VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Roger E. Henderson, Circuit Court Judge

MITCHELL RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002302

APPENDIX

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Q. Good morning, Mr. Rivers -- afternoon, Mr. Rivers?
A. Good afternoon. How are you doing?
Q. I'm doing okay. Thank you for asking.
A. You're welcome.
Q. You indicated earlier that the child was suffering from breathing issues, was he suffering from breathing issues or was he not breathing at all?
A. Suffering from breathing issues because Jennifer Quick, the biological mother ---
Q. If I may clarify before you finish answering that question. I'm referring to the morning the child died. You indicated earlier that you woke up and you found that the child was having breathing issues after having slept under your armpit, was the child having issues breathing or was the child not breathing at all?
MR. BOOZER: Your Honor, I'm going to object to the cross examination. We're not here to retry the case. Really the issue is on what his lawyer was not doing. I certainly just had him give a little bit of background for the court's understanding. He can certainly look at the transcript and refer back to the transcript and look at that but I do object to any re-cross examination of him or retrying the case with him.
MR. JAMES: Your Honor ---
THE COURT: I agree with that, but you allowed him

to go into that. I mean, at the time he was answering your questions I wonder why we were covering that ground but I'll let you go ahead. I mean, in fairness to you, I'll let you seek a response.

MR. JAMES: Your Honor, I only briefing wish to ask ---

THE COURT: We don't need to waste a lot of time.

MR. JAMES: --- the question because he went into it on direct examination.

THE COURT: Right.

A. He had breathing issues because they had put him on steroid medicine and everything.

Q. Isn't it true there was introduced at trial, evidence -- let me stop and rephrase that question ---

A. Mmm, hmm.

Q. Isn't it true that you gave a statement to law enforcement after your trial ---

A. I gave a statement, yes, sir, I did.

Q. Isn't it true that you were subjected to a polygraph examination?

MR. BOOKER: Objection, Your Honor. I don't say anything to do with a polygraph.

MR. JAMES: We're not in front of the jury, Your Honor, and this goes to the question of his inconsistent statements over time.

THE COURT: All right. What's the question again?

MR. JAMES: Isn't it true that he was subjected to a polygraph examination?

THE COURT: I'll let him answer that. Yeah.

A. Yes, sir.

Q. All right. And isn't it true that after that polygraph examination you offered a second statement to law enforcement?

A. I did. The same -- I gave them a video statement.

Q. All right.

A. Mmm, hmm.

Q. You recall there being any discrepancies between that statement and the initial statement?

A. No, sir, because they have everything on file. I gave them the same video statement on the written statement I gave them.

Q. Isn't it true that there was at testimony or there was at trial testimony that you gave a third statement to law enforcement that was not recorded on video?

A. No, I didn't give them a third statement. No, sir. I did not.

Q. But isn't it true that there was a trial testimony to that effect?

A. I don't understand, trial statement.

Q. Did anybody else at trial say that you gave a third

statement?

MR. BOOKER: Objection, Your Honor, hearsay.

THE COURT: Sustain.

Q. You indicated that DSS deemed you fit to take care of the child, is that correct?

A. Yes, sir.

Q. Had you had any prior encounters with DSS before taking custody of the child?

MR. BOOKER: Objection, Your Honor, relevancy.

MR. JAMES: Again, he got into the issue of being deemed fit by DSS?

THE COURT: All right. I'll overrule the objection. Answer the question.

MR. BOOZER: Your Honor, if I may just briefly on argument. I only ask that to explain why the child was in his custody. That was not to get into any sort of prior encounters he may or may not have had with DSS which is now what is trying to be delve into I believe.

MR. JAMES: Your Honor, I'm not seeking to delve particularly deep into it. I just want to draw the court's attention to the fact that there was testimony in the record that Mr. Rivers had prior encounters with DSS, that it was not divulged to DSS when they were making the analysis as to whether to place this child with him and that there was testimony that had DSS known about those

prior encounters, there's no way in heck they would have placed this child with him.

THE COURT: Okay.

MR. JAMES: That's I'm trying to get out. And I'll move along ---

THE COURT: It doesn't have any real bearing on the issue before the court but ---

MR. BOOZER: I hate to keep objecting, judge, but there's no one here from DSS to testify. I wasn't there to make this cross examination of anyone from DSS. I just don't feel like it's relevant at all for what we're here for today.

THE COURT: I mean, there's been testimony that DSS did the investigation, found their home to be proper, allow the adoption. If DSS missed the ball somewhere that's their problem. I'll sustain the objection at this point based on your argument.

MR. JAMES: Thank you, Your Honor. I beg your indulgence.

MR. BOOZER: Thank you, Your Honor.

MR. JAMES: I have no further questions, Your Honor.

THE COURT: Okay. Mr. Boozer?

MR. BOOZER: No redirect, Your Honor.

THE COURT: Okay. You can step down, Mr. Rivers.

MR. RIVERS: Thank you, sir.

THE COURT: Certainly.

MR. BOOZER: Your Honor, we'd go ahead and call Mr. Matt Swilley to the stand.

THE COURT: All right.

THE CLERK: Do you solemnly swear the testimony you're about to give the court is the truth, the whole truth, and nothing but the truth help you God?

MR. SWILLEY: I do.

THE CLERK: Have a seat in the witness box and state your full name for the court please, sir.

MR. SWILLEY: Matthew Sherrod Swilley.

MATTHEW SWILLEY first being duly sworn, testified as follows:

Direct Examination by Mr. Boozer:

Q. Mr. Swilley, how are you doing?

A. Good.

Q. Good. Did you represent Mr. Rivers in this trial that we're talking about?

A. I did.

Q. All right. How did you come about representing him?

A. I was appointed to Mitchell's case subsequent to Jason Turnblad leaving the public defender's office. I think his case was actually assigned to Mr. Turnblad at the time.

Q. Okay. Have you been in the courtroom for Mr. Rivers'

testimony?
A. I was.
Q. And did you recall his testimony about when the incident was supposed to have happened in 2005 and his trial was not until sometime much later?
A. Right. It was five and a half years.
Q. Do you know, sort of, what was going on for that long course of time that there was nothing happening with it?
A. Well, I know that originally the solicitor's office prosecuted the case because there is a consent bond or I think then, Solicitor Hodge, had actually signed. When Mitchell was actually charged I think I was like 20 years old. But at some point Ms. Mayes was given the case and at that time she took over prosecution. Sometime before I was assigned to the case.
Q. Okay. Now, what was sort of the -- obviously Mr. Rivers testified at trial, prior to trial and I'm not talking about any sort of aborted plea that ever happened but prior to that, was he pretty adamant about having a trial in the case?
A. Yes.
Q. Okay. Was this ever a situation he was going to go in there and enter any sort of plea?
A. No. No.
Q. Okay. So y'all were fully preparing to go to trial

the entire time?
A. From the time I got the case I was preparing for a trial, yes.
Q. All right. Now, let's go back and we'll talk about -- have you reviewed this trial transcript?
A. Yes.
Q. Okay. And without looking at it, are you pretty familiar with, sort of, the things that happened at trial?
A. Very familiar.
Q. Okay. On page 51 it looks like there was an attempt at a plea to a lesser offense, do you recall that?
A. Yes.
Q. All right. And then Mr. Rivers, basically, he said couldn't do it and wasn't going to enter the plea, do you recall that?
A. Yes.
Q. What was, sort of, the conversation that was going on at that point?
A. Mitchell and I talked and I, you know, Mr. Jones and I and Mitchell had talked and, you know, I didn't want to, I never wanted to force him to plead to anything but I did feel that at that time that maybe it was the best option -- I felt that at that time it was probably the best option for him just because, you know, the mandatory minimum of twenty (20) years of homicide by child abuse.

Q. And up to a life sentence, right?
A. Correct.
Q. Okay. I'm sorry I may have cut you off.
A. That was pretty much the point I told him is that, you know, if he took the plea it was a guarantee that he would get less time no matter what that he would've gotten for a guilty verdict by homicide by child abuse.
Q. What was yours -- what was, sort of, the trial strategy in this case?
A. Well, the trial strategy was that Mitchell didn't have to care that child all the time. He may have had to care the child in about, and around the time it's passing but he didn't, he didn't take care of that child. I mean, he worked. He was in manual labor. And, basically, the State couldn't prove that he had done anything to cause the child to die and that, you know, and after Judge Burch from what I perceived ruled on the collateral issues, the collateral injuries issues, that he didn't cause anything to happen to that child.
Q. Well, when you say at the time, you're talking about the other injuries that were found on the child with broken ribs?
A. Right. And that substantially hindered, you know, his defense, I believe and for the jury.
Q. And let me ask you some questions about that. Now,

you, obviously, you made a motion pretrial right before trial to suppress some of that evidence, talk a little bit about that?

A. Based on my recollection I made a motion to suppress evidence of any injuries that did not pertain to the cause of death of the child because they weren't relevant and even if they were relevant, they couldn't be attributed to Mitchell. I mean, there was nothing to indicate that he had anything to do with any of the collateral or whatever you want to call them, unrelated injuries to the child particularly any bruising because there were different color bruising on the child's body that would've indicated he had been, that he would've been hurt at various times before his passing. So the point was that wasn't relevant to the case and even if it was relevant it's substantially more prejudicial than probative.

Q. You're talking about the other injuries?

A. Correct. Yes.

Q. Which included, I guess, what they called of some broken or some fracture ribs?

A. There was -- there was some ribs that had been healed that they could tell had been broken. There was some bruising. There was some petechia on the child that I don't believe was related to the child asphyxia. I think -- and, you know, based on my recollection I don't think

that there was -- and I couldn't really understand the State's theory, I mean, obviously they wanted that to come in because it made him look bad but, I mean, there wasn't any response as to what would indicate that he caused those injuries.

Q. And let me ask you this and, Your Honor, I'm looking at page 87 of the transcript, and Mr. Swilley the court, after you make the motion ---

A. Yes.

Q. --- regarding what you called collateral evidence which you're referring to the other injuries, right?

A. Collateral, yeah, the collateral injuries.

Q. Right. The court says, "I'm gonna have to deny that motion too based on, especially, a recent case. These child cases are getting a little different treatment than what we're normally used to involving adult cases and other type criminal cases. All right. You're protected on the record on that." Do you recall that?

A. I do.

Q. All right. So at that point, do you think that your argument and your motion regarding those other, what I'll call unrelated or strange injuries, that you're protected and that's preserved for appellate review?

A. I interpret that to mean that he was, he had decided the motion and he had ruled against me and that his

decision on that matter was final and, yes, that I was protected for appellate purposes. That's the way that I -- I -- that's what I believe at the time.

Q. Okay. And eventually what happens is Dr. Ross, do you recall who Dr. Ross was?

A. I do.

Q. Who is that?

A. She was -- she's the pathologist with Newberry Pathology Associates I believe that was the one who performed the autopsy on Mitchell Alexander Rivers.

Q. All right. And so she states, and is on page 148, where she testifies that, "they x-rayed several" -- "we also found x-rayed several rib fractures that were healing", was that something she testified to?

A. Yes.

Q. And at that point if the record reflects that you didn't make an objection at that point in time, would that be accurate?

A. Yes.

Q. Okay. Is there reason you didn't object at that point?

A. I thought the matter had already been decided by Judge Burch and it would have been superfluous.

Q. And that was based on the earlier ruling and that you were protected on the record?

A. That's correct.
Q. Have you now come to find out and learn that, that's not correct?
A. Yeah, I was wrong.
Q. Okay. Was that a mistake on your part?
A. Yes.
Q. All right. Now, moving on, on page 184 they actually call another doctor, did they not?
A. Correct.
Q. All right. And in that testimony he again testifies to, " no rib fractures, the child dies two months later and now we've got healing rib fractures", and at that point, did you make any sort of objection?
A. I did not.
Q. All right. And again did you not object for that same reason you thought you were still protected?
A. That's correct.
Q. And come to find out that was incorrect, right?
A. Yes. According to the Court of Appeals I was, I was not protected.
Q. All right. Now, with regard to those old injuries, the rib injuries and whatnot on whatever the old injuries may have been, was there anything tying Mr. Rivers to those injuries?
A. No, not to my recollection. Nothing.

Q. And did those injuries have anything to do with the death of the child?
A. Not to my knowledge.
Q. And what -- do you recall what the manner of death was, was it asphyxiation?
A. Well, it was asphyxiation. If I recall correctly, I believe initially the manner of death by Dr. Ross had been deemed accidental. At some point, I think it came out that Ms. Mayes may have contacted Dr. Ross and subsequent to that the cause of death had changed to homicide but I don't think there was ever any discrepancies as to the manner of death. The child had been asphyxiated in some manner.
Q. Now, did you file the notice of appeal for Mr. Rivers?
A. Yes.
Q. Okay. Did you -- at that time, were you doing any appellate work or strictly, um, public defender, excuse me?
A. I was a full-time public defender at the time.
Q. All right. Did you have any ideas about what the appeal would be about or did you tell Mitchell what you thought should be a pursued on appeal?
A. I can't remember. I don't think Mitchell and I ever discussed any specifics of any appellate issues but I knew that, that the issue of the unrelated injuries unrelated to the death of the child was going to be if not the issue, you know, definitely, you know, the essential issue in the

appeal was what I thought.

Q. Okay. And so you were expecting that issue to be one of the appellate issues?

A. Yes.

Q. All right. Since the appeal and whatnot, have you read a copy of the appellate order in this case?

A. Several times.

Q. You've read it several times?

A. Yes.

Q. And you understand that in the appellate order, basically, what the appellate court found is that, basically, you weren't protected on the record and that further action on your part had to have occurred in order for them to review that issue?

A. Correct.

Q. All right.

MR. BOOZER: I beg the Court's indulgence, Your Honor.

THE COURT: Yes, sir.

Q. And you understand that the court says, we find no exception existed that would've relieve Rivers of his requirement to obtain a final ruling when that evidence that they're talking about from the two doctor's was offered, so they say, basically, you had to object to it in order to review that issue?

A. Yes. I believe you had to object contemporaneously to preserve the issue is what the appeal says.

Q. Okay. And in the argument -- in the opinion, the note, footnote 2, that the court makes, "is during oral argument the State admitted it's strongest argument was the issue presented is unpreserved. We remind the bar that our appellate courts have consistently refused to apply a plain error rule and it is the responsibility of counsel to preserve the issues for appellate review, have you read that?

A. I have.

Q. All right. Based on looking back at this trial, based on your review of the trial transcript and the opinion issued by the appellate court, do you think that your failure to object to those items negatively affect his trial?

A. Yes.

Q. Okay. And do you also think that it negatively affected his appeal?

A. Yes.

Q. At the time -- was this in February of 2011 when this trial happened?

A. Yes.

Q. At that time, how long had you been practicing law?

A. I passed the bar -- I think I was sworn in November of

2009 so a year and two, three months.
Q. Okay. And you, obviously, handled a number of cases since then?
A. Yes.
Q. Is this something that you would now know that you would not be protected on the record, that you would object to it and preserve it?
A. Absolutely.
Q. All right. Let me ask you this, how many cases do you think you've now, today, handled?
A. Handled or tried?
Q. Let's do handled first?
A. Criminal cases?
Q. Yes, sir.
A. Hundreds.
Q. How about trials?
A. Over, I believe, of about fifty.
Q. Okay. Did you have any contact with Mr. Rivers after this case?
A. After -- immediately after he was sentenced, I told him that I explained that I was going to appeal to him and we had a brief conversation. And I did send Mitchell a letter I believe I copied him with the notices of appeal, if I'm not mistaken.
Q. Okay. Have you expressed to Mitchell any regrets on

this case?
A. Absolutely. I actually -- that was one of the reasons why I left the public defender's office the first time after this case.
Q. Why is that?
MR. JAMES: Objection. This doesn't get to the question of whether not he was efficient at trial, Your Honor.
THE COURT: I'll overrule the objection. You can answer the question.
MR. BOOZER: Thank you, Your Honor.
THE COURT: I think it does apply.
A. It was -- it was really -- I was really dejected and I didn't feel that -- I didn't feel that Mitchell had gotten a fair shake and it just left a really bad taste in my mouth.
Q. I think we probably all have cases we remember, is this sort of 'the case' for you that you look back on and regret or remember the most?
A. Criminal case, yes.
Q. In looking back at this sort of, these, outside injuries, really from your review of the case and your knowledge of the case, there was nothing tying Mitchell to those injuries, correct?
A. That's correct.

Q. Okay. And that really, for them to be able to get into that and show the jury they're other injuries especially fractured ribs this child has been subjected to, would you say that was extremely prejudicial to his case?

A. Yeah. It turn the case into a case where instead of a one time occurrence of a child dying, it showed a whole pattern of abuse that was allowed to be, you know, submitted before the jury. So, yes, he was -- yeah, it made it very, very difficult.

MR. BOOZER: I begged the Court's indulgence Your Honor?

THE COURT: Yes, sir.

MR. BOOZER: Thank you, Mr. Swilley. That's all the questions I have at his time.

Cross Examination by Mr. James:

Q. Good afternoon, Mr. Swilley.

A. Good afternoon.

Q. Isn't it true that some of those injuries were recent?

A. There were -- there were varying, I think, varying ages of the injuries according to the records that I received. Some being, I think, there were some that would've been verily recent proceeding to the date in which the child passed away.

Q. In fact, some of the bruising was red, some were yellow?

A. If that's what the records show.
Q. Okay. Can you recall a timeline of when Mr. Rivers regain custody of the child?
A. I don't -- I'm not really sure when he and Kim were awarded custody. I don't know that.
Q. All right.
MR. JAMES: If I may beg the Court's indulgence just one moment.
THE COURT: Sure.
Q. Mr. Swilley, you indicated your belief that your failure to object negatively effected the trial, that Judge Burch had already denied your attempt to keep out this collateral evidence, correct?
A. That's what I had believed that he denied it. The Court of Appeals opinion states it differently. My subjective belief was that the matter had been ruled upon and that his ruling was final. That's what I thought.
Q. And I'm splitting hairs just a little bit here, but had you objected in a timely manner, do you believe Judge Burch would've changed his previous ruling?
A. I don't know what Judge Burch would've done. I don't know. I can't say what Judge Burch would've done.
MR. JAMES: No further questions, Your Honor.
THE COURT: Okay. Mr. Boozer?
MR. BOOZER: No redirect, Your Honor.

THE COURT: All right. Thank you, Mr. Swilley. You can step down.

MR. SWILLEY: Can I be excused?

THE COURT: Any objection to Mr. Swilley being excused?

MR. BOOZER: None, Your Honor.

MR. JAMES: No objection.

THE COURT: All right. Thank you, Mr. Swilley.

MR. BOOZER: No further witnesses, Your Honor.

THE COURT: Okay. All right. Mr. James, any from the State?

MR. JAMES: Your Honor, the State calls Tiffany Gibson.

THE CLERK: Do you solemnly swear or affirm the testimony you're about to give the court is the truth, the whole truth, and nothing but the truth so help you God?

MS. GIBSON: I swear.

THE CLERK: Have a seat in the witness box and state your full name for the court please, ma'am.

MS. GIBSON: Tiffany Dominique Gibson.

TIFFANY GIBSON, first being duly sworn, testified as follows:

Direct Examination by Mr. James:

Q. Good afternoon, Ms. Gibson.

A. Good afternoon.

Q. I will endeavor to be brief in your examination this afternoon. Where do you work today?

A. I work for the child support division of DSS.

Q. And where did you work at the time of this trial?

A. The Fourth Circuit Public Defender's Office.

Q. All right. And at that time, how long had you been practicing law?

A. November of 2010 so right at three months.

Q. And what role did you play with respect to Mr. Rivers' trial?

A. I was more so there observing since I had just started three months ago.

Q. Understandable. There has been some discussion about page, primarily page 87 of this transcript, where Judge Burch denies motions on memoranda, memorandum and informs Mr. Swilley that he's protected on the record, do you remember that part of the trial?

A. Somewhat.

Q. Do you remember if any part of that seem strange or unusual to you?

A. I don't recall.

Q. Did you say anything to Mr. Swilley to indicate any concerns about the procedure?

A. I don't think I did.

Q. Did you believe that Mr. Swilley was protected on the

record?

A. I think so.

MR. JAMES: No further questions, Your Honor.

MR. BOOZER: No questions, Your Honor.

THE COURT: Okay. You can step down, Ms. Gibson. Thank you.

MR. JAMES: Your Honor, made this witness be excused? Mr. Boozer?

MR. BOOZER: Court's indulgence, Your Honor.

THE COURT: Any objection to her being ---

MR. BOOZER: Oh, no, objection, Your Honor. None at all.

THE COURT: All right. You may be excuse, Ms. Gibson.

MS. GIBSON: Thank you.

MR. JAMES: Your Honor, the State's next witness is Benjamin J. Tripp.

THE COURT: All right, sir.

MR. JAMES: The State calls Mr. Tripp.

THE CLERK: Do you solemnly swear or affirm the testimony you're about to give the court is the whole truth, the whole truth, and nothing but the truth so help you God?

MR. TRIPP: I so swear.

THE COURT: Have a seat in the witness box and

state your full name for the court.

MR. TRIPP: Benjamin John Tripp.

BENJAMIN TRIPP, first being duly sworn, testified as follows:

Direct Examination by Mr. James:

Q. Good afternoon, Mr. Tripp.

A. Afternoon.

Q. Where do you work?

A. Beaufort County Public Defender's Office.

Q. And where did you work prior to Beaufort County?

A. Appellate defense.

Q. How long did you work at appellate defense?

A. About three years.

Q. About how much experience do you have as a licensed attorney total?

A. About seven years.

Q. You were the appellate defender assigned to this case, correct?

A. Yes, sir.

Q. When you initially brief this case, you originally submitted an Anders brief, is that correct?

A. Breen Stevens submitted an Anders brief. I came on appellate defense after him and inherited the case.

Q. Did you inherit the case before or after the court denied the Anders brief and requested further briefing?

A. I don't specifically recall. If I had to estimate I would say before the Anders denial based on there's typically not much time between a denial and when a new brief is due, a merits brief would be due.

Q. There is something of a secondary allegation by applicant that you were ineffective because you fail to brief issues other than those that you were requested brief by the court. When an Anders brief is rejected and you are asked to brief a specific issue, is it typical to brief something other than that specific issue?

A. No.

Q. What is your typical response when you receive an indication from the court that Anders brief is rejected and that you need to brief a specific issue?

A. In a case unlike this one where I had originally authored the Anders brief, I would devote the time specifically to thinking about whether I had missed something, whether the court has some other motivation for denying the Anders motion and probably discuss it with some other attorneys in the office.

Q. How did you feel about the strength of applicant chances on appeal after you submitted your brief?

A. Hope for the best but certainly prepare for the worse.

Q. Did this case receive oral arguments?

A. That's a very good question I should know the answer

to and I hadn't posed it to myself until now. I'm not recalling whether it did or didn't.

Q. If I may refresh your memory on the case of the opinion, do you have a copy of the opinion up there?

A. I do not.

MR. JAMES: If I may approach?

THE COURT: Yes, sir.

A. I'm reading off the copy of the opinion from the Court of Appeals the heading of the opinion says it was heard January 8, 2015.

Q. Do you remember any aspect of that oral argument?

A. Not well. What I am recalling was that more time and discussion was spent on the substantive issue rather than the issue preservation question.

MR. JAMES: No further questions, Your Honor.

THE COURT: Mr. Boozer?

MR. BOOZER: Thank you, Your Honor.

Cross Examination by Mr. Boozer:

Q. Mr. Tripp, how are you?

A. Hanging in there.

Q. You had a long right up here, I think. Have you reviewed -- I guess you're pretty familiar with the opinion from the Court of Appeals?

A. Yes, sir.

Q. All right. At the time, how many -- how long did you

work for appellate defense?
A. Total about three years.
Q. How many appeals do you think you handled in that time?
A. Direct and PCR conservatively 150 to 350.
Q. Okay. Was this case fairly early on in your tender there or was it in the middle or to the end, do you remember?
A. Fairly early.
Q. All right. Is it, in your experience when we submit an Anders, is it unusual for the court to come back and direct you in a manner to brief something?
A. Yes.
Q. In your experience, do you know about how many times you've experience that?
A. I'm fairly certain that for cases that I briefed or appeal on PCR, I had one to three come back as a denial of the Anders motion or Johnson motion for the PCR.
Q. Okay. So it's pretty unique when that happens?
A. Yes.
Q. All right. I think earlier you said you made the comment on direct about another motivation in denying Anders, what did you mean by that?
A. Sometimes Court of Appeals or Supreme Court seems to -- let me take that back -- with an Anders brief the court

is typically going to issue a summary opinion in one sentence granting the Anders motion to be relieved as counsel, not provide any explanation as to the arguments.

Q. Okay.

A. If the court denies the Anders brief and request a merits brief that provides an opportunity for the court to write a more explanatory opinion and, of course, the point of the opinion is to explain issues to the bar and to the public.

Q. When you were, I guess, preparing your brief, did you actually -- did you argue the case, an oral argument, do you recall?

A. I would've argued the case after the ---

Q. Okay. Was this something -- was this an issue that you kind of -- you stated earlier, you hoped for the best, I think that was kind of your comment when handling the appeal, is that because the issue wasn't preserved that you sort of hoping for the best in this case?

A. Right. Exactly.

Q. Was that your biggest hurdle, in the appeal, was issue was not preserved for appellate review?

A. Yes. All along that was clearly the biggest and almost certain, only hurdle.

Q. And, in fact, it's noted in the opinion itself footnote 2, the recording says that, during oral argument

the State admitted it's strongest argument was the issue was, the issue presented is unpreserved, right?

A. Right. In the clarity of that being a hurdle was what suggested to me that the court had a motivation and still had, had a particular unique motivation and still hearing the case ---

MR. JAMES: Objection. He speculating to what the court was thinking.

THE COURT: I sustain that objection.

MR. BOOZER: Thank you, Your Honor.

Q. Mr. Tripp, have you ever seen this language used in all the 150 to 350 appeals that you handled during your time as appellate defense, have you seen the language used that's noted in the footnote of the opinion, "we remind the bar that are appellate courts have consistently refused to apply the plain error rule and it is the responsibility of counsel to preserve issues for appellate review." Have you seen that before?

A. No. And I've only seen one other opinion and it was a case that I had, that was a PCR where the court gave that type of direct and unequivocal instructions to the bar explaining its position on how a trial lawyer should handle a particular issue.

Q. And in your experience in handling all of these cases and serving as appellate defender, is your sort of

interpretation of that is that there's an error but we just can't review it because it is not preserved?

MR. JAMES: Objection. Speculation.

MR. BOOZER: Judge, I'll ---

THE COURT: If you can lay some foundation for him being able to answer it, I'll let you go a little further.

MR. BOOZER: Thank you, Your Honor.

Q. Mr. Tripp, as appellate defender you have to interpret, understand, try to figure out what the meaning of certain rulings are so that you can use them in your cases?

A. Absolutely.

Q. And do you do that even now on a daily basis?

A. Certainly.

Q. All right. And so clearly -- well, let me ask you this, do you understand what the plain error rule is?

A. Yes, sir.

Q. What is that?

A. An appeals court will overlook the failure to preserve an issue for appeal if not ruling in favor of the proponent of the issue would result in plain error.

Q. And you understand what it means to a preserve issues for appellate to review, right?

A. Yes, sir.

Q. Okay. So putting those two things together, is it

your understanding based on this statement but also the cases that are cited in the State v. Passmore, Elam v. SCDOT, they're, basically, even if there is an absolute error, counsel is wrong, if it's not preserved, they can't review it, is that right?

A. Yes, that was what I understood from what you pointed out.

Q. Okay.

MR. BOOZER: Thank you, Mr. Tripp. That's all I have.

THE COURT: Anything else, Mr. James?

MR. JAMES: No further questions, Your Honor.

THE COURT: Okay. You can step down. Thank you, sir.

MR. TRIPP: Thank you, Your Honor.

MR. JAMES: Your Honor, May this witness be excused?

MR. BOOZER: Any objection?

MR. BOOZER: No objection, Your Honor.

THE COURT: You may be excuse, sir.

MR. TRIPP: Thank you, sir.

MR. JAMES: Your Honor, the State has perhaps more argument we think could be adequately captured in the oral setting and so if it is amenable to the court, I would respectfully request the opportunity to submit memoranda as

on this case.

THE COURT: Mr. Boozer?

MR. BOOZER: I prefer to make oral arguments, judge, but I certainly understand if, Your Honor, is inclined to grant briefings that's fine as well.

THE COURT: All right. I don't find it necessary but if you wish to do so, Mr. James, I give you some time to prepare a memorandum.

MR. JAMES: All right. Would, Your Honor, also ---

THE COURT: You can submit one too if you want to, Mr. Boozer.

MR. BOOZER: Thank you, Your Honor. Do you prefer it to also have brief closings or ....

THE COURT: Does counsel wish to have a brief closing for the record?

MR. JAMES: It may do well to flush out the record, Your Honor, to have brief closings as well.

THE COURT: Okay. All right, sir.

MR. JAMES: Your Honor, there is no question that the issue of the collateral injuries is not preserved for appellate review because the Court of Appeals has said as much. The question here today, however, on post-conviction relief is not necessarily whether or not that issue was preserved for appellate review, but whether trial counsel was reasonable in relying upon the statements of the trial

judge, of Judge Burch, when he said he was protected and that the matter was preserved for appellate review. Your Honor, the State's position is that defense counsel did reasonably rely upon the statements of the trial judge and I have, to hand up for your consideration, two cases that have already been provided to opposing counsel and that is State v. Wiles, 383 S.C. 151. That is a 2008 out of the Supreme Court. And Christenson v. Ault 598 F.3d 990 that is an Eighth Circuit case from 2010. Your Honor, if I may approach?

THE COURT: Yes, sir.

MR. JAMES: Your Honor, counsel unequivocally stated on direct testimony and on cross-examination that when he heard the statement from Judge Burch he thought it to meant that the order was final and that there would be no further consideration of it. Your Honor, under State v. Wiles that is one of the exceptions to the rule against in limine hearings sufficiently preserving the decisions of the trial court for appellate review.

Your Honor, additionally, the State's position is that this issue that wasn't preserved nonetheless would've lost an appeal anyway. For all of the reasons set forth in the State's brief of respondent previously submitted to the Court of Appeals and specifically relying primarily on the case of State v. Martucci that is 380 S.C. 232 that is a

2008 case under the South Carolina Court of Appeals, if I may approach.

THE COURT: Yes, sir.

MR. JAMES: Your Honor, Martucci stands very clearly for the proposition that these sorts of cases, these homicides by child abuse cases, would be all but impossible to prosecute if not for the admissibility of evidence of prior collateral injuries indicating not that a the death of a child was a mere accident but which go to show a pattern, a recurring pattern of horrible abuse and that, that exist in this record, that existed in the record that was before the court on appeal and the court frankly could've denied it on the merits, but chosen, instead, to deny it for reasons of issues of preservation.

Third, Your Honor, ultimately the collateral injuries are secondary to the facts of the case that were presented at trial because all of the elements of homicide by child abuse are there. Applicant found the baby not breathing. Applicant went outside and he didn't tell anybody. And, Your Honor, I think that represents extreme indifference for the purposes of homicide by child abuse. And so in hindsight this is unfortunate that the matter was not preserved for appellate review in the eyes of the Court of Appeals but hindsight is not standard under Strickland. The prevailing of standard is what was reasonable at the

time. And, Your Honor, it's perfectly reasonable for Mr. Swilley to have relied on the court's statement that the issue was preserved. Thank you.

THE COURT: Thank you, sir. Mr. Boozer?

MR. BOOZER: Thank you, Your Honor. If it pleases, the Court? Your Honor, if I may just briefly while it's in my mind I want to click off and just kinda give my rebuttals to each of these cases that have been cited by the State.

The first case which has been handed up just to differentiate State v. Wiles and they indicate that their position is that this was a final ruling and that it was okay, that there were no further duties for counsel. Well, clearly the Court of Appeals didn't think so because they lay it out how it's not preserved in the opinion. In the case that they're relying on which is State v. Wiles, I don't agree that, that's what this case says. They do take an instance where a motion in limine is made and then nothing else is done and they found that the issue was preserved. And they go on to when they're reviewing the case they say, "thus, we find the Court of Appeals erred in ruling that the issue raised on appeal was procedural barred." That's not what we have in this case. Clearly the Court of Appeals says it wasn't preserved. Your Honor, on Martucci that they raise and saying that well the only

way we could prove a child abuse case or homicide by child abuse is with all this other evidence, well that's not right either judge. In Martucci, specifically, what's so important about Mr. Rivers case is this evidence that the State was seeking to admit there was no way nothing done to link that to Mr. Rivers. In Martucci there linking evidence that applies directly to Martucci that "the evidence was Martucci's hostility, cruelty and abuse toward the child could be established by evidence that during the weeks before he died. Martucci the defendant abuse the child by slapping him in the face, taping his mouth shut and dunking his head in the bathtub until he choked to stop him from crying." All we have in Mr. Rivers's case are some injuries to the ribs that supposedly healing that we have no idea where they came from. So that's completely different than these cases that are being cited by the State.

Your Honor, I won't go on and on but in this instance I think that Mr. Swilley clearly feels terrible about how the case turned out. He's admitted that this was an error. He was certainly early on in his career when tried this case. Mr. Rivers clearly backed out of what I guess would be a favorable plea because he wouldn't be subjected to life because he's adamant he didn't do this. And I think that this is certainly that opportunity where the Court of

Appeals lays it out perfectly for us how his lawyer was defective. Whether it was reasonable or not I don't even think it takes, we can take that into account. I don't think it was reasonable. It was erroneous. And he's since, his lawyer has admitted, that he has since learned that. He would know that he would need to continue object. So, Your Honor, for those reasons we believe that this application should be granted. Thank you.

THE COURT: Thank you, Mr. Boozer. Thank you, Mr. James. All right. I will -- how much time do you need get those memorandums to me?

MR. JAMES: Fourteen days, Your Honor.

THE COURT: I'll give you twenty.

MR. JAMES: Twenty? Okay.

THE COURT: All right.

MR. JAMES: I appreciate the opportunity for a day off.

(CONCLUSION OF THE HEARING ON JULY 17, 2017)

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court for Darlington County, South Carolina, on the 17th day of July, 2017.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

s/ *Lisa S. Carter*

Lisa S. Carter

Circuit Court Reporter

January 13, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	
Mitchell Rivers, S.C.D.C. No. 344799,	)	Case No.: 2015-CP-13-00108
Applicant,	)	
v.	)	**MEMORANDUM OPPOSING POST-CONVICTION RELIEF**
State of South Carolina,	)	
Respondent.	)	

Respondent, pursuant to its granted request to submit a post-hearing memorandum in support of its position, would respectfully show this Court that Matthew Swilley's (Counsel) failure to object to evidence of certain collateral injuries to the victim entitles Mitchell Rivers (Applicant) to no relief.

I.

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

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Matthew Swilley, Esquire also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the

records of the Chesterfield County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings.

II.

Counsel was not ineffective because, though he issues presented in his memorandum were not preserved for appellate review, Applicant suffered no prejudice because the evidence was properly admitted to the jury. In Martucci, the South Carolina Court of Appeals found that evidence of prior abuse or neglect was admissible as proof of intent and the absence of accident. 380 S.C. 232, 252, 669 S.E.2d 598, 609 (Ct.App. 2008). "When a child is brought to an emergency room with injuries in various stages of healing, there is evidence of recurring child abuse. If the multiple, separately occurring injuries are not admissible in child abuse prosecutions, the crime would be virtually impossible to prove." Id., 380 S.C. at 254, 669 S.E.2d at 609. "[W]here, as here, the perpetrator is the parent or a person with exclusive custody and control over the victim, proving the abuse becomes extremely difficult. As a result of the difficulties in proving child abuse, 'evidence which shows a pattern of abuse becomes even more probative than it might otherwise be.'" Id., 380 S.C. at 256, 669 S.E.2d at 610-11. Additionally, under the *res gestae* theory, "evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." Id. 380 S.C. at 257, 669 S.E.2d at 612 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). The record need not reflect the exact manner in which a collateral injury occurred. State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct.App. 2011), overturned on other grounds, 406 S.C. 215, 750 S.E.2d 612 (2013). "When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person

who might have inflicted the injuries." Estelle v. McGuire, 502 U.S. 62, 68 (1991); see also State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991) (Permitting testimony of injuries to show battered child syndrome where given by a properly qualified expert).

The injuries at issue together established a pattern of abuse to Victim while Victim was in Applicant's custody. Victim was placed with Applicant and his wife, Kimberly Quick Rivers, on April 22, 2005. Tr. 111, l. 20 – p. 112, l. 6. X-ray examination of Victim on June 20, 2005, did not show any rib fractures. Tr. 158, l. 17 – p. 159, l. 2. Dr. Janice Ross testified that broken ribs, still in the process of healing, were discovered in the autopsy and that the injury was "[p]robably at least seven to fourteen days old" at the time of the Victim's death.[1] Tr. 157, l. 19 – p. 158, l. 1. Both Dr. Ross and Dr. Clay Nichols testified that mostly fresh bruises, atop some older bruises, and subdural hemorrhage indicated blunt force trauma from a knuckle or fist occurring contemporaneously with Victim's death by asphyxiation. Tr. 148, ll.7 – p. 149, l. 15; p. 151, l. 7 – p. 152, l.7; p. 154, l. 3 – p. 155, l. 4; p. 183, l. 1 – p. 184, l. 3. Dr. Nichols, considering all of the injuries together, described Victim's treatment as "a classic case of Battered Child Syndrome." Tr. 186, ll. 15-19. Applicant testified at trial that either he or his wife was with the child at all times, but that he was never alone with his child.[2] Tr. 288, ll. 9-10. Applicant testified that he was in immediate physical control of the child the night of August 6, 2005, until Victim was put to bed, and then again through the night. Tr. 265, l. 23 – p. 266, l. 9. Victim was pronounced dead at the hospital the morning of August 7, 2005. All of these injuries were relevant at trial and probative to the question of whether or not the four-month-old's death was an accident. Accordingly, the evidence was admissible, and Applicant suffered no prejudice from the failure to preserve the issue of its admissibility for appeal.

[1] Compare to the partially healed rib fractures found in Estelle, "which were approximately seven weeks old." 502 U.S. at 65.

[2] Despite, as noted below, also testifying that the child's mother was still asleep when he awoke with the dead child.

III.

A person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . ." S.C. Code Ann. § 16-3-85(A)(1). "For the purposes of the [homicide by child abuse] statute, 'extreme indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 366-67 (Ct. App. 2002)).

Applicant's own statements and testimony established the extreme indifference sufficient to convict him for homicide by child abuse. Taking all facts as Applicant presents them, and only those facts, Applicant left his helpless child alone immediately after reviving him by CPR. Applicant did not call for follow-up medical attention. Applicant did not wake his wife to monitor or attend to the child, who by his testimony slept through his performing CPR on Victim. Applicant went outside and stayed outside until his wife woke and found the child dead. Because of the testimony establishing Applicant's extreme indifference, any error in admitting evidence of collateral injuries was harmless.

IV.

Error by counsel alone does not establish a constitutional deprivation of effective assistance of counsel. That error must be such that counsel's performance "fell below an objective standard of *reasonableness* under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)) (emphasis added). Though at the PCR hearing Counsel testified to his considerable regret for not preserving the collateral injury issue for appeal, his hindsight regret does not

amount to evidence of ineffectiveness. See Edwards v. State, 392 S.C. 449, 456, 392 S.C. 449 (2011) (quoting Strickland at 689) ("[E]very effort [must] be made to eliminate the distorting effects of hindsight"); Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999) (the issue of ineffectiveness is for the court to decide, so admissions of deficient performance by attorneys are not decisive – no error in finding trial strategy, even though counsel categorically denied making a strategic choice); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (a trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"); Gentry v. Sinclair, 576 F.Supp.2d 1130, 1154 n.38 (W.D. Wash. 2008) (finding "counsel's current regret about their performance . . . does not support a claim that trial counsel performed deficiently at the time of trial"). Trial counsel using PCR for an exercise in hindsight, second-chance advocacy on behalf of his former client was not evidence of deficient performance.

Counsel's error was reasonable reliance upon an experienced judge's affirmation that an issue was preserved. Counsel's error did not change the outcome of trial and could not have done so—the evidence would have come in anyway, did rightfully come in, and ultimately the elements of the crime were otherwise satisfied by Applicant's own attempts to explain away the homicide of his child. Accordingly, for these and all reasons presented at the evidentiary hearing, Respondent respectfully requests this Court deny Applicant's application for post-conviction relief.

[*Signature on following page*]

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

7 August, 2017

On Mon, Aug 7, 2017 at 10:43 AM, Johnny James < > wrote:

Mr. Burch,

Please find attached for Judge Henderson's consideration Respondent's "Memorandum Opposing Post-Conviction Relief" in the subject case. Physical copies will be placed in the mail today to the Clerk of Court and opposing counsel. Mr. Boozer is copied on this e-mail.

Respectfully,

Johnny E. James Jr.

Assistant Attorney General, PCR

Office of the Attorney General

State of South Carolina

P.O. Box 11549

Columbia, SC 29211-1549

803.734.3737

--

Lance S. Boozer, Esq.

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---------- Forwarded message ----------
From: **Lance S. Boozer** <
Date: Mon, Aug 7, 2017 at 2:35 PM
Subject: Re: RIVERS, Mitchell v. State (2015-CP-13-00108) - Memo Opposing PCR
To: Johnny James <
Cc: "Henderson, Roger E. Law Clerk (Paul M. Burch Jr.)" < >, Fourthcircuitpcr
< >, "Henderson, Roger E." <>

Mr. Burch -

On Applicant's behalf, we will not be submitting a separate Memorandum Supporting Post-Conviction Relief unless his Honor desires one and respectfully request that his Honor accept this email. We rely on the testimony of Applicant's former counsels presented at the PCR hearing, the Brief of Appellant from the direct appeal which encompasses the law relating to the inadmissibility of the unrelated prior injuries, the appellate opinion and the arguments I presented in closing following the hearing including the State's inability to positively link the prior injuries to my client. As noted in my prior arguments, the cases the State relied upon at the evidentiary hearing are all clearly distinguishable from this case and, in my opinion, strengthen the Applicant's position. In *Martucci*, evidence of prior abuse or neglect was admissible as proof of intent and absence of accident. In *Martucci*, evidence was presented the defendant previously slapped the child, taped his mouth shut and dunked his head in the bathtub until he choked. Those acts were positively tied to Martucci and admissible. In Applicant's case, there was absolutely no evidence tying the child's prior injuries to the Applicant and are thus inadmissible.

Additionally, in its Memorandum, the State asserts for the first time that the prior injuries were admissible to show that the child suffered from Battered Child Syndrome. We would assert that the State failed to advance this argument both on direct appeal and at the PCR hearing and it is abandoned.

Please do not hesitate to contact me should any further information be required. Mr. James is copied on this email.

Thank you,

Lance

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	
Mitchell Rivers, S.C.D.C. No. 344799,	)	Case No.: 2015-CP-13-00108
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

2017 OCT 19 PM 12:53
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

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

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

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

I. PROCEDURAL HISTORY

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

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

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

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

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

Present Application

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

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

Applicant requests relief as follows:

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

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the

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

A. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

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

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

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

[2] This summary encompasses both the allegations of ineffective assistance of counsel restated above as 1.a. and 1.d.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Ineffective Assistance of Appellate Counsel

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

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

IAAC Allegation #1 – Failure to Raise Court's Denial of Directed Verdict on Appeal

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

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

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

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

III. CONCLUSION

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

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

IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

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

ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

Darlington, South Carolina

Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.
2017 OCT 19 PM 12:53

WITNESSES

Sgt. Wayne Jordan
Chesterfield County Sheriff's Department

Law Enforcement Case #:

Lt. Brian Davis 191

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

_____
Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to:

_____

_____
Defendant

ARREST WARRANT NUMBER
CHE00383

ARRESTED ON: 2005-10-03

ACTION OF GRAND JURY

Sandra Lowe
Grand Jury Foreperson
10-19-2010
Date

VERDICT

True Bill
Guilty under (A)(1) homicide by child Abuse
Petit Jury Foreperson
02-11-11
Date

DOCKET NUMBER:
2010-GS-13-1072

The State of South Carolina

County of Chesterfield

COURT OF GENERAL SESSIONS

Term:
October 2010

THE STATE

vs.

Mitchell Rivers

INDICTMENT FOR

Homicide by child abuse

§16-03-0085(A)(1)

CDR Code: 2356

A True Copy, Attest
Faye S. Sellers
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

INDICTMENT FOR

Homicide by child abuse

§16-03-0085(A)(1)

At a Court of General Sessions, convened on October 19, 2010, the Grand Jurors of Chesterfield County present upon their oath:

Homicide by Child Abuse
S.C. Code Section 16-3-85(A)(1)

That Mitchell C. Rivers did in Chesterfield County, on or about August 7th, 2005, willfully and unlawfully commit the offense of homicide by child abuse by causing the death of a child under the age of eleven while committing child abuse and/or neglect, by an act or omission, and the death occurred under circumstances manifesting an extreme indifference to human life, to wit: M.A. Rivers, date of birth April 13th, 2005, died on August 7th, 2005 as a result of child abuse or neglect, in violation of Section 16-3-85, S.C. Code of Laws, 1976, as amended.

2011 FEB 14 PM 2 43
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

A True Copy, Attest
Faye L. Sellers
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

William B. Rogers, Jr.
WILLIAM B. ROGERS, JR.
SOLICITOR