LAW OFFICE OF
TRICIA A. BLANCHETTE

January 16, 2019

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

RE: Nathaniel Mitchell v. State; Case No. 2007-CP-40-6693

Dear Sir:

Attached for filing, I have enclosed an original and one copy of a Notice of Appeal and Certificate of Service in the above referenced case. Upon filing, please return the copy of the Notice and Certificate of Service in the enclosed envelope. Also, for filing, I have enclosed a copy of the Order of Dismissal.

I was appointed to represent Mr. Mitchell. Therefore, I am copying the Office of Appellate Defense with this letter and all enclosures.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Lindsey McCallister, Office of the Attorney General
Office of Appellate Defense
Nathaniel Mitchell

PO Box 2147 • Leesville, SC 29070
803.908.3266 • blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable D. Craig Brown, Circuit Court Judge

Case No.: 2007-CP-40-6693

Nathaniel Mitchell, 284407,.....Petitioner,

vs.

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

NOTICE OF APPEAL

Nathaniel Mitchell, Petitioner, appeals the Order of Dismissal issued by the Honorable D. Craig Brown on December 6, 2018, which was filed on December 14, 2018. Petitioner, through counsel, received notice of the entry of the Order on December 20, 2018.

Respectfully submitted,

Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January 16, 2019

THE STATE OF SOUTH CAROLINA
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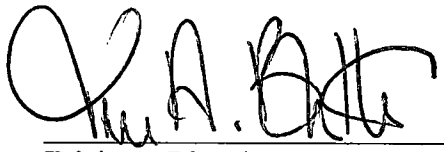
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I placed in the United States mail this 16th day of January 2019 a Notice of Appeal to Lindsey McCallister, of the Attorney General's Office, at:

Office of the Attorney General
Att: Lindsey McCallister, Assistant Attorney General
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January 16 2019

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Nathaniel Mitchell, #284407, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2007-CP-40-6693 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 8, 2007. Respondent made a Return and Motion to Dismiss on March 4, 2008. The Court convened an evidentiary hearing into the matter on July 12, 2016, at the Richland County Courthouse. Applicant was present at the hearing and represented by Tricia Blanchette, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf. Also testifying at the evidentiary hearing were Applicant's sister, Patricia Brockington; Applicant's trial counsel, Douglas Strickler, Esquire; and Applicant's trial counsel, Lesley Coggiola, Esquire. The Court had before it a copy of the trial transcript, the records of the Richland County Clerk of Court regarding the subject convictions, the record on appeal, Applicant's records from the South Carolina Department of Corrections, the application, and the State's return. Further, the Court had before it records from Applicant's Rule 29 motion. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In June 2000, the Richland County Grand Jury indicted Applicant for homicide by child abuse (2000-GS-40-5066). Douglas Strickler, Esquire (Strikler), and Lee Coggiola, Esquire (Coggiola), represented Applicant. On May 17, 2002, Applicant proceeded to trial before the Honorable Henry F. Floyd and a jury. Applicant was found guilty as indicted. Judge Floyd sentenced Applicant to imprisonment for twenty-five years.

Applicant filed a timely notice of appeal. Robert Dudek, Esquire, (Appellate Counsel) perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on in a published opinion on January 10, 2005. State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005). The remittitur was returned to the circuit court on October 24, 2006.

Applicant filed an application for post-conviction relief on October 8, 2007. The State filed its Return and Motion to Dismiss on March 4, 2008. On January 23, 2012, Applicant, through counsel, Tricia Blanchette, Esquire, filed a Motion for Abeyance and/or Dismissal Without Prejudice. The State filed its return to the motion on February 29, 2012. Based on the information in Applicant's motion, by order dated April 4, 2012, the Court appointed the Richland County Public Defender's Office for the limited purpose of filing a Motion for a New Trial Based on After-Discovered Evidence, pursuant to Rule 29(b), SCRimP. On April 3, 2015, a hearing was conducted on Applicant's motion to stay the PCR at the Richland County Courthouse before the Honorable Brooks P. Goldsmith. Applicant was present and represented by Tricia Blanchette, Esquire. Respondent was represented by J. Clayton Mitchell, Esquire. Upon conclusion of the hearing, the Court ordered Applicant's PCR application be held in

abeyance until a final resolution be reached on Applicant's motion for a new trial. On February 9, 2015, Applicant appeared before the Honorable Robert E. Hood to argue a motion for a new trial based on after-discovered evidence. By order dated July 29, 2015, Judge Hood denied Applicant's motion for a new trial.

On February 17, 2016, Applicant through PCR counsel, filed an amendment to his original PCR application alleging ineffective assistance of trial counsel. On June 2, 2016, Applicant filed, through PCR counsel, filed a subsequent amendment to his PCR application alleging further claims of ineffective assistance of trial counsel.

II. ALLEGATIONS

In his initial Application for Post-Conviction Relief, Applicant alleged:

1. Ineffective Assistance of Counsel
2. Prosecutorial Misconduct
3. Structural Due Process Errors
4. "The State courts, erroneously applying of Statutory Law, and Failure to give charge and Instructions of a proper and Lesser charge based on evidence and the totality of circumstance."

In his Amendment to Application for Post-Conviction Relief dated February 17, 2016[1], Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

    a. "Failure to raise the statutory indictment issue at the beginning of trial and failure to advise Applicant accordingly."
    b. "Failure to make contemporaneous objections during the trial testimony of Dr. Defelice regarding the forensic interview, treatment and opinions regarding the child witness, which amounted to inadmissible bolstering of the child witness."
    c. "Failure to move to remove the juror that wrote the court about his/her reaction to the allegations of child abuse and/or move for a mistrial."

[1] This Amendment included all allegations made in Applicant's March 5, 2012 Amendment, and it specifically superseded that Amendment.

d. "Failure to object to the Solicitor's comments during closing argument about what Applicant's deceased wife knew and her reasons for taking certain actions."
e. "Failure to utilize Dr. John Plunkett or a similarly qualified expert to refute the State's theory of shaken baby syndrome."

2. Ineffective Assistance of Appellate Counsel

a. "Failure to raise trial counsel's argument regarding the indictment on appeal."
b. "Failure to properly raise all meritorious issues on appeal, specifically, but not limited to, the following issues: 1) Failure to address Jackson v. Denno hearing, 2) Failure to address defense counsel's motion regarding the use of the child witness' video testimony, 3) Failure to address defense counsel's objections to the introduction of testimony regarding prior signs of abuse reported by childcare worker, 5) Failure to address defense counsel's motion for a mistrial due to juror misconduct, and 6) Failure to address the court's ruling to limit the defense's reply witnesses."

At the evidentiary hearing, and with consent of counsel for the State, Applicant added an additional ground alleging:

1. Ineffective assistance of trial counsel for failure to object to the opinion testimony of Dr. Nichols when it appears from the record he was not qualified as an expert.

At the evidentiary hearing, Applicant only proceeded on the below allegations:

1. Ineffective Assistance of Trial Counsel

a. "Failure to raise the statutory indictment issue at the beginning of trial and failure to advise Applicant accordingly."
b. "Failure to make contemporaneous objections during the trial testimony of Dr. Defelice regarding the forensic interview, treatment and opinions regarding the child witness, which amounted to inadmissible bolstering of the child witness."
c. "Failure to move to remove the juror that wrote the court about his/her reaction to the allegations of child abuse and/or move for a mistrial."
d. "Failure to object to the Solicitor's comments during closing argument about what Applicant's deceased wife knew and her reasons for taking certain actions."
e. "Failure to utilize Dr. John Plunkett or a similarly qualified expert to refute the State's theory of shaken baby syndrome."
f. "Failure to object to the opinion testimony of Dr. Nichols when it

appears from the record he was not qualified as an expert."

2. Ineffective Assistance of Appellate Counsel

   a. "Failure to raise trial counsel's argument regarding the indictment on appeal."
   b. "Failure to properly raise all meritorious issues on appeal, specifically: 1) Failure to address defense counsel's motion regarding the use of the child witness' video testimony, and 2) Failure to address defense counsel's motion for a mistrial due to juror misconduct."

Therefore, this Court finds Applicant has waived and abandoned all the other claims against trial counsel and appellate counsel listed in his original application or amendments thereto. Those allegations are hereby denied and dismissed with prejudice.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety, including the trial record and the record of the new trial motion, and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

I. Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as

having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

A. Indictment Issue

At trial, Strickler raised an issue regarding the indictment and the statutory definitions of abuse and neglect. At the time of the offense, the statute for homicide by child abuse read in

part: "A person is guilty of homicide by child abuse who . . . causes the death of a child under the age of eleven while committing child abuse or neglect as defined in Section 20-7-490. . . ." S.C. Code Ann. 16-3-85 (1999). Strickler asserted Section 20-7-490 did not contain a definition of child abuse or neglect, instead containing a definition for "abused or neglected child." Therefore, Strickler argued the statute itself was defective, and the court could not have subject-matter jurisdiction to try Applicant.

Applicant alleged he wanted his trial counsel to raise the issue prior to trial instead of during his directed verdict motion after the State presented its case. He further indicated he did not remember ever discussing the issue of the validity of his indictment with his counsel. Strickler testified he did not believe his argument regarding the statutory definitions related to the sufficiency of the indictment, and he raised it as a subject-matter jurisdiction argument based on his understanding of the law at the time.

This Court finds Applicant has failed to meet his burden of establishing Strickler was deficient in his performance and should have raised the indictment issue prior to trial. The South Carolina Supreme Court had not yet rendered its opinion in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), at the time of this trial. At the time of trial, any issues with the indictment went to subject-matter jurisdiction which can be raised at any time, which would have included at the time of the directed verdict motions. As a result, counsel was not deficient by not raising the issue prior to trial. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (observing "We have never required an attorney to be clairvoyant or anticipate changes in the law").

Further, Applicant cannot demonstrate how he was prejudiced by the failure to raise the issue before trial. If counsel had raised the issue before trial, the remedy would be to quash the indictment and allow the State to re-indict. By raising it at the directed verdict stage, if Applicant had been successful, double jeopardy would likely have attached which would have prevented retrial by the State. This Court finds, even if Strickler should have raised the issue prior to trial, Applicant has failed to demonstrate prejudice from Strickler's decision to raise the issue after the State presented its case.

Further, this Court notes the issue, whether raised prior to trial or at directed verdict, is entirely without merit. The failure of a statute to contain a definition of a term does not render that statute void or preclude the trial court from having subject-matter jurisdiction.[2] The terms of the statute were capable of receiving their ordinary and custom meaning, which is not in conflict with the definitions provided by section 20-7-490. See Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994) ("Where the legislature elects not to define a term in a statute, the courts will interpret the term in accord with its usual and customary meaning."); State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 318 (1992) ("The words used in the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."). As a result, Applicant has failed to demonstrate either of his counsel were ineffective for failing to raise this issue prior to trial, and the application is denied as to this issue.

B. Objections to Dr. Defelice Testimony

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[2] It should be noted, Applicant has not raised this as an issue challenging the constitutionality of the statute for being either vague or overbroad. Even if he did raise such a challenge, this Court would find it is without merit.

Applicant testified he wanted counsel to object to testimony presented by Dr. Defelice regarding her forensic interview of the child abuse victim's sister. He alleged the testimony was impermissible bolstering, and while his counsel objected on hearsay grounds, they should have also objected on the ground of bolstering.

Strickler testified he did not remember ever discussing bolstering or the need to object to bolstering. He further testified if the testimony was bolstering, the defense should have objected to the testimony. Coggiola testified she handled the cross-examination of Dr. Defelice. When asked about the testimony that the child was consistent and able to remember the events surrounding her sister's death, Coggiola indicated she should have objected to the testimony as bolstering. Coggiola could not give any reason why she did not object on the basis of bolstering.

Based on the testimony at trial and the testimony at the hearing, this Court finds counsel's performance deficient for failing to object to Dr. Defelice's testimony on the grounds of bolstering. See Thompson v. State, 423 S.C. 235, 244–45, 814 S.E.2d 487, 492 (2018) (finding counsel provided deficient representation for failing to object when a witness vouched for the credibility of another witness); State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (finding the law "clear that no witness may give an opinion as to whether the victim is telling the truth."). Counsel failed to provide a reasonable strategic basis for failing to object.

However, this Court finds the failure to object was not prejudicial in light of the overwhelming testimony in the record. Dr. Defelice's testimony bolstered the child witness who saw Applicant beating his foster daughter with a belt. This testimony of the child explained the bruising to the child's buttocks, but did not relate to her cause of death. Trial counsel correctly and thoroughly argued that this case was not one about spanking and not about the death of a

child from excessive spanking. Additionally, Applicant admitted spanking the child victim with a belt on the morning of her death. As a result, the child's testimony did not contradict Applicant's testimony and any bolstering would not have been prejudicial to the Applicant.

Further, the State offered overwhelming scientific evidence indicating the cause of death in this case was shaken baby syndrome. Numerous experts testified the injuries sustained by the child victim could only have occurred through a significant automobile accident, a multi-story fall, or violent shaking. The history provided by Applicant eliminated any possibility of the first two. The only person present at the house capable of causing the death of the victim through shaking was Applicant. As a result, Dr. Defelice's testimony, even if it was impermissible bolstering which should have been objected to by trial counsel, did not prejudice 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. Therefore, this allegation is denied and dismissed.

C. <u>Removal of the Juror</u>

Applicant testified his counsel should have moved to remove a juror or move for a mistrial because of the juror's note which indicated he may not be able to handle gory testimony. Coggiola also indicated she should have moved to have him removed given the nature of the testimony.

This Court finds find counsel was not deficient in failing to move to remove this juror or for failing to move for a mistrial because there was no proper legal basis to seek removal or a mistrial. The trial judge questioned the juror regarding his note and explained the nature of the photographs and testimony likely to be presented at trial. The juror indicated he could handle what was presented. The trial judge also asked the juror to let the court know if any of the

material bothered him. Neither the juror's note, nor his subsequent behavior at trial, warranted the grant of the extreme remedy of a mistrial. See State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial."). Accordingly, this Court finds trial counsel were not deficient in failing to move to remove the juror or in failing to move for a mistrial because neither was warranted when the trial judge properly questioned the juror and considered the responses.

Further, Applicant has failed to demonstrate any prejudice resulting from the failure to remove the juror. At no time during the trial did the juror indicate he was having difficulty with the testimony or evidence being presented. Applicant failed to articulate any behaviors or actions on the part of the juror which indicated he was having difficulty with the testimony or which could have impacted other jurors. Accordingly, even if trial counsel were deficient in their representation, Applicant has failed to produce evidence of prejudice sufficient to raise a question regarding the outcome of the trial. Therefore, this allegation is denied and dismissed.

D. Objections to Solicitor's Closing Argument

Applicant contends his trial counsel should have objected to the portion of the State's closing argument in which the solicitor referenced his deceased wife and what she knew or believed. Coggiola maintained there should have been an objection because it was arguing facts not in the record. Further, she testified she felt badly for failing to object and explained that sometimes trial counsel let things go by, particularly in closings, but she should have objected to this argument.

First, this Court finds the statements by the solicitor were inferences which could be drawn from the record presented. "[S]olicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom." Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Simmons, 331 S.C. at 338, 503 S.E.2d at 166; see also, State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997) (arguments must be confined to evidence in the record and reasonable inferences therefrom, although a failure to do so will not automatically result in reversal). "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. at 338, 503 S.E.2d at 166-167 (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

In the instant case, the solicitor stated:

> What was Sonya Mitchell's reaction? Sonya Mitchell had wanted these children, think about it. In a normal relationship without an abuser in the household, if someone calls up their wife and says so and so stiffens up, your reaction is I'm coming right away, get a blanket and meet me - - because Sonya Mitchell knew. She had seen those bruises and she knew where they came from. She rushed home and that part of his story alone says it all.

The evidence indicated Applicant called his wife, who told him to wrap the child up and she would be there shortly. When she arrived, she immediately took the child from Applicant and went to the hospital. A reasonable inference from the testimony is that she did not trust Applicant to take the child to the hospital or otherwise give the child proper care because she knew he had not been good to the child in the past.

Even if the State's comments went beyond the inferences available from the record, they did not result in such prejudice as to infect the trial with unfairness as to make the resulting conviction a denial of due process. The commentary was at most a rhetorical flourish that did not impact Applicant's defense. "The closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture . . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir. 1974) (citations and internal quotations omitted).

When viewed in light of the overall record, this Court finds the commentary by the solicitor had negligible impact on the trial, especially considering there was overwhelming evidence of Applicant's guilt. As found previously, numerous experts all testified this was a case of shaken-baby syndrome and child abuse. They all testified the injuries sustained by the child victim were not accidental in nature and could not have been caused by another child. Applicant was the only adult present, and the only person capable of causing the injuries which lead to the child victim's death. The overwhelming evidence of Applicant's guilt precludes a finding of prejudice sufficient to require a new trial. See 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). Accordingly, Applicant has failed to demonstrate his trial counsel were deficient, but even if deficiency exists, he has failed to meet his burden of establishing sufficient prejudice to raise a question of the outcome of the trial and warrant a new trial. This allegation is therefore denied and dismissed.

E. Failure to Utilize Dr. Plunkett or Similar Expert

Applicant contends his trial counsel should have utilized Dr. John Plunkett or another similar expert instead of Dr. Ross utilized at trial. Strickler indicated he handled the scientific testimony, but could not specifically recall if he spoke with Dr. Plunkett prior to trial. He testified he believed he did speak with Dr. Plunkett based on conversations related to the new trial motion hearing. Further, he testified he was very familiar with Dr. Plunkett and his research at the time of trial. Additionally, he testified he interviewed and talked with many pathologists, medical doctors, and biomechanical engineers on the subject of shaken-baby syndrome.

Additionally, this Court has reviewed the extensive record from the new trial hearing, including the testimony of Dr. Plunkett. In his testimony, Dr. Plunkett opined his testimony at the time of trial would have been that the injuries to the child were caused by an impact and not shaking. He testified that since the time of trial several articles have been written which support his theory that the subdural hematoma, retinal hemorrhaging, and brain swelling could not have been caused by shaking alone. He also admitted he could not determine if the injury was accidental or non-accidental, solely that it was caused by an impact and not shaking. Finally, he agreed with Dr. Ross, the expert utilized by trial counsel at trial, and Dr. Ross's conclusion the child victim did not die as a result of shaking.

The Court finds trial counsel were not deficient in choosing to utilize Dr. Ross as their expert instead of Dr. Plunkett or another expert. Strickler consulted with several experts prior to choosing Dr. Ross. Dr. Plunkett admitted the substance of Dr. Ross's testimony regarding the injury not being caused by shaking was the same as what he would have testified to if he had been called at trial. As counsel for Applicant during the new trial motion admitted, Strickler

"was probably ahead of the curve on this and did the best that he could with what he had." This Court finds trial counsel were not deficient for failing to continue expert shopping.

Trial counsel selected Dr. Ross, who was qualified as an expert in forensic pathology, neuropathology, and biomechanics. Dr. Ross's main contention at trial was the injuries sustained by the child victim could not have been caused by shaking alone. Dr. Plunkett specifically agreed with Dr. Ross's testimony that impact was necessary and the death could not have resulted from solely shaking the toddler. Additionally, Strickler referred several times in cross-examination of the State's witnesses to Dr. Plunkett's study regarding "Fatal Pediatric Head Injuries Caused by Short Distance Falls." Trial counsel presented to the jury the relevant arguments and expert opinion to counter the State's theory of shaken-baby syndrome. Trial counsel's selection of an expert and presentation of that expert at trial did not fall below reasonable professional norms and, instead, this Court finds he was likely "ahead of the curve."

Additionally, Applicant has failed to demonstrate prejudice sufficient to cast doubt on the outcome of his trial. Much of the same testimony Dr. Plunkett would have given at Applicant's trial was already presented by Dr. Ross. Dr. Plunkett indicated there were few studies available prior to 2002, and as a result, he would not have offered significant additional medical or biomechanical testimony such that a different verdict would have been reasonably likely. Therefore, this Court finds trial counsel did not render ineffective assistance by failing to expert shop. Accordingly, this allegation shall be denied and dismissed.

F. <u>Objections to Dr. Nichols' Testimony as Unqualified Expert Testimony</u>

Applicant contends his counsel failed to properly question the qualifications of Dr. Nichols, the State's reply witness, and further asserted trial counsel failed to object when Dr. Nichols testified to his medical opinions without being qualified as an expert. Strickler testified he did not know why he did not conduct *voir dire* of Dr. Nichols' qualifications, though he indicated he had not seen his CV and was not used to examining him at the time of trial. However, Strickler admitted Dr. Nichols would have been qualified and was qualified as an expert to testify.

At trial, Dr. Nichols testified he worked as a forensic pathologist for Richland Memorial Hospital. He indicated had been a forensic pathologist for twelve years at the time of trial and was board certified in anatomic and forensic pathology. Dr. Nichols testified he taught at MUSC prior to joining Richland Memorial. Finally, he indicated Governor Hodges appointed him to sit on the Child Fatality Advisory Committee for the state.

This Court finds trial counsel was not deficient in failing to further question Dr. Nichols regarding his background, education, and experience. Dr. Nichols' education, training, and experience detailed at trial indicated he was clearly qualified as an expert in forensic pathology and further questioning by counsel would not have impacted Dr. Nichols' ability to be qualified as an expert in forensic pathology. See Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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."); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997) ("To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such

knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'").

Additionally, the State did proffer him as an expert at trial, specifically stating: "Your Honor, at this time we'd offer him as an expert in forensic pathology." The trial court clearly understood he was being offered as an expert and allowed him to testify as such. Even if he was not officially declared an expert by the trial court, Applicant cannot demonstrate any prejudice as Dr. Nichols was clearly qualified to testify as a forensic pathologist and all of his testimony was clearly within his expertise.

II. Ineffective Assistance of Appellate Counsel

Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "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, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (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. . . ." Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383

S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). This Court presumes the result of the proceedings on appeal is reliable, and requires the applicant to prove the presumption incorrect in his particular case. See Smith v. Robbins, 528 U.S. 259, 287 (2000).

Initially, this Court notes Applicant had a direct appeal filed in which Appellate Counsel argued Applicant should have received a charge for involuntary manslaughter as a lesser-included offense of homicide by child abuse. The Court of Appeals admitted this was a novel issue and issued a substantial published opinion addressing the issue. See State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005). This Court notes "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones, 463 U.S. at 752–53. "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...." Jones, 463 U.S. at 754. This Court finds Appellate Counsel was not ineffective for choosing to raise a novel issue on appeal and not raising the other issues.

Additionally, this Court notes Applicant did not present the testimony of Appellate Counsel during his hearing. As a result, Appellate Counsel did not testify as to his reasons for declining to raise the issues Applicant believes should have been raised on appeal. This Court presumes Appellant Counsel provided effective assistance of counsel, and it is Applicant's

burden to establish otherwise. This Court does not believe Applicant has met this burden when he failed to present any testimony by Appellate Counsel. See e.g., Hill v. State, 415 S.C. 421, 431, 782 S.E.2d 414, 419–20 (Ct. App. 2016) (finding Applicant failed to meet his burden of establishing appellate counsel was deficient even though trial counsel testified the issue was preserved, but appellate counsel did not testify as to his reasons for declining to raise the issue on appeal.). In any event, this Court will address the specific issues raised by Applicant below.

A. Failure to Raise Indictment Issue

Applicant contends Appellate Counsel should have raised the issue regarding the indictment and subject-matter jurisdiction argued by Strickler during the directed verdict motions at trial. As discussed above, the issue was without merit. The failure of the statute to define the terms or in referencing a statute which did not contain the exact terms for definition did not render the trial court without subject-matter jurisdiction. The terms could be applied using their plain, ordinary, and customary definition. See Strother v. Lexington Cty. Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) ("When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning."). As a result, this Court finds even if the indictment/subject-matter jurisdiction issue been raised, it is not reasonably likely Applicant would have prevailed on appeal.

B. Failure to Raise All Meritorious Issues

1. Child Videotape Testimony

First, Applicant maintains Appellate Counsel should have raised on appeal a challenge to allowing the child witness to testify via video without Applicant present in the courtroom. On appeal, the "trial court's decision to allow videotaped or closed-circuit testimony is reversible

'only if it is shown that the trial judge abused his discretion in making such a decision. . .'" State v. Bray, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting State v. Murrell, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). "Where there is evidence to support a trial court's ruling, it will not be overturned for an abuse of discretion." Id.

In the instant case, there was ample evidence to support the trial court's ruling allowing video testimony. The State presented the testimony of Dr. Defelice as expert testimony. Dr. Defelice testified to a reasonable degree of psychological certainty that the child being required to testify in court in front of Applicant would cause psychological trauma. The State also played a video recording of the child's interview in which she indicated her fear of Applicant. Based on the extensive testimony indicating the risk of trauma to the child, the likelihood her testimony would be impacted, and the fact she expressed fear of Applicant and not of the courtroom or process, any appellate court would find the trial court did not abuse his discretion in allowing the testimony by video. Accordingly, and especially in light of the novel issue raised on appeal, this Court finds Appellate Counsel was not ineffective in failing to raise this issue on appeal. See, e.g., Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

2. Juror Misconduct

Second Applicant contends Appellate Counsel was ineffective for failing to raise the issue regarding the trial court's denial of a motion for mistrial based on juror misconduct. In the instant case, the issue presented by Applicant would not have been successful on appeal and so Appellate Counsel was not ineffective for failing to raise this issue instead of other issues.

At trial, a juror expressed his personal feelings on the case and conducted some independent research. Other jurors heard his expressed feelings. The trial court excused the juror and then conducted an individual *voir dire* of each of the remaining jurors. The questions asked of the jurors were suggested and agreed upon by counsel for both parties. Each of the jurors explained what they heard and attested it would not affect their ability to be fair and impartial. Additionally, each of the jurors indicated no further discussion occurred after the dismissed juror expressed his personal feelings.

On appeal, the appellate court would give substantial deference to the findings of the trial court and would not reverse the denial of a mistrial absent an abuse of discretion. See State v. Pittman, 373 S.C. 527, 556, 647 S.E.2d 144, 159 (2007) (stating a trial court's factual findings regarding juror misconduct will not be disturbed absent an abuse of discretion); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (stating "the trial judge is in the best position to determine the credibility of the jurors; therefore, this [c]ourt should grant him broad deference").

The trial court in this case conducted a hearing of individualized *voir dire* and considered the responses as required by State v. Aldret, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999). After the hearing, the trial court concluded no prejudice resulted from the juror's expression of his feelings, the judge specifically stated, "I'm satisfied you got twelve fair and impartial jurors to continue in the deliberations." Given the responses of the remaining jurors, this ruling would not have been overturned on appeal. Finally, the trial court issued a proper instruction to the jury reminding them of their duty as jurors and explaining they should not engage in premature deliberations or bring in outside materials or influences. As a result, this issue, had it been raised on appeal, would not have reasonably resulted in a new trial. Accordingly, Appellate Counsel

was not ineffective for failing to raise this issue instead of, or in addition to, the novel issue raised on appeal, and Applicant has failed to meet his burden for proving both deficiency and prejudice.

For all of the reasons noted above, Applicant's allegations regarding Appellate Counsel's failure to raise allegedly meritorious issues are denied and dismissed.

IV. CONCLUSION

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

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

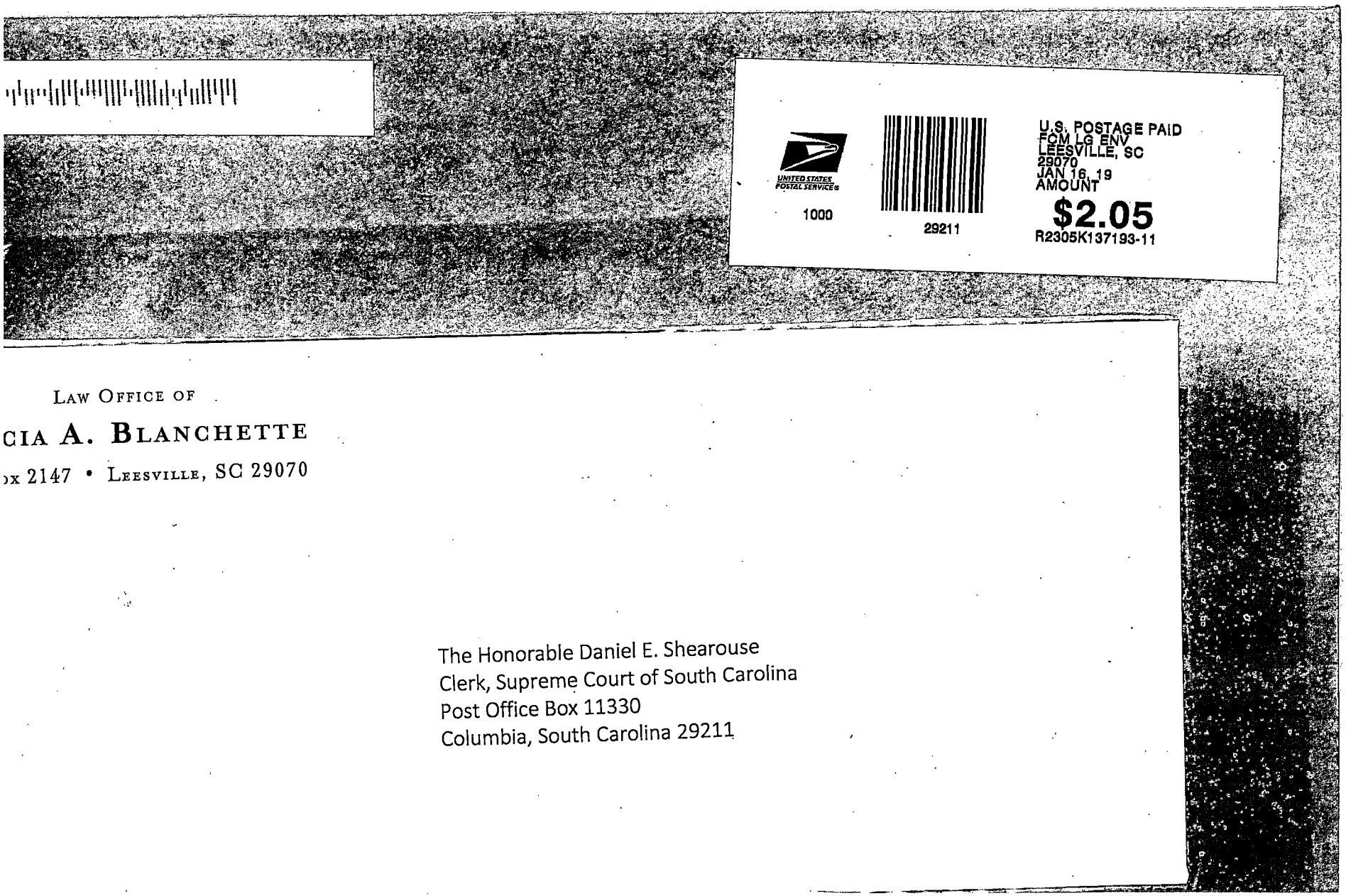
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 6 day of December, 2018.

D. CRAIG BROWN
Presiding Judge
Fifth Judicial Circuit

Lancaster, South Carolina



LAW OFFICE OF

CIA A. BLANCHETTE

)X 2147 • LEESVILLE, SC 29070

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