bench conference?

MR. CHILDS: No, sir.

THE COURT: From the State?

MR. WHITMIRE: None, Your Honor.

THE COURT: All right. I'll see you guys tomorrow in Oconee County. Thank you.

MR. WHITMIRE: Thank you, Judge.

(WHEREUPON, court stood at recess for the day at approximately 6:45 p.m.)

February 10, 2015

(WHEREUPON, court convened with all parties present and the following proceedings were had.)

(WHEREUPON, Plaintiff's Exhibit Number 40, 41 and 42 were marked and admitted into evidence.)

THE COURT: All right. Hinton; we're back on the record with Matthew T. Hinton. Ms. Tye, you were on the stand yesterday when we broke. You're still under oath. Would you come around, please, ma'am?

MR. WHITMIRE: Your Honor, may I put something on the record, if you'll permit me?

THE COURT: Yes, sir; you may.

MR. WHITMIRE: We had some substantial issues administratively yesterday about opposing counsel's attempt to retry the case line by line. And the State would stand by its initial position that

ninety-eight percent of these allegations are facially without merit. And the ones that potentially have merit have been clearly answered by counsel, well within trial testimony. I can't think of any way we can expedite this action. And counsel has certified -- and all this has merit. So I thought about it. I don't know any good way to get it, you know, going faster. But we intend to show that every single allegation has been raised today. It's no different than any other case.

THE COURT: Mr. Childs, have you given any consideration to my request yesterday to do anything to expedite the presentation of your client's case?

MR. CHILDS: I have a direct trial transcript that I had in preparation of this case that outlines the individual lines and pages of certain testimony that I would raise just in the normal course. I've got a summary of those I've prepared this morning that we can submit for that purpose.

THE COURT: Okay, sir.

MR. CHILDS: It's entitled direct trial transcript Applicant issues. And it addresses Applicant's position about the failure to object to relevancy and failure to object to hearsay. It's a little -- as it was my notes to some extent, later on

it kind of is a little argumentative. If the Court might disregard that, I could submit this. If you want to review it, I've handed a copy of that to Mr. Whitmire?

THE COURT: Do you have any objection?

MR. WHITMIRE: No, Your Honor, as I also did submit a pre-hearing brief to you. No objection from me.

MR. CHILDS: And would you want to make that an exhibit?

THE COURT: Sure. Let's go ahead and get it marked, please, sir.

(WHEREUPON, Plaintiff's Exhibit Number 43 was marked and admitted into evidence.)

MR. CHILDS: Could we approach the bench on another issue?

THE COURT: Sure.

(WHEREUPON, a bench conference was held off the record.)

MR. CHILDS: Are you ready?

THE COURT: Yes, sir.

DIRECT EXAMINATION CONTINUED

BY MR. CHILDS:

Q. Ms. Senerius, I'm going to show you what's been marked Plaintiff's Exhibit Number 40, which is an

interview of Ashley Bright, with a date on it of 8/12/09?

A. I think it's 8/17/09.

Q. Oh, you're correct. Was that obtained from your file?

A. Yes, I believe this was something that we sent you. This was one of the original or one of the copies that we had in our file.

Q. And here's the copy that you had from your file on that?

A. Yes, sir.

Q. And Plaintiff's Exhibit Number 41, also interview of Desmond Holland?

A. Yes.

Q. And that was from your file, as well?

A. Yes.

Q. And then the Plaintiff's Exhibit Number 42, which was the 9-1-1 call?

A. Yes.

Q. All right. Now, is it your testimony that you listened to these CDs?

A. It was a very long time ago. I don't have a distinct memory of specifically listening to those. But it is our general trial strategy to review everything that we received. I can't tell you when

the last time I heard it was, though.
Q. If you happened to listen to the CD of Ashley Bright, the CD of Desmond Holland and the CD of the 9-1-1 call and they terminated midway through the interview, they stopped, and the 9-1-1 call stop before the end, would you remember that?
A. I would think so, but again, I just don't specially have a memory right now of listening to those. But we'd had -- we have multiple copies, so I don't know that that's the specific one I listened to. So I can't say that I have some -- I can't say that's the exact disk I listened to.
Q. Okay. You have multiple copies of those disk?
A. We have copies of disks in the file, yes, sir.
Q. Okay. Were those the original disks provided to you from the prosecution?
A. I believe so. Like I said, we have multiple copies in here. We received some, I believe, from Mr. Child's (verbatim) file. And then we received some directly from the State. And so I don't know that those are the exact ones that we received from the State, but that looks to be the ones.
Q. I mean, was that -- you or your dad's handwriting on there?
A. No.

Q. And the ones in your file, would it have different handwriting on it?
A. I can check real quick if you'll give me a second.
Q. Okay.
A. (Reviews file.) These are 9-1-1 calls. I think there were some photos, was the other CD.
Q. Okay. You don't have any others?
A. They may be in another box of just discovery stuff downstairs. But I don't have -- I brought as much as I could carry.
Q. Okay. Well, I just want to make sure that these are the CDs that were provided to you from the prosecution?
A. They look to be the CDs that are usually sent over by the solicitor's office here in Oconee. Usually they use those packets.
Q. Okay. Now, you took the cross-examination of Desmond Holland; is that correct?
A. Yes, it is.
Q. And did you attempt to interview Mr. Holland before his testimony?
A. No, I did not.
Q. Did you -- I think I've already asked you if you knew that in this CD he indicates he knew Ashley

Bright from high school?

MR. WHITMIRE: Objection, speculation. Let the CD speak for itself when it's played back.

MR. CHILDS: Yeah. That's fine.

Q. You never attempted to talk to his fiance?

A. No, I did not.

Q. Do you recall in his direct testimony that he talked about the dog coming to the door?

A. I believe his testimony was that he heard the dog scratching at the door, but that's all my memory. I have the transcript in front of me, but other than specifically reviewing it ...

Q. And I'll just refer to page 200, line 8 through 20, where he said the dog scratched on the door?

A. Yes.

Q. And did you know that Mr. Hinton and Ms. Bright actually have two dogs?

MR. WHITMIRE: Objection. Calls for speculation unless there's some ... It's not in the record.

THE COURT: Overruled.

A. I did not know that they had two dogs, but I don't know that he said that he knew they had one or two. I know he said that he did hear a dog scratching at the door.

Q. Okay. Well, I mean, are you trying to dispute his direct testimony that he said a dog was scratching on the door?
A. No. I'm just saying I don't know that he specifically knew that there was potentially another one in there. But he said a dog scratched at the door.
Q. Right. And did you ask him about that in his cross-examination, whether it was a dog or two dogs?
A. I did not ask him whether it was a dog or two dogs. I did ask him about the dog.
Q. And I think his testimony was that the sound he heard was the loudest noise he'd ever heard?
A. I would have to refer back to the transcript, but I do know he referred to it as being very loud, at least one of them.
Q. One a scale of one to ten, it was a ten?
A. Yes. I think he actually mentioned it was an eleven at one point and went back down to a ten.
Q. Did you cross-examine him about that statement, that it was the loudest noise -- that it was an eleven on a scale of one to ten?
A. I believe I talked to him about the noise and when he heard them, but I don't know that I specifically asked him about whether or not it was a

level of ten.

Q. All right. And I'd asked you yesterday and I went back and looked, it appears, according to his testimony, he said his fiance was there when he heard the noise?

MR. WHITMIRE: Objection, asked and answered. We went over this for forty-five minutes yesterday.

THE COURT: Ask your question again, please.

Q. It appears from the testimony -- I went back and looked at it after you said that you weren't sure if he testified about his fiancé being there at the time. Is it correct that he said in his testimony that his fiancé was there when he heard the noise.

A. If you can refer me to a line ---

THE COURT: I overrule your objection. Go ahead.

THE WITNESS: I apologize.

A. If you can refer me to a line, I'm -- I know when I was talking to him about it, there was some discrepancy in him saying where he was when he actually heard it, especially based on his statement. And I believe I specifically asked him about his statement and the differences in his statement that he'd written and what he'd testified to that day.

Q. Right. And that would be page 200, line 7 through 11. I was walking my fiancé to the door. By the time I got not even to the first bathroom, I heard a boom?

A. Yes. I believe I tried to clarify that with him on cross-examination about exactly where he was. But I believe on cross he referred to the fact that she'd gone, that he was walking back to the bedroom. Because in his written statement he referenced, I think, actually being in the bed when he heard one of the noises.

Q. Right. But didn't that implicate the importance of whether or not the fiancé was there? And didn't that require you, at least in the investigation of the case, to check into her whereabouts?

A. Well, he specifically said, at least in one of his statements, that he was in the bed, that the fiancé wasn't there. So this is what he said at trial. So I tried to cross-examine him on the issue between his statement and what he referenced at trial. So basically what he said at trial, I wouldn't have been able to go back and -- I don't know how to answer that differently.

Q. Is your answer that you weren't prepared for that statement?

MR. WHITMIRE: Objection. Asked and answered and badgering. Her trial strategy has been testified to clearly. And it's, quite frankly, reflected very clearly on the record. We're asking about speculative matters concerning whether his fiancé was interviewed and unless his fiancé is here, there's evidence to put the record -- this is just a speculative fishing expedition.

THE COURT: Overruled. Go ahead.

A. If you can repeat your question. I'm sorry.

Q. Doesn't that mean that you weren't prepared for him to testify that his fiancé was there?

A. No. It's not that I wasn't prepared. His statement did not say that his fiancé was there so we were using the information and the documentation that we'd been provided by the state.

Q. You were provided with a copy of her work schedule?

A. Yes.

Q. And the State relied heavily on that work schedule to allegedly corroborate Mr. Holland's testimony?

A. I don't believe they put her work schedule in.

Q. That's correct. You allowed him to testify about it or the officers were allowed to testify about the

work schedule.
A. But I don't believe they put her work schedule in to corroborate any of that.
Q. Well, you know, the record will reflect whether or not the officers were asked, did the work schedule of his fiancé corroborate his testimony? But didn't you think that was important to find out if she actually even was living there at the time?
A. I don't know, other than just the information that I had. I don't believe that she was somebody that was testifying or that she was somebody that was going to give any specific evidence about -- they did not say she was planning on testifying against Mr. Hinton.
Q. Right. Well, she could have testified for Mr. Hinton if she wasn't there; right?
A. If she wasn't there?
Q. Yeah?
A. How would she have testified for Mr. Hinton if she was not present?
Q. Well, if she testified differently than Mr. Holland, then that would contradict his testimony, wouldn't it. I mean -- well, let me rephrase that.
THE COURT: Hang on for a second.
MR. CHILDS: And let me, let me ---

THE COURT: Hang on. Hang on. You've kind of beat this horse for a while and you beat it yesterday, so I'm going to ask you to start moving forward; okay?

MR. CHILDS: Yes, sir.

Q. Did you ask Mr. Holland what he did after he heard the noise?

A. He heard two. And I believe I did go into it with him as to what he did regarding walking upstairs. I believe he walked upstairs or he testified that he walked upstairs both times. And I did ask him about -- specific things about that, whether or not he felt it was important enough to call and contact the police or the apartment manager, make a reference to a well baby check. And he testified, I believe, that no, he did not.

Q. All right. And did you ask him if he was there at the apartment that night when the EMS and the police responded to the apartment above him and stayed all night, into the next day?

A. I did not ask him about that. I believe he testified that he went to his mother's.

Q. For how long?

A. I don't -- I would have to refer to the trial transcript on that.

Q. Nobody asked him how long he was at his mother's.
A. Again, I'll just refer to the trial transcript on that.
Q. Wouldn't it be relevant to cross-examine him about why he didn't know about the incident beforehand?
A. Why he ---
Q. Why he wasn't at his apartment that night or the next day?
MR. WHITMIRE: Again, I'm going to object on relevance, Your Honor, on this inquiry. If we're going to get into why he didn't cross-examine and you can't prove what the answers would have elicited with what's in the record and the evidence before the Court, there's no purpose under Strickland to even allow this testimony ---
THE COURT: I sustain that objection.
MR. CHILDS: Are we ready with the CD?
THE COURT: Would you identify that?
MR. CHILDS: Yes. It's Plaintiff's Exhibit Number 41.
(WHEREUPON, Plaintiff's Exhibit Number 41 was published for the Court.)
Q. So does that refresh your memory of what you listened to?

A. Vaguely.
Q. And do you remember it cutting off at the end?
A. I don't know that I remember that. I do remember that that was pretty much what we read in the written statement.
Q. About him -- my girlfriend said, don't worry about it?
A. I didn't hear that part right this second.
MR. WHITMIRE: Objection.
Q. I told my girlfriend the TV ---
THE COURT: Just one second. When he objects, stop.
MR. WHITMIRE: Objection. I'd ask counsel to rephrase the question. What my girlfriend told me about -- I don't know what he's talking about at this point. A little foundation.
Q. Did you hear on the audio where he said my girlfriend said don't worry about it?
A. I don't know that I heard that specifically. Can you give me a little more context.
Q. Should I play it again?
A. Well, I just mean, if you can give me a little more context as to which part of the tape you're referring to?
Q. Well, it's on the earlier part of the tape. But

later on he says, I told my girlfriend the TV fell.
A. I do remember that part, yes.
Q. And so had you listened to the tape, you would have known that the girlfriend was allegedly there?
A. Okay. That's not what I picked up from that, but I understand what you're saying.
Q. I told my girlfriend the TV fell, doesn't mean she's there?
MR. WHITMIRE: Objection. Argumentative and it calls for speculation. Two different grounds.
THE COURT: Overruled. Go ahead.
A. No, the way I listened to that was that he was talking about it later.
Q. How did you gather that from that, that he was talking about that later?
A. Because it sounded as if they were discussing the incident later.
Q. And where it says my girlfriend said, don't worry about it. Why would she say that later?
A. If he was worried about something and talked about it later, then she may have said, don't worry about it. I don't know -- I don't remember exactly that part. I was talking about the later -- the part in the video where they were referencing what may have happened, whether it was a TV falling, etcetera.

Q. Did you hear the officer characterize the noise he heard as a whimper?
A. I do believe the officer said that once, yes.
Q. Okay. Did you cross-examine Mr. Holland about this audio?
A. No, I did not.
Q. And why not?
A. Because the audio seemed to go along with his statement. So I cross-examined him from the written statement -- about the written statement.
Q. Well, the audio differed from his direct testimony; didn't it?
A. So did it differed from his written statement, as well.
Q. Right. And so wouldn't that be helpful?
A. It could have been. That's why I cross-examined him about the written statement because that was something that he'd specifically written and signed as well.
Q. So Mr. Holland was the critical cog of the State's case; isn't that true?
MR. WHITMIRE: Objection. Calls for speculation.
THE COURT: Sustained.
MR. WHITMIRE: That's the third time he's

said something's critical to the State's case.

THE COURT: Sustained.

Q. Did you hear the testimony from the audio interview about him seeing the police there that night?

A. I did hear that, yes.

Q. And would not that be important to ask him about in cross-examination for you to show that he didn't make any reports to the police for several days, even though the police -- he saw the police that night?

A. Potentially. I know I did cross-examine him specifically about the information that he had from that day.

Q. Right.

A. And that he obviously wasn't that concerned about it, since he didn't contact law enforcement that day when it happened.

Q. All right. But you didn't ask him on cross-examination about seeing the police that night?

A. No, I did not.

Q. Because apparently you didn't know he said that?

A. I don't know that I specifically remember that from the video, but I don't know that I never knew it. Video -- excuse me -- the DVD or CD.

Q. Now, were you concerned that the CD provided by

the State cut off during his interview?
A. I think I talked about this a second ago. I think part of my issue was that the State's CD referenced what the written statement was and that was pretty much the end of the written statement. So I don't know that I specifically was concerned about that, no.
Q. So you don't want to hear the rest of the interview with Desmond Holland?
A. I don't really know how to answer that.
Q. Well, yes or no, did you want to hear the rest of the interview ---
THE COURT: No, sir. That's not a proper question. You can play it or not; okay, sir?
MR. CHILDS: I'm going to play the CD of Ashley Bright. But I was asking her if she -- whether or not she wanted to hear the rest of the audiotape of Desmond Holland's interview.
THE COURT: I'm sorry. I misunderstood your question.
MR. CHILDS: Okay.
THE COURT: Go ahead.
A. I don't know that there was an additional piece to that. That's why I was referencing his written statement, which seemed to encompass the information

that he was going to testify about.

MR. CHILDS: I'm going to play the CD of Ashley Bright's interview.

THE COURT: What Exhibit is that, please?

MR. CHILDS: Exhibit 42 -- 40, excuse me.

MR. WHITMIRE: I would object to relevance for wasting court time to play it here. For the record, they're -- their materials for preparing this case are voluminous, thousands of pages. They spent weeks. Are we going to go through all the evidence and play got you or can we just submit it for Your Honor.

THE COURT: We'll let him play it.

MR. CHILDS: Was that an objection, I ---

MR. WHITMIRE: It was an objection.

THE COURT: Just hold on one second. You guys, if you want to have an objection, state the objection. You do not argue back to his objection. You speak to me. And you state your objection clearly on the record. Is that understood?

MR. WHITMIRE: Yes, Your Honor.

MR. CHILDS: Yes, sir.

THE COURT: Is that understood? Okay.

(WHEREUPON, Plaintiff's Exhibit Number 40 was published for the Court.)

Q. And is that the CD that you listened to?
A. I don't have a specific memory of listening to that CD.
Q. Do you ever remember listening to the rest of that discussion?
A. No.
Q. In that CD did she indicate that her mother watched the child one day?
A. I believe she indicated that her mother was over there one day, but I think she said it was Monday.
Q. I thought it was Thursday or Friday she said initially?
A. I think she said her mother was over there on Thursday or Friday, but for some reason I remember her saying that it was Monday that her mom watched the child.
Q. And you know from Eller's testimony, she didn't actually watch the child on Thursday. She had just saw the child downstairs?
A. Right.
Q. Did you notice the statements in the CD about hearing the odd breathing was eight to nine?
A. Yes.
Q. And was that different from her testimony at trial?

A. I don't know -- I don't remember that she gave a specific time period for the breathing, but I do know that I talked to her about the breathing. And I think even on there she says it was somewhat normal, that Matthew was a heavy breather.

Q. Right. You don't remember her testimony about it being nine to ten?

A. I didn't, no, sir.

Q. The record will reflect whatever that is. This was a statement taken -- I think my notes said August 17th at one twenty-eight a.m.?

A. I believe that's what the CD referenced on the outside.

Q. And so the child had gone to the hospital on the 16th; correct?

A. Yes.

Q. And so this was as the child was over at the hospital, Greenville Memorial?

A. I don't remember the specific time line, but I don't have any reason to object to that, no.

Q. All right. And did -- do you know where that audio was taken?

A. No, I do not.

Q. All right. Was there any mention in the audiotape of her statement that she made at trial

about the -- on page 89, line 14 through 17?

A. No.

Q. In listening to the audiotape, did you find -- let me strike that. Does she seem awfully calm and collected on that audiotape?

MR. WHITMIRE: Objection. Calls for speculation.

THE COURT: Sustained.

Q. Do you have an impression about her demeanor from the audiotape?

MR. WHITMIRE: Same objection, Your Honor.

THE COURT: Overruled.

MR. CHILDS: I'm trying to get to the useful ---

THE COURT: I overruled the objection.

MR. CHILDS: All right.

A. She seems a bit nervous.

Q. She seems a bit nervous?

A. It sound as if so, yes, to me.

Q. Did she sound upset?

A. She sounded tired. I don't know that she specifically sounded upset. I don't know that I heard her crying or anything of that nature.

Q. Wouldn't this audio support the testimony about her demeanor being flat and emotionless after the

incident at the hospital?
A. I mean, I guess it potentially could, yes.
Q. Would not that audio have been an effective method of cross-examination of her?
A. I believe her statement references a number of those things, which is one -- you know, we went back through that and from my memory of the supplementary reports from the police officers, I believe there were a number of things that she talked about or that they talked about in there that were also listed and in written form.
Q. Wasn't there a lot of testimony at the trial about the characterization of Mr. Hinton's information about the shower incident, that supposedly that information had changed over time?
A. Can you be more specific? I'm sorry.
Q. Like in this audio she relates that he told her about the shower incident?
A. Yes. She does reference that.
Q. And that was one twenty-eight a.m. on August the 17th?
A. Yes, I believe so.
Q. Later on, several witnesses are asked about those statements. And is it not -- and I'll let the record reflect that. But was your impression that the

testimony was that he made that disclosure much later?
A. No. I believe his testimony was that he made it at some point in Greenville.
Q. But weren't other witnesses trying to say that, no, he didn't say that until late?
A. There may have been other witnesses that said that he didn't say that to them until later. But I know he talked to a number of different people including doctors and Ashley. From my memory of his statements, they were all relatively consistent with each other. He may be more detailed in one than another, but I think that's normal for anybody that's talking about an incident. His statements did not seem inconsistent to us.

MR. CHILDS: Just one minute, Your Honor.

Q. Wasn't it her testimony, page 69, line 13 through 17, that the entire time I always had a doubt because stories had changed. He told me different things?
A. Yes. That was when she was talking about why she'd changed her mind.
Q. And this indicates a consistent relation to her about the shower incident that occurred at least by one twenty-eight, August 17th; is that correct?

MR. WHITMIRE: Objection, Your Honor, relevance.

THE COURT: Overruled.

A. I believe the statement on the 17th, being so close in proximity to the alleged incident, that she may have -- this may have been specifically referencing later, but I don't disagree that what she said there is somewhat different than what she said on the video -- or the CD, excuse me. She was pretty clear on the CD that she was -- did not believe that Mr. Hinton would have harmed his child.

Q. And, in fact, in the testimony on page 86, line 16 through 21, she said -- she was asked, did the defendant ever mention any accident or fall or slip or mishap related to the shower? And her answer was, he didn't until after we had talked to the detective that met us at Greenville Memorial?

A. Yes, sir.

Q. And isn't this the detective that she talked to at Greenville Memorial?

A. I'd have to go back and look at all the specifics on it. I don't remember exactly who she talked to at exactly what time.

Q. And you're not sure from your recollection whether or not that statement was taken at Greenville Memorial or after they left Greenville Memorial?

A. You mean the CD?

Q. Yeah?
A. No, sir, I'm not.
MR. CHILDS: Let me introduce Exhibit Number 42. And that's just a second file on that -- there's a number of them.
(WHEREUPON, Plaintiff's Exhibit Number 42 was published for the Court.)
Q. Do you ever recall listening to the rest of the 9-1-1 call placed by Ms. Bright?
A. No.
Q. Would that have been something you would want to listen to?
A. It potentially would have been. However, based on the discussions with our client, based on the review of the information that we had, there were no real issues with the 9-1-1 call that we were made aware of that -- I mean, there seemed to be no discrepancy in the fact that Matthew had called out to her, that she called 9-1-1, that EMS arrived soon thereafter, and that Matthew was attempting CPR, and that he was attempting, I think a sternum rub that he testified to, which may have been what she was referencing in her CD just a moment ago.
Q. All right. But you weren't concerned about what else she might have said to the dispatcher?

A. Not at that time, no, sir. That was not one of the issues that we were trying to be focused on. Like I said, I know that our client was present at that time. There was nothing additional that he alerted us to either.

Q. What were the issues you were trying to be focused on?

A. Focused on what potentially had happened, focused on his statements, focused on presenting him as the loving father that we had information that he was. Focused on the fact that he had taken care of her that day, focusing on the fact that he, you know, provided CPR as soon thereafter as he could or as soon as he noticed that there was antyhing going on. Presenting Matthew in the light that we believe showed that he was the loving father that we had information that he was.

Q. That he didn't inflict these injuries on her?

A. Correct. Or that if he did, based on the shower, the slip in the shower, that that was potentially the only other incident that he was aware of.

Q. But you knew the shower incident really according to, at least Mr. Price's expert, really couldn't explain that?

MR. WHITMIRE: Objection. Asked and

answered yesterday.

MR. CHILDS: Yeah. I agree. I agree.

Q. Now, did you also -- were you also there for the closing arguments?

A. I was present throughout the whole trial; yes, sir.

Q. And were you -- did y'all have an agreement as to who might object to certain things on closing statements?

MR. WHITMIRE: Objection, again, Your Honor. Asked and answered from yesterday's testimony.

THE COURT: What was your question?

Q. Did y'all have an agreement as to who might object to things on closing statements?

THE COURT: I sustain that objection.

MR. CHILDS: I thought I asked about opening statements yesterday.

THE COURT: Go ahead. Very limited.

MR. CHILDS: All right.

Q. Did you recall the prosecutor's statement, today is the day to speak for Ashley?

A. Yes, I do.

Q. Did you ---

MR. WHITMIRE: Objection, relevance.

THE COURT: He hasn't asked the question

yet, Mr. Whitmire. Go ahead.

Q. Did you perceive any basis to object to that comment?

A. There was a close line ---

THE COURT: I overrule your objection.

A. There was a line that she was getting close to for objections and we knew we were going to be able to speak, but it was somewhat concerning.

Q. All right. And so who made the decision to or not to object to that?

A. I believe it was a joint decision. I don't know that we sat there while she was speaking and specifically -- I would try not to hustle around while there's testimony going on.

Q. Right.

A. You know, neither one of us objected to it.

Q. Do you know of any reason or strategy that you would not have?

A. Similar strategy to what we've kind of talked about, that she was -- it's an emotional case, that we were trying not to just look harsh and hateful about a child that's deceased, because as a general theory juries are going to be somewhat sympathetic to that. I believe that was addressed in opening. And so we were trying to allow them to have sympathy for the

minor child but also understand that Mr. Hinton was not the one that caused those injuries.

Q. What did that have to do -- that theory of the case have to do with the prosecutor stating today is the day to speak for Ashley (verbatim)?

A. Because I thought she said [redacted] I apologize.

Q. Well, you're right. [redacted]

A. Because [redacted] was the victim, the deceased child.

MR. CHILDS: Just one minute, Your Honor. That's all I have of this witness, Your Honor.

THE COURT: All right. Let's take about a five or ten-minute break, a ten-minute break and then come back for cross-examination.

MR. WHITMIRE: Thank you, Judge.

THE COURT: All right. You can't speak with anybody about your testimony; okay?

THE WITNESS: Yes, sir.

(WHEREUPON, court stood at recess for a short break.)

THE COURT: Mr. Whitmire.

MR. WHITMIRE: May it please the Court.

CROSS-EXAMINATION

BY MR. WHITMIRE:

Q. Good morning, Ms. Senerius?

A. Good morning.
Q. I'll try to keep this brief as you've testified ad nauseam at this point. How long have you been in practice with your father?
A. I joined his practice in August of 2009 after I spent a year with Judge Macaulay.
Q. Is this your first time going through the PCR process?
A. It is.
Q. However, you have also tried and won child abuse cases?
A. I've been actively involved in DSS cases involving child abuse, yes, sir.
Q. Matlock (phonics) in Oconee County?
A. Yes, that was a criminal sexual conduct with a minor case. That was tried a month, almost to the day, before this case.
Q. Y'all tried a case Cody Sprouse and won it, homicide by child abuse?
A. I was not actively involved in the trial, but I was involved with the preparation, speaking with the client, and my father is the one that actually tried that one actively.
Q. In other words, you're familiar with the subject material?

A. Yes.
Q. Now, when you were appointed and substituted counsel, do you recall your initially involvement in the case?
A. Usually -- well, I wasn't appointed. Technically, my father was appointed. This case was big enough, it was something that we needed to focus on. So I, even though I wasn't appointed, was actively involved in the preparation and the trial of this case. But when we got -- at that time we had a policy in place that anytime we got a public defender appointment, we would send an initial client letter, is what we referred to it as, that outlines the -- some of our representation, our hours, email addresses, ways to contact us, ways for the client to be in touch with us. Notice to the client to make sure that we continue to have their contact information, etcetera.
Q. And on that, I have just a few more questions on the subject. Mr. Hinton received benefit of two substitute attorneys?
A. Yes.
Q. A private investigator?
A. Yes.
Q. You had him submitted for a polygraph?

A. Yes, we did.

MR. CHILDS: Objection. Not relevant. Not admissible.

MR. WHITMIRE: Not relevant for the truth of the matter, Your Honor. It's relevant to show what counsel's course of conduct in the handling of this case.

MR. CHILDS: The results are not admissible.

THE COURT: Overruled. The results are not admissible.

MR. WHITMIRE: I missed that, Your Honor.

THE COURT: I overruled his objection, but I stated that the results are not admissible.

Q. How was Mr. Hinton as a client?

A. He was relatively responsive. He answered our questions, seemingly openly. He -- sometimes we had a little bit of a difficult time getting in touch with him, but that is not abnormal. His family was also attentive and present throughout the time. We didn't -- he wasn't a, quote unquote, problem client. He was helpful, answered most questions.

Q. What was your case strategy in submitting him for a polygraph?

A. I think it was something that we had talked about with him partially to try to help just kind of

understand what the process was. One, it allows him to go ahead and be questioned about certain things regarding the case under a somewhat difficult situation, so that if he did choose to testify that would not have been the first time that under stressful circumstances he would have been asked questions regarding the incident. So I think a lot of times that has to do with it. We understand that the results are not admissible so that's not something -- we weren't trying to get them to prove that necessarily.

Q. Was Mr. Hinton helpful in explaining his side of it?

A. Yes and no. He answered our questions. He didn't really seem to have a lot of information about that day, other than what you've heard and other than what he testified to at trial. There wasn't a whole lot of other answers specifically.

Q. Y'all explain to him the need for him to be an active client participant?

A. Yes, we did. We talked about that on a couple of occasions. And, you know, with the contact that we had with him we always advise our clients and it goes out in that initial letter that if they ever have any cause for concern or any questions, that the best way

to really sit down and talk with us is to set an appointment. And he would do that on occasion.

Q. Did you have any difficulty getting in touch with him leading up to trial about five weeks before?

A. There was a time period when the numbers that we had, had been disconnected. So we reached out by letter to the mailing address that we had, that I believe was his mother's, which is where he was living at that time.

Q. During your pre-trial preparations, did he convey and was able to grasp an understanding of the complexity and seriousness of this case?

A. He seemed -- it seemed like he understood the seriousness of her injuries, but not necessarily the seriousness of what was happening, that we were going to trial on this big issue of her death, and that the State was proving -- was going to prove that he was the one that did this.

Q. Did y'all undertake different tactics in trying to communicate with him and getting helpful information out of him?

A. We did. That was one of the reason that I decided or that we had decided as a team for me to take part in this case at all was my father and I are very different people. He may be able to express

something one way. I can express it very differently. And so we had hoped that either between myself, him or us as a team, that we would be able to gather the information that we needed.

Q. Now, if you can't answer this exactly, I fully understand. Approximately how much time and labor did your firm spend on getting ready for this trial?

A. I can't answer it exactly. I do know there were multiple meetings with the client. There were multiple meetings that we had with other people. We did have an investigator that we also had present at the trial that is familiar with this area, that also had a connection to Oconee Memorial. So we had him there through jury selection, I know, to try to help us with jury selection. We reached out to different resources that were medical -- not experts, but people that we knew in the medical field to have them under confidentiality review the documentation that we had to see if there was anything else, since we are not medical experts, that we were -- anything else to kind of bring to light. We, as I said, we did reach out to the polygraph investigator to allow Mr. Hinton to have that conversation or be questioned about these issues ahead of time. There was the entire week of the trial that both myself and Mr. Senerius present. We're the

only two attorneys in our firm. We had staff with us at least, I believe, three or four of the days that we were up there. So our office was essentially shut down for that week and the week prior to that in preparation.

Q. Approximately when did the solicitor disclose the witness list to you or to your firm?

A. I don't remember specifically. Ms. Simmons is pretty good about doing that at least a week ahead of time. But obviously not all of those witnesses are necessarily going to be called, but she is usually pretty good about making sure. She is attempting to streamline the trial, as well.

Q. Were you able to adequately prepare for witnesses that you handled?

A. Yes.

Q. Now, would you have objected had the solicitor, through leading questions, put words in the witnesses' mouth you didn't see coming?

A. We would have depending on the question. I think, you know, it's -- you are listening throughout trial and you're taking notes and you're wanting to make sure that they're not testifying themselves through the leading. So if it had been something like that, then, yes.

Q. Would you have objected if you had concerns on the propriety -- admissibility of the leading question asked?

A. Yes.

Q. And the last question on that, would you -- so you knew the witnesses already?

A. Yes, we did. We knew the potential witnesses. I don't believe she called everyone that was on her list, but I'd have to go back and check on that.

Q. And you guys had decided who was going to handle what witness ahead of time?

A. Yes, we did.

Q. Would knowing that an expert or witness is going to testify later in trial influence your decision to object to possible hearsay?

A. Yes.

Q. Can you explain?

A. Knowing that there is going to be a witness that potentially would have a different view or a different version or just saying something differently, is something that if we can get it out through that witness, especially if it's going to be an expert. Unfortunately, juries do take a lot of testimony from experts and sometimes they take it more strongly than they do a lay witness. So if there's something like

that that we could get out through an expert or poke a hole in a time line through an expert, then we were going to attempt to do that.

Q. Did the Applicant in this case communicate with you during the course of trial through a notepad?

A. Somewhat. I've got some notes that indicate that there were some discussions during the jury selection. I believe there was one juror in particular. And I just have a number. I don't have a name. I don't believe it was a juror that was seated, that he specifically didn't feel good about, so we struck that juror, from my memory, I believe. But I do have one note from him. It's always our policy to put a notepad -- well, we sit on either side of the Defendant and put a notepad in front of the Defendant with a pen. Because from my days of clerking, Judges don't like a lot of hustle and bustle around the courtroom while the witnesses are testifying. So we didn't want him to have to lean over and speak necessarily. We wanted him to be able to write it. And he was not in shackles at that time. So he would have had free reign of being able to write.

Q. And the lay witnesses you handled, did he ever pass any notes and request any potential cross-examination questions?

A. No. The other thing that I always do, that I got in the habit of a long time ago was before I finish a witness, I step back over to the defense table and reference with co-counsel and/or the client and ask if there was anything in particular that maybe I missed while I was asking questions.

Q. Just a few more questions.

A. Uh-huh (affirmative).

Q. Do you recall your impression of the victim's demeanor and the way she came across to the jury when she testified?

A. I remember her coming across just -- not necessarily extremely emotional that day but just very sad, a grieving mother. She came across just almost like smaller than she was. I mean, she just -- it was an emotional day.

Q. Would delicate be an appropriate word?

A. Yes.

Q. And I don't want to belabor the point that's been explored, for hours on end during your testimony. But was it always understood that he would take the stand?

A. We had talked about it at length, both prior to trial and in the days during the trial, and then as Judge Macaulay's procedure, he makes you, even if you've decided what you want to do, he makes you take

additional time and talk to your client and the attorney about it. Mr. Hinton had planned on, at least ahead of time, testifying. But obviously, that could have changed throughout the trial. I don't remember it ever changing. From my memory, he had planned to take the witness stand throughout the trial. But again, I don't know that he had -- that's something that is always touch and go, depending on what's going on.

Q. What was your impression of Mr. Hinton as a witness?

A. He seemed nervous. He seemed -- and I think it seemed to come across a bit harsh. But, again, I think that probably was because of the fact that he was nervous. I don't know how the jury took him specifically, but he did seem a little rigid, a little harsh, I guess is the best way to say that.

Q. Did your firm, you and your father, spend a significant amount of time preparing him for that testimony?

A. Yes. And, again, that was one of the other reasons that we did the polygraph because they ask difficult questions in that process, as well. So that wouldn't have been the first time he would have heard that.

Q. Do you recall him helping the case through his testimony?

A. I don't remember it making us feel better necessarily, but I don't remember necessarily it making us feel worse. I mean, I think in the middle of trial, your emotions are a little off anyways, but I don't necessarily remember a relieved feeling once he was finished testifying.

Q. Did you try this case to the best of your ability?

A. Absolutely.

MR. WHITMIRE: No further questions, Your Honor.

THE COURT: Any redirect?

MR. CHILDS: Just real briefly.

REDIRECT EXAMINATION

BY MR. CHILDS:

Q. You said your investigator -- did your investigator do any field work in this case or just attend the trial?

A. I don't remember specific field work. I know that we had him previously registered with OID. You have to register your investigator. I know we had him previously registered. But I do specifically remember him attending trial. I just don't remember anything

else.

Q. All right. But he was available to locate any witnesses that you needed to?

A. He could have. I mean, I don't know that we didn't, but, yes, he is able -- he is capable of doing that.

Q. Now, the witness list that you received before the trial from Ms. Simmons, did it list records custodian for Desmond Holland's fiance's work records?

A. I would have to look back at it. I honestly don't remember off the top of my head.

Q. And do you have that?

A. I have a box. I don't know where it is in the box. It would take me a ---

Q. I'm supposed to have your entire file?

A. Yes, I believe you do.

Q. And so I don't see that in what you provided to me?

A. And that's what I'm saying is I don't know that I have that here. I'm saying I know that Lindsey's usually good about providing that information ahead of time.

Q. Well, in any event, at the trial itself they didn't list any records custodians for ---

MR. WHITMIRE: Objection. Outside the scope

of cross-examination, Your Honor.

THE COURT: How is that within the scope of cross-examination?

MR. CHILDS: That's fine, Your Honor.

Q. If the witness list you were provided by Ms. -- I'll withdraw the question. If the witness list Ms. Simmons provided you did not have the records custodian for the Netflix records, and the fiance's work records, what would that indicate to you?

A. That it was potentially something that we had referenced or that we had spoken to her about before and did not make her call the records custodian for those records.

Q. Is that what you did?

A. I don't remember. That's what that would indicate to me.

Q. And do you recall agreeing to let those records in, or ---

A. I don't know.

MR. WHITMIRE: Objection. Outside the scope of cross, Your Honor.

THE COURT: Again, how is that within the scope of cross-examination.

MR. CHILDS: I'll withdraw that second part.

THE COURT: Thank you, sir.

MR. CHILDS: That's all the questions I have.

THE COURT: All right. May this witness be excused?

MR. CHILDS: Yes, sir.

MR. WHITMIRE: Absolutely.

THE COURT: All right. Thank you, ma'am.

THE WITNESS: I'm going to leave the box of information here if that's okay?

THE COURT: For your dad?

THE WITNESS: I didn't know who was next. I can take it back here, however.

THE COURT: Well, who's your next witness?

MR. CHILDS: Well, normally, my next witness would be Mr. Hinton.

THE COURT: I'm asking who it is, not what normally it is.

MR. CHILDS: Well, if we want to get Mr. Senerius out here, we can call him next.

THE COURT: It's your case.

MR. CHILDS: I'll go ahead and call Mr. Senerius.

THE COURT: Very good.

Mr. Senerius, you can come around. Ms. Tye, thank you.

THE WITNESS: Thank you, Your Honor.

THE CLERK: Place your left hand on the Bible. Raise your right hand.

Do you solemnly swear or affirm the testimony you give to the Court to be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE CLERK: Please have a seat.

GORDON SENERIUS,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. CHILDS:

Q. Mr. Senerius, we've been privy to some exhibits that have already been entered into evidence that relate to this case; in particular, Exhibit Number 3. Let me show you that and see if you're familiar with it?

A. These look like trial prep notes.

Q. All right. And those were -- is a list of witnesses there, Alex Hood, Ronnie Craig, William Fowler, Danny Stevens, Denise Richardson, and Brandy Burgeon (phonics)?

A. Right.

Q. Did you have the occasion to speak with any of those individuals?

A. Seems to me that I did at least with maybe Mr. Hood, Craig, and Fowler. I can't remember for sure. This has been a long time ago.

Q. Okay.

A. I don't believe that any of them had anything in the way of facts to testify to.

Q. Were they character-type witnesses?

A. More so that than other, yeah.

Q. Okay. And did you indicate to Mr. Hinton that character witnesses were out of the question in this case?

A. I indicated to Mr. Hinton that it was a fine line to go into. And that his character really wasn't in question. Nobody is accusing him of being a terrible person, that I recall.

Q. Okay.

A. We did put up some character witness testimony concerning him, if I remember correctly, about him being a good dad and loving, you know, being good with kids, things of that nature.

Q. And so the other witnesses you were -- do you remember why you didn't call them as character witnesses?

A. I suppose it was a matter of strategy trying to get the case -- keeping the focus of the case in the

right spot. I suppose if you'd asked me this three and a half years ago, I'd been able to answer you better. But I don't recall anything other than that.

Q. Okay. Do you recall speaking to those individuals and did they provide to you statements that would bolster his credibility?

MR. WHITMIRE: Objection. Asked and answered.

THE COURT: Overruled.

A. To bolster Mr. Hinton's credibility?

Q. And I said it really poorly.

A. Okay.

Q. So let me rephrase it. Having spoken to some of these individuals here that were potentially character witnesses ---

A. Right.

Q. --- were they helpful? Did they tell you he had good character?

A. Yeah. They were cumulative to what other people had said.

Q. Okay. And Ms. Richardson listed here, his mother, ---

A. Right.

Q. --- did you speak with her?

A. Oh, she was in the office on more than one

occasion.
Q. Okay. And you had her listed as a witness on your witness list at trial?
A. I don't recall. If you say so.
Q. Just the record ---
A. Whatever the record says.
Q. --- says her name ---
A. Okay. Whatever the record says.
Q. All right. Do you recall what her testimony was going to be?
A. Her testimony was whatever it says in the record. I believe it was that he was a good father and was good with kids. I don't remember specifically. I've not reviewed the transcript.
Q. All right. Well, she didn't testify.
A. Okay. All right. There must have been a reason for it that I don't recall at the time.
Q. Do you recall any discussions with her about the transportation of Ms. Bright to and from the detention center to visit with Mr. Hinton?
A. Do I recall that?
Q. Yes?
A. No.
Q. Okay.
A. It doesn't mean she didn't tell me that. It just

means I don't recall it.

Q. All right. Do you recall any discussions with her about Ms. Bright's statement that she had been read the autopsy report?

A. No.

Q. Okay. Now, there was evidence presented or documents and records indicated from an incident that happened in Greenville County, I believe with a -- and the note here, it goes on page -- I thought it was. Hang on a second. Yeah. This was about the prior child. Let me rephrase that.

A. Okay.

Q. I don't think that's listed here. Oh, there it is on the first page. --- about a Dixie Gravely McCracken, a breach of peace?

A. Right.

Q. Do you recall anything about that, why y'all were even concerned with it enough to even take notes about it?

A. It would be ---

MR. WHITMIRE: Objection. Asked and answered. Ms. Senerius answered that specific question yesterday.

THE COURT: Ms. Senerius did.

MR. WHITMIRE: She did.

THE COURT: Refresh my memory. For some reason it's not -- I'm not recalling it.

MR. WHITMIRE: She testified that it was a basic investigation to make certain she wouldn't be ambushed with something. No other purpose besides that.

THE COURT: I do recall that. Why is this new information and not cumulative?

MR. CHILDS: Well, I needed to hear his testimony as to what he felt the purpose of that was. I think it may be different. My inquiry with her ---

THE COURT: So it's your intent to go back and re-track side by side ---

MR. CHILDS: No. No, sir.

THE COURT: --- Ms. Tye's and Mr. Senerius's testimony?

MR. CHILDS: No, sir.

THE COURT: I'll give you a little leeway, but let's not dawdle; okay, sir?

MR. CHILDS: Right.

Q. Do you remember anything about that?

A. I remember that coming up with regard to issues of his character.

Q. Okay. And were you concerned about that being presented by the State in the case?

A. Yes.
Q. All right. And on page two of the note here, he indicates about the pink blanket around the child's legs?
A. I see the note.
Q. Do you remember anything about that?
A. That's not my handwriting.
Q. All right. Your note also indicates -- or the note indicates he had an honorable discharge from the military?

MR. WHITMIRE: Objection. Asked and answered and relevance. Same reason, asked and answered and relevance because it was Ms. Senerius's note.

MR. CHILDS: All right.

Q. Let me ask you this. At the trial of the case did you ask Mr. Hinton about his honorable discharge from the military?
A. While he was on the witness stand?
Q. Yeah?
A. I don't remember. If I did, it would be in the transcript.
Q. All right.
A. If it's not in the transcript, I didn't ask him.
Q. Do you remember asking him about what high school

he went to?

A. What high school he went to?

Q. Yeah?

A. No, sir. I don't recall that.

Q. Did you ask him about playing baseball in high school?

A. Probably not since the case didn't deal with baseball.

Q. Right. Well, you know, important is the defendant's background; isn't it?

A. It can be to a certain extent.

Q. Right. And so the better a defendant's background is, the better he is presented to the jury; is that correct?

A. Could be. But playing baseball, I don't think, would be germane as to what -- how nice a guy he was.

Q. Well, it makes him more of a person; doesn't it?

MR. WHITMIRE: Objection. Bolstering and asked and answered. Mr. Senerius has testified ten minutes ago that character was not an issue he wanted to bring up.

THE COURT: Overruled.

THE WITNESS: I'm sorry.

THE COURT: I said overruled.

THE WITNESS: Oh.

A. I don't know. I suppose so. I used to be triathlons and long distance cycling so I don't know that that makes me a better person. It's just something that I enjoyed.

Q. Well, I think we think better of you because you did.

A. Well, that's awfully nice of you.

THE COURT: All right. Let's not banter; okay?

MR. CHILDS: All right.

Q. And so normally would you want to bring those things out in respect to a defendant if you could?

A. It depends on the case.

Q. Now, you were sent a letter to -- Mr. Price sent you a letter shown in Exhibit Number 4. Can you identify that?

A. Yeah. I remember seeing this.

Q. All right. Did you basically concur with that letter as far as your investigation that the shower incident couldn't explain the injuries?

A. Not being a doctor, I wouldn't say that I concurred with it. I did, however -- I have a -- had a pediatric physician who was retired military who would consult with me on cases, point me in the right direction. He wouldn't testify.

Q. Right.
A. And I went over the medical records with him. I don't know whether I showed him this letter or not. And he didn't have anything helpful to tell me.
Q. Right. So you went over the issue of the classic metaphyseal lesion that was testified to at trial?
A. Went over that with who?
Q. With the doctor you consulted?
A. Yes.
Q. And what was your understanding of what that is?
A. My understanding of what that is was better three years ago than what it is now, okay? I don't recall specifically and I can't give you an expert testimony or expert testimony with regard to the medical issues. I know that Mr. Price had hired an independent pathologist to review the work that had been done by the state's pathologist. I sat down with a doctor, a pediatrician friend of mine, who had dealt with a lot of child abuse cases, shaken baby cases, consulted with him. And he didn't have anything helpful to tell me. He didn't have anywhere -- he didn't put me in any direction to get additional information.
Q. All right. Well, did you understand that the metaphyseal lesion was a rather subtle injury to a child?

A. It can be.

Q. And during the trial itself, I believe it was testified to quite frequently, and the record will reflect that, so I'm not trying to ...

A. Okay.

Q. --- that that was a broken leg. Would you agree that was an improper characterization to that?

MR. WHITMIRE: Objection, Your Honor. Relevance in terms of -- unless he's intending to put expert findings up in reference to the PCR. It's improper testimony to get from anyone else.

THE COURT: Mr. Childs?

MR. CHILDS: Well, I think the question is why did he not object to the testimony that it is a broken leg, when it's a subtle injury. And so I think his understanding of what type of injury it was would relate to why or why not he didn't object to that characterization?

THE COURT: I sustain that objection.

MR. CHILDS: All right.

Q. Now, you also --

MR. CHILDS: I believe, Your Honor, we've already covered the jury selection. Do I need to get back into that at all? Except can I ask him questions about the media coverage?

THE COURT: Sure.

Q. Was there extensive media coverage of this case?

A. Of this case?

Q. Yes, sir?

A. I know to the extent that there was -- give me a minute. There appears to have been at least in comparison to most cases.

Q. Was there television coverage as well?

A. That, I don't recall. I think somebody told me that there was. There wasn't any that I was able to track down.

Q. All right. Do you remember television coverage at the trial?

A. I do not. At trial I'm not concerned with what's behind me.

Q. I understand. Were you concerned about too much publicity?

A. No, not really.

Q. And why not?

A. Because cases have had more publicity than this. I have had -- I've been doing this, at that time, about thirty-four years, I guess. I can recall maybe one or two instances where the publicity was such that after trying to empanel a jury you were not able to. But I've never had a situation where if I could

empanel a jury that there would be a change of venue.
Q. And so your decision whether or not to seek a change of venue would be based upon the jury's responses to voir dire?
A. Yeah, to a large extent. I believe -- gosh, I don't remember. I'm talking three and a half years ago. The subject may have been broached in chambers. And if it was then the response would have been, we'll try to seat a jury first and if we can't -- I mean, if you ask a jury can you be fair and honest, ninety-nine times out of a hundred, they're going to say yes. And if they say no, based on my past experience, that's the juror I want on the jury because they're being totally honest with me.
Q. All right. And I'll let the record reflect the jurors that responded that they could or could not.
A. Right.
Q. I was just going to ask you, though, were you satisfied with the Judge's instruction to the jury about publicity?
A. Yes.
Q. Now, in your discussions with Mr. Hinton, if you recall them, did he indicate to you that Ms. Bright had not wanted the child?
A. I recall there were some discussions about the

surprise and maybe how it might have affected. I don't recall him ever specifically saying -- and he may have. I'm just saying I don't recall him saying -- she didn't want the baby.

Q. All right. And did you recall any discussions with him about who was the primary care giver and her response to the child.

A. I'm sorry. That he was the primary care giver?

Q. Who was the primary ---

A. Oh. Who was the primary care giver. I suppose the subject came up. I don't recall.

Q. Okay. Now, we've introduced into evidence some journals that were recovered by the police. Do you remember those?

A. Those? You're talking about Ms. Bright's journals?

Q. Yes.

A. I probably looked at them, but that was Ms. -- that's my daughter's witness. I have trouble calling my daughter Ms. Senerius. I'm sorry.

MR. WHITMIRE: Objection.

A. She's my daughter. I call her Brittany.

THE COURT: Just one second. What's your objection?

MR. WHITMIRE: Relevance and asked and

answered yesterday.

THE COURT: I'm going to let him ask the question first and renew your objection if appropriate.

Q. All right. So you don't really recall those?

A. Not as I sit here today.

Q. All right. And basically you left that to your daughter as far as that issue is concerned?

A. I left the investigation, if you will, for lack of a better word, of witnesses or how she was going to prepare for her witnesses with her. We talked about it but ---

Q. All right.

A. If I didn't have confidence in her, I wouldn't have had her sitting next to me.

Q. I understand.

A. Or on the other side of Mr. Hinton, I should say. She wasn't sitting next to me.

Q. Now, was this the first criminal trial that she did cross-examinations on state witnesses?

A. No.

Q. Can you tell me that other trial she mentioned earlier?

A. Yeah, about a month before or so we tried a case in Oconee County, a criminal sexual conduct second

degree case, and it drew extensive publicity. During the trial it had drawn extensive publicity. Initially, when it happened it was a case that was probably three years old at the time we tried it. We were substitute counsel in this particular case. There was some rather delicate DNA testimony about certain bodily fluids and their location and the alleged victim. And my daughter handled the cross-examination of the state's DNA expert.

Q. All right. Was that her involvement in that case?

A. Was that her only involvement in that case, no.

Q. Well, as far as in the trial?

A. No. She was there the whole time.

Q. As far as questioning witnesses?

A. Well, that's the main one that I remember.

Q. Okay.

A. And she did a wonderful job. Oh, and we got a not guilty verdict in that case too, by the way.

Q. All right. Do you recall the testimony of various witnesses about the character of the decedent during the trial?

A. The baby?

Q. Yeah?

A. Yes.

Q And you didn't have any objection to that?
A. No, sir.
Q. Okay. What was the theory of your case?
A. The theory of our case was that our client did not do anything intentionally to hurt the child. We tried to play it out that way. That's the only information that we had, the only theory that we could go on that he was not guilty. No one was pointing fingers at anybody else. Nobody had any alibi witnesses. Most of the fact statements as to what occurred on the day of the injury were undisputed. You know, you go with what you've got.
Q. I understand. And so you ruled out the issue of whether or not there was third-party guilt or involvement in this case?
A. And I'm sure you're aware that that's a difficult road to hoe in South Carolina. And I have pursued that avenue in the past when I have had evidence that I could directly point to. But I didn't even have any strong circumstantial evidence in this case. The only other person that I could point at supposedly during that period of time, based upon the doctor's testimony, was the baby's mother.
Q. And you did actually raise some issues about that in the examination of the Officer Roundy, I think

that's correct.

A. Roundy?

Q. Roundy. You asked about her demeanor at the hospital?

A. Sure.

Q. And you asked a rather short question about her affect at the hospital?

A. Okay.

Q. But you didn't ask any questions related to what he noted in his file about her behavior. And those are shown on Exhibit Number 21 at the bottom there?

A. Okay. Are you talking about the last paragraph or do I need to go further up?

Q. That last paragraph.

A. Okay. Okay. I've read it.

Q. So did you -- well, I'll let the record reflect that. Would that be something that you would want to ask him about on cross-examination?

A. Well, it's difficult to say. I've always taken the opinion that you don't ask questions you don't know the answers to or you don't know where they're going to lead on cross. There are a number of reasons why anyone in that situation could have a flat affect. Be concerned about things. I mean, this lady is being questioned by a police officer about injuries

sustained to her child. Never having been in that particular circumstance myself, I can't tell you how I would react. And I don't know that she would react any differently.

Q. Well, I understand. But he thought it was unusual enough to make a note of it in his in his -- I mean, apparently?

A. Well, I don't know that he thought it was unusual enough. It's not uncommon to see that information in a report.

Q. That she didn't ask about the injuries to her child. And that she didn't ask about ---

A. Well, that's his recollection. This is his recollection. She did not sign this.

Q. I understand. You asked him about her affect?

A. I asked him about her affect.

Q. But you didn't ask him about that note from the incident report where he saw her behavior, where she didn't ask about the injuries to the child, or she didn't ask ---

A. These are fact statements that he's got down here. Nothing about her emotional state.

Q. All right. Well, let me show you Exhibit Number 23 and ask you to look at the fourth paragraph.

A. Okay.

Q. Please tell me what that says?
A. Yeah. You want me to read it?
Q. Yeah?
A. Okay. Everyone showed emotion over this information except Ashley who showed very little if any. I spoke with the attending physicians who were present at the time the family was told of the condition of [redacted] and asked about the response from the family and Ashley. I was, I guess that's told, it was flat-line, not normal.
Q. All right.
A. Sounds like shock.
Q. Right. Well, you were asking him about her affect at the hospital when he talked to her?
A. Uh-huh (affirmative).
Q. And the reason for that inquiry was what?
A. I really don't recall why I asked that specific question at that point in time. I suppose I wanted that information out in front of the jury. I suppose it was because I knew what the answer to his question would be.
Q. All right. And on cross-examination of her when she was re-crossed -- actually redirected by Ms. Simmons -- and do you have the transcript up there?
A. Yes.

Q. Look at page 130.
A. Okay.
Q. Line 5 through 10.
A. Lines 5 through what?
Q. 10. In his answer where she redirected him after your questions?
A. This is the -- oh, the testimony of ---
Q. Roundy?
A. --- Roundy? Okay.
Q. And so the prosecutor followed-up and asked him how did you -- when did you eventually learn about her normal demeanor? And he responded, I learned that she's an individual that holds things in and does not display emotions to anybody except maybe in private.
A. Okay.
Q. Would that response not have been hearsay?
A. It could have been. Again, you get into the question of the definition of hearsay. Were they offering it for the truth of the matter asserted? Could it be followed up by other questions from other witnesses? I don't object to everything that is technically a violation of the rules.
Q. Right.
A. Jurors don't like that. They think I'm hiding something from them.

Q. Right. Did you agree to allow the Netflix records testimony to be discussed by the witnesses? The Netflix records that supposedly corroborated Ms. Bright's testimony?

A. Yes.

Q. So you agreed they could testify about that?

A. Yeah.

Q. And it wasn't introduced into evidence?

A. Okay.

Q. Do you remember why you agreed they could testify about ---

A. I would have agreed to that not having that custodian in there because it wasn't a germane issue. There was no argument that she wasn't there. So whether she was watching Law and Order on Netflix or Sponge Bob on the Cartoon Channel was of no consequence.

Q. Right. And did you not object to the testimony about her work record even though that was never introduced?

A. I don't. If the work records weren't introduced obviously, it wasn't something for me to object to. If they were introduced, I obviously didn't think that it was germane at the time to any central issue of the case.

Q. Well, if the questions to Investigator Roundy was that all her testimony was corroborated by the Netflix records and the work records, wouldn't that be hearsay?

A. Well, it would corroborate the fact that she was where she was.

THE COURT: Do you have an objection.

MR. WHITMIRE: Objection. Relevance. There's no purpose in taking testimony. That's not hearsay. It's investigative testimony.

THE COURT: Sir?

MR. WHITMIRE: It's investigative testimony offered by an officer, not for the truth of the matter. There's no purpose of even taking testimony.

THE COURT: Overruled. Go ahead.

A. Okay. Ask me the question again.

Q. I will. And I'm trying not to point out each individual -- I provided a summary for the Judge about the testimony about these records.

A. Correct.

Q. But the evidence -- and I think if you read the transcript it'll say that the officer testified that all the information that Ms. Bright provided to him was corroborated by these work records and this Netflix records that was never introduced in the

trial. And nobody questioned their testimony as to it being hearsay because they were documents produced by somebody else?

A. I'm assuming at the time that I didn't object to that stuff because I didn't think that it hurt us or helped us one way or the other. There was testimony -- they corroborated her testimony as to where she was. As far as I knew from any of the evidence that I had, from talking with my client and others, nobody disputed where she was or what she was watching on television. My client couldn't dispute what she was watching on television. If anything, by her testimony of being there during the period of time when the child's injuries became severe, she probably put herself in their cross-hairs. So there wasn't any reason to dispute it.

Q. Well, I think the testimony was that -- and, again, the record will reflect that. I'm not asking you to rely upon that.

A. Okay.

Q. But the actual Netflix records shown in Plaintiff's Exhibit Number 39, I'll ask you to look at that.

A. Okay.

Q. And so basically that's an email to somebody who

was not a witness in the case; correct?
A. Yeah. It's addressed from the customer service of Netflix dot com.
Q. All right. And so the testimony may be from the transcript that this corroborated her checking on the child every thirty to forty-five minutes, up until about ten o'clock?
A. Okay.
Q. Did that corroborate that?
A. Did that corroborate that she's checked on the child every thirty to forty minutes?
Q. Yes.
A. I wouldn't say that it corroborates it and I wouldn't say that it contradicts it. It just merely shows that these shows were on, on I guess a television in her account or an account she had access to.
Q. Right. And when was the last video that played?
A. The last video that played ---
MR. WHITMIRE: Objection. Asked and answered from Ms. Senerius yesterday.
THE COURT: What ---
MR. CHILDS: That's fine.
THE COURT: Okay, sir.
Q. So you didn't see any purpose in going over the

Netflix records with any of the witnesses?
A. No.
Q. Now, the employment records that were testified about, not introduced into evidence, do you remember that? The payroll records of Ashley Bright?
A. I remember that she testified she was at work. I think she testified -- well, she testified she was at work.
Q. And that's Plaintiff's Exhibit Number 36. Do you recall that?
A. Okay. I don't recall seeing it before, but I'm sure I probably did.
Q. Okay.
A. If it was provided in discovery then we would have had that asked.
Q. Did you inquire into that notation about work the next day on August the 17th?
A. On August the 17th? No, I did not.
Q. Okay. But you had no objection to the officers testifying that this document corroborated her testimony without introducing it into evidence?
A. No. And it does.
Q. The officer testified also that he confirmed the testimony of Desmond Holland by checking the employment records of -- I'm sorry.

A. Do you need these?
Q. Yeah. Let me go back and look at my notes.
MR. CHILDS: Pardon me, Your Honor.
THE COURT: Mr. Childs, I believe it's an Exhibit and I may have that document.
MR. CHILDS: Oh, I've got it, but I just don't have the marked one; but I assume it's in there.
Q. The work records of Jamari Robinson, do you recall that? It's reflected in Exhibit 18 that's somewhere?
A. Do I recall seeing this? I do not recall seeing it. It doesn't mean I didn't, just that I don't recall.
Q. If the record reflected that you allowed the officer to testify that Desmond Holland's testimony was corroborated by Jamari Robinson's work records, would you normally object to that?
A. It would depend on whether or not the work records corroborated the testimony.
Q. If you knew they couldn't introduce the records into evidence because the records custodian wasn't there?
A. The records custodian may or may not have been there because we may not have -- we may have stipulated that the records custodians don't have to

be there. I've been in a number of trials where I could stipulate to that, a number of trials where I don't. It just depends on whether or not at that point in time in my trial strategy whether I think it's worthwhile having somebody come up saying that they are John Doe, they work at so and so, they're the records custodian for this, and this is their record.

Q. All right. Do you recall doing that in this case?

A. Specifically, no.

Q. Yeah. I mean the Verizon records went in without objection. I understand the custodian was called -- was there as a witness.

A. Okay.

Q. And I understand the strategy of that. And the Verizon records ---

MR. CHILDS: Do you have the exhibits from the trial?

MADAM COURT REPORTER: No, I do not.

MR. CHILDS: Okay.

Q. The Verizon records, it's shown as State's Exhibit Number 9 in the criminal trial, were introduced without objection. I understand your theory behind that. But there is a -- on the third page of this, there is an area where a text message

was marked out.

A. Okay.

Q. And referring to Plaintiff's Exhibit Number 37, it appears the response that was marked out says, even if she's sober. And that was in response to Mr. Hinton advising his girlfriend that he did not want her mother to come over to the house.

A. Okay.

Q. Do you recall that?

A. Not specifically. But if that's what the records indicate, I don't disagree.

Q. All right. And do you recall in the testimony in this case there's a lot of issues that that was odd, that he didn't want his mother -- well, Ashley's mother coming over to the house that day?

A. There were people expressing that opinion, certainly.

Q. And did you ask Mr. Hinton about that?

A. I don't remember. I may have.

Q. On his direct examination?

A. Oh, on his direct examination?

Q. Yes, sir?

A. No. I may have asked him. I don't recall. The record will reflect ---

Q. It will reflect whatever you asked him?

A. Yeah.
Q. Well, wouldn't that be important to ask him that, to refute that testimony that that behavior was odd?
A. It could be.
Q. Okay. Because the notes we have from Plaintiff's Exhibit Number 37 and says -- there's a note there that says, Ashley's mom was on pills. And I think your daughter testified that that's her -- somebody's notes?
A. Yeah. That's my handwriting. Back then you could actually read it.
Q. You can't read mine.
A. You can't read mine now.
Q. But do you know why they marked out from the State's Exhibit the response that would make your client's behavior seem more appropriate?
A. No, I do not.
Q. In your testimony related to the doctors' testimony -- you did the cross-examination on the doctors; is that correct?
A. I believe so.
Q. All right. And do you -- give me that back so I can finish up. Do you recall any objection you made concerning any of the doctors' testimony about their testimony being speculative?

A. No. Their testimony was their opinion.
Q. All right. And did you recall ever objecting based on their testimony not having a proper foundation?
A. No. I believe they testified their foundation was their reports -- records that they'd looked at and activities that they had participated in.
Q. And any objection that their testimony was not within a reasonable degree of medical certainty?
A. No. And the reason for that would have been that would have been the next question. This is to a reasonable degree of medical certainty. There are certain things that you don't want to emphasize to a jury. And expert testimony is one of them.
Q. Well, when the doctor was questioned by the prosecutor as to whether or not these injuries were inflicted by a small or a large person?
A. Right.
Q. And said a large person, did you object to the foundation of that answer?
A. No, that was that doctor's opinion.
Q. Well, did you ask him what the basis of that opinion was?
A. Specifically, no.
Q. Okay.

A. You want to know why?
Q. Sure?
A. Because he would have given me his opinion that it was based upon his experience and knowledge in the practice of medicine. And it would have reemphasized the difference between Ashley and Matthew.
Q. All right. But these injuries that were -- allegedly occurred, you've handled these kind of cases before ---
A. I have.
Q. --- and they don't required a very strong person to inflict them; do they?
A. It depends on the doctor you talk to.
Q. Okay. Now, one of the doctors, and I'll let the record speak for which doctor, testified that the injures incurred by the child occurred within -- let me rephrase it.

MR. WHITMIRE: I'm not objecting. Just for the record I don't mind being patient for future purposes.

MR. CHILDS: Let me go on to something else. I'll find that in a minute. I'm sorry.

Q. Mr. Hinton's fingerprints were taken or photographs of his hands and measurements of his hands were taken; do you recall that?

A. No, but I'm sure they were.
Q. Okay. You don't recall that?
A. I don't specifically have a recollection of his fingerprints and hand prints and size being taken, but I'm sure the police would have been remiss in their job if they didn't.
Q. Do you recall -- so you recall there was an issue about fingerprints on the child?
A. I believe so.
Q. And do you recall if there was any evidence that -- any effort or ability to match those fingerprints to Mr. Hinton's hands?
A. I don't believe there was, but I don't recall.
Q. All right. And do you remember asking the officers about that investigation, their inability to match those fingerprints and the measurements of his hands?
A. Not specifically, but if there was -- the record will indicate what I did and didn't do about it.
Q. Right. Wouldn't that normally be something you would want to bring out to the jury, the fact that some of the evidence does not indicate that your client committed the crime?
A. I think the jury understands that. When you get the evidence in that they can't identify who the

fingerprints are.

Q. Well, nobody asked that?

A. They didn't put any evidence that they were admitted -- that they were Matthew's, that I recall.

Q. Right. So ---

A. So they don't have ---

Q. They tried and were unable to do it.

A. Okay.

Q. Wouldn't that be a good question to pose to the investigating officer, that you could not match up the fingerprints to the evidence?

A. If the evidence in the trial is already that they can't match up the fingerprints to any particular individual, then why would I go ask somebody -- no, sir. I would not do that.

Q. All right. Well, let me ---

A. First of all I don't know what he would answer.

Q. Let me clarify?

A. Okay.

Q. What they did was measure his hands in order to try to match up the size of his hands to the injuries on the decedent's body?

A. Right.

Q. And the result of that was that apparently they were unable to do that. They could not match his

hands up with the injuries on the decedent's body?
A. Okay.
Q. And do you recall that?
A. I do not recall that.
Q. Okay.
A. I'm not saying it didn't happen. I just don't recall it.
Q. If that happened, would not that be something you wanted to ask the investigating officer about?
A. No.
Q. Okay. And explain to me why?
A. Because he's already said they don't match up.
Q. Well, he didn't say they didn't match up. Nobody asked him about ---
A. Well, he didn't say they matched up either?
Q. Right?
A. So if he's not going to tell me something -- I'm not going to ask him a question on cross-examination that I don't know the answer to.
Q. Well, you knew the answer to that?
A. No, I knew that they didn't match up.
Q. Right.
A. But I didn't ask him why. I'm not going to give him -- an example. If I should have asked it, okay, that's your opinion. I suppose at the time I did not

feel that it was germane or relevant.

Q. Okay.

A. I mean, I can go back over this transcript in twenty/twenty hindsight and say that there are probably things I should have done and probably things that I shouldn't have done. Any lawyer who tries cases is going to tell you the same thing.

Q. Right. Do you recall the issue of the retinal hemorrhages on the victim?

A. Shaken baby syndrome, there's always retinal hemorrhaging.

Q. And do you recall any questions about CPR causing those injuries as well?

A. I do not. But CPR doesn't cause retinal hemorrhaging. At least to the best of my medical knowledge.

Q. Okay. Is that anything that you -- what do you base that on?

A. My experience with these kinds of cases, talking with different medical experts in the area and talking with the consulting expert that I used in this particular case.

Q. All right. Dr. Troupe testified at trial that the -- on page 238, line 1 through 3, which is in response to a question earlier -- indicating that the

child would not have been normal a few hours earlier that day?

A. Uh-huh (affirmative). Correct.

Q. And did you inquire as to any witness about the possibility that these injuries were inflicted while Mr. Hinton was sleeping that afternoon?

MR. WHITMIRE: Objection. Relevance, unless counsel has an intended medical expert to produce this for ---

THE COURT: Do you have such evidence?

MR. CHILDS: I've got it from the transcript. And also I've got testimony from the other doctor that said that the injuries occurred within less than eight hours of presentation from the ER. It's in the record.

MR. WHITMIRE: Ultimately, Your Honor, none of us are doctors. The witness is not a doctor. If he's going to question the doctor's findings, that would be inappropriate. However, to point out cross-examination on different testimony from doctors, absolutely appropriate.

MR. CHILDS: All right.

Q. But my question really is why didn't you ask the doctors could those injuries have occurred after five thirty then?

A. Why didn't I ask if they could have occurred after five thirty?
Q. Yeah?
A. I don't know. I suppose I could have. I could have asked them if they occurred prior to five-thirty.
Q. Well, you did. I mean, you asked them if it could have been older than eight hours?
A. Right.
Q. And that was the issue of the subdural hematomas developing over time.
A. Right.
Q. Which I understand there's a theory behind that, as well?
A. Right.
Q. But the evidence here was that apparently the child was normal from five thirty until approximately ten while the mother was checking on the child. And so would not that be helpful to say to the doctor, couldn't the time frames have been shorter than eight hours.

THE COURT: Weren't there, in fact, questions in the record that shortly up to EMS arrival that this could have occurred?

MR. CHILDS: Yes, sir.

THE COURT: Okay. Go forward, please, sir.