

RECEIVED

JAN 29 2019

S.C. SUPREME COURT

LAW OFFICE OF  
**C. RAUCH WISE**  
Attorney & Counselor at Law  
305 Main Street  
Greenwood, SC 29646  
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C. Rauch Wise

Telephone  
(864) 229-5010  
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January 25, 2019

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

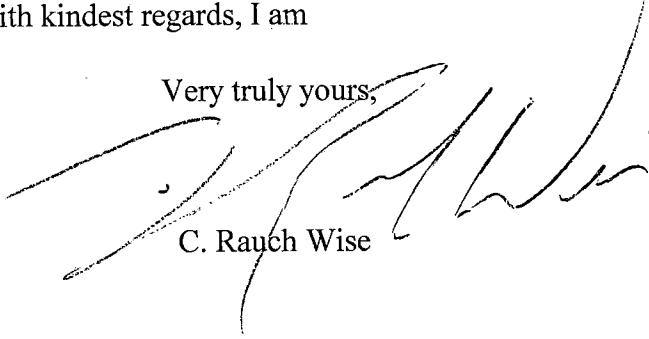
Re: Roger A. Williams, #303509 vs. The State, Case No. 2015-CP-0802034

Dear Hon. Shearouse:

I am enclosing herewith the original Notice of Appeal together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

  
C. Rauch Wise

CRW/slt  
Enclosure

cc Kelly Oppenheimer  
Berkeley County Clerk  
Hon. Robert M. Young

RECEIVED

JAN 29 2019

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

Robert M. Young, Sr., Circuit Court Judge

Case № 2015-CP-0802034

Roger A. Williams, #303509 ..... Appellant,

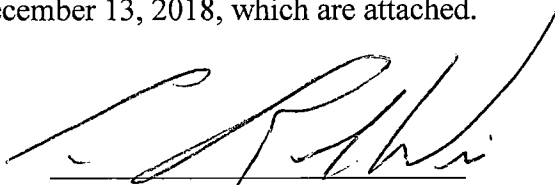
vs.

The State ..... Respondent

NOTICE OF INTENT TO APPEAL

Roger A. Williams appeals the Order of the Honorable Robert M. Young filed on January 16, 2019, and the Order of Dismissal filed on December 13, 2018, which are attached.

January 25<sup>th</sup>, 2019



C. Rauch Wise  
Attorney at Law  
305 Main Street  
Greenwood, SC 29646  
(864) 229-5010

Attorney for Appellant

OTHER COUNSEL OF RECORD

Kelly Oppenheimer  
SC Attorney General Office  
PO Box 11549  
Columbia SC 29211

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

JAN 29 2019

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas  
Robert M. Young, Sr., Circuit Court Judge

S.C. SUPREME COURT

Case No 2015-CP-0802034

Roger A. Williams, #303509 ..... Appellant,

vs.

The State ..... Respondent

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on January 25, 2019, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Notice of Intent to Appeal in the above case addressed to Kelly Oppenheimer, SC Attorney General Office, P.O. Box 11549, Columbia, SC 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 25<sup>th</sup> day

of January, 2019.

[Signature] (L.S.)  
Notary Public for South Carolina

My Commission expires: 12/2/2019

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

Roger A. Williams, #303509, )  
Applicant, )

v. )

State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS )  
FOR THE NINTH JUDICIAL CIRCUIT )

Case No. 2015-CP-08-203 )

ORDER DENYING APPLICANT'S )  
"MOTION PURSUANT TO RULE 59" )

19 JAN 16 AM 9:47  
LETTER TO THE CLERK  
CLERK OF COURT  
BERKELEY COUNTY SC

FILED

This matter comes before this Court by way of Applicant's "Motion Pursuant to Rule 59," asking this Court to alter or amend its order of dismissal denying Applicant's application for post-conviction relief.

I.

Roger A. Williams (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. During its September 2010 term, the Berkeley County Grand Jury indicted Applicant for homicide by child abuse (2010-GS-08-1519) and unlawful conduct towards a child (2010-GS-08-1521). Thereafter, during its November 2010 term, the Berkeley County Grand Jury indicted Applicant for destruction or desecration of human remains (2010-GS-08-1876). James K. Falk, Esquire, represented Applicant on these charges. Assistant Solicitor Anne M. Williams and Assistant Solicitor Deborah Herring-Lash, both of the Ninth Circuit Solicitor's Office, prosecuted the case. On September 18, 2012, Applicant appeared before the Honorable R. Markley Dennis, Jr. and pled guilty as indicted to desecration of human remains. Judge Dennis accepted the plea and deferred sentencing. Subsequently, Applicant proceeded to a jury trial on the remaining charges before Judge Dennis on October 8-1/1, 2012. Following deliberations, the jury convicted Applicant as indicted. Judge Dennis sentenced him to a term of imprisonment of life without the

possibility of parole for homicide by child abuse, ten years for desecration of human remains, and ten years for unlawful neglect of a child. The sentences were to run concurrently.

Applicant filed a timely notice of appeal, and Appellate Defender Susan B. Hackett, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. Following briefing, the South Carolina Court of Appeals issued a written order on October 24, 2014, indicating Applicant wished to withdraw his appeal and, therefore, dismissing the appeal. The Remittitur was issued on November 19, 2014.

## II.

On August 27, 2015, Applicant filed an application for post-conviction relief. In this application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistant [sic] of trial counsel; [and]
  - a. Failure to object to prosecutorial misconduct; [and]
  - b. Failure to impeach State's witness Grace Trotman.
2. Prosecutorial Misconduct.
  - a. Giglio vs. U.S. violations.

Respondent made its return on June 2, 2016, requesting an evidentiary hearing be held. Subsequently, Applicant, through his counsel, filed an amendment to the application for post-conviction relief on May 21, 2018. In this amendment, Applicant raised the following additional claims:

1. Trial Counsel was ineffective in cross examining co-defendant;"
  - a. Trial Counsel failed to properly cross examine the co-defendant as to her video taped statement where she admitted to striking [Victim] and this should have been shown to the jury.
2. Trial counsel failed to properly ask for a directed verdict;
  - a. Trial counsel failed to ask for a directed verdict on the issue of whether [Applicant] failed to render medical aid which resulted in the death of [Victim].
3. Trial counsel failed to request jury instruction on the jury agreeing on means of death;
  - a. Trial counsel failed to ask for an instruction that the jury had to unanimously agree as to the means of causing the death of [Victim].
4. Trial counsel failed to require the state to elect as to their theory of the case;



- a. Trial counsel failed to require the State to elect as to which theory they were going to the jury on as the state argued several different means by which the alleged crime could have been committed.
5. Trial counsel failed to object to the mug shot of co-defendant being introduced;
  - a. Trial counsel erred in allowing the mug shot of the co-defendant to be introduced showing she had bruises that were old and could not have been inflicted by the applicant. The State used the picture as evidence of abuse by the applicant and in their closing argument. Tr. At 665. Trial Counsel also failed to object to testimony from the co-defendant that [Applicant] had abused her. The testimony violated Rule 404b.
6. Trial counsel failed to object to the expert of the state using hearsay testimony to form her opinion;
  - a. Trial counsel failed to object to the expert for the state relying upon the out of court statements of witnesses and thus deprived [Applicant] of [his] right to confront the witnesses against [him] in violation of Crawford v. Washington, 541 U.S. 36 (2004).
7. Trial counsel failed to properly cross examine the expert for the state;
  - a. The trial counsel failed to object or question the expert for the state about the expert relying upon the false statement made by the co-defendant in her confession.
8. Trial counsel failed to object to picture of [Victim] being introduced;
  - a. Trial counsel failed to object to the picture of [Victim] showing some bruises when the evidence established that [Applicant] was never accused of striking [Victim] in the face.
9. Trial counsel failed to properly cross examine the expert for the state;
  - a. Trial counsel failed to question the validity of the opinion of the expert when the testimony of the expert was based upon inconsistent facts as to the number of seizures and the timing of the seizures and as to the timing of the alleged abuse.
10. Trial counsel failed to move to quash the indictment;
  - a. Trial counsel failed to move to quash the indictment as the facts alleged there were so vague that the jury could have convicted [Applicant] for failing to render aid while [he] was at work and by contending that [he] failed to prevent the co-defendant from inflicting injuries while [he] was at work.
11. Trial counsel failed to object to an improper charge as to aiding and abetting homicide by child abuse being a lesser-included of homicide by child abuse;
  - a. Trial counsel failed to object to the judge charging that aiding and abetting homicide by child abuse is a lesser included offense of homicide by child abuse.
12. Trial counsel failed to object to statements about [Applicant's] religious beliefs; [and]
  - a. Trial counsel failed to object to the testimony as to [Applicant's]

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religious beliefs or lack of religious beliefs as to a belief in God. On pages 198 to 199 the co-defendant was permitted to testify as to my lack of [sic] a belief in God. Such testimony violates Rule 610 of the South Carolina Rules of Evidence.

13. Trial counsel failed to object to the appeal to racial prejudice through the testimony of co-defendant.
  - a. Without objection, the state was permitted to elicit testimony from [his] co-defendant that [Applicant] was racially prejudiced. This testimony was not relevant to any issue at trial. This is found on page 199 of the transcript.

A hearing into the matter was convened at the Charleston County Courthouse on ~~May~~<sup>Mr</sup> May 23, 2018, before the Honorable Roger M Young, Sr. Applicant was present at the hearing and represented by C. Rauch Wise, Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent. At the hearing Applicant proceeded forward on the following allegations of ineffective assistance of counsel:

1. Failure to properly cross-examine the co-defendant as to her videotaped statement;
2. Failure to move for a directed verdict on the issue of whether Applicant failed to render medical aid, which resulted in Victim's death;
3. Failure to require the State to elect which theory it would proceed forward on at trial;
4. Failure to object to the introduction of Applicant's co-defendant's mug shot;
5. Failure to object to the introduction of a picture of Victim;
6. Failure to quash the indictment;
7. Failure to object to statements regarding Applicant's religious beliefs
8. Failure to object to statement regarding Applicant's racial prejudices; and
9. Failure to object to the admissibility of the videotaped interview of Applicant by law enforcement in which law enforcement repeatedly told Applicant they knew he was lying.

After hearing all the testimony presented at the evidentiary hearing, as well as arguments from both parties, this Court issued an order of dismissal on November 26, 2018, denying and dismissing the application with prejudice. Said order was filed with the Berkeley County Clerk of Court on December 13, 2018.

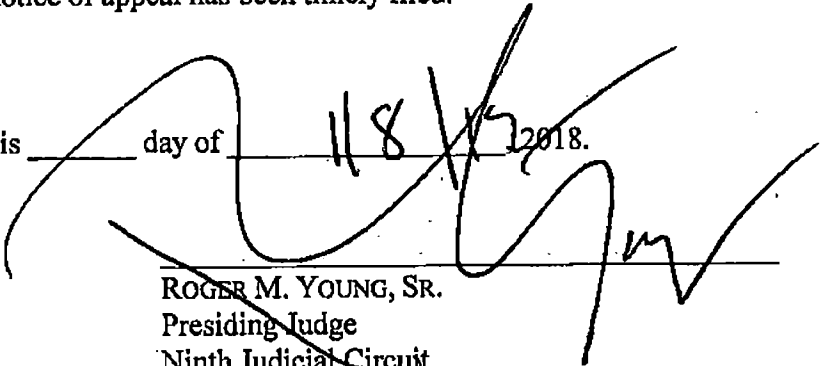
Subsequently, on December 21, 2018, Applicant, through his counsel, submitted a "Motion Pursuant to Rule 59." Respondent submitted its return on or about December 27, 2018.

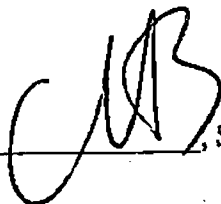
III.

This Court finds its order of dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRPC. *See also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). This Court further finds its order of dismissal addresses and disposes of all allegations raised. Having carefully reviewed the entire record in this matter and arguments presented both during and after the evidentiary hearing, this Court finds there is no basis for altering or amending its prior ruling.<sup>1</sup> Therefore, this Court hereby denies Applicant's motion in its entirety, and affirms the previous order of dismissal.

This Court notes if Applicant desires to secure appellate review of this order and the order of dismissal, a notice of appeal must be filed and served within thirty days of the service of this order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 11/8/18 day of 11/8/18 2018.

  
\_\_\_\_\_  
ROGER M. YOUNG, SR.  
Presiding Judge  
Ninth Judicial Circuit

  
\_\_\_\_\_  
South Carolina

<sup>1</sup> The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. *See* Rule 59(f), SCRPC.

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )  
 )  
Roger A. Williams, #303509, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2015-CP-08-2034

ORDER OF DISMISSAL

HARRY P. SIMMONS  
CLERK OF COURT  
BERKELEY COUNTY

2018 DEC 13 AM 9:16

FILED  
DW

This matter comes before the Court by way of an application for post-conviction relief filed August 27, 2015, by Roger A. Williams (Applicant). The State (Respondent) made its Return on June 2, 2016, requesting an evidentiary hearing be held. Thereafter, on May 21, 2018, through his counsel, Applicant filed an amended application for post-conviction relief. An evidentiary hearing was convened on May 23, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and represented by C. Rauch Wise, Esquire. Respondent was represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office.

### PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. During its September 2010 term, the Berkeley County Grand Jury indicted Applicant for homicide by child abuse (2010-GS-08-1519) and unlawful conduct towards a child (2010-GS-08-1521). Thereafter, during its November 2010 term, the Berkeley County Grand Jury indicted Applicant for destruction or desecration of human remains (2010-GS-08-1876). James K. Falk, Esquire, represented Applicant on these charges. Assistant Solicitor Anne M.

Williams and Assistant Solicitor Deborah Herring-Lash, both of the Ninth Circuit Solicitor's Office, prosecuted the case. On September 18, 2012, Applicant appeared before the Honorable R. Markley Dennis, Jr. and pled guilty as indicted to desecration of human remains. Judge Dennis accepted the plea and deferred sentencing. Subsequently, Applicant proceeded to a jury trial on the remaining charges before Judge Dennis on October 8-11, 2012. Following deliberations, the jury convicted Applicant as indicted. Judge Dennis sentenced him to a term of imprisonment of life without the possibility of parole for homicide by child abuse, ten years for desecration of human remains, and ten years for unlawful neglect of a child. The sentences were to run concurrently.

Applicant filed a timely notice of appeal, and Appellate Defender Susan B. Hackett, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. Following briefing, the South Carolina Court of Appeals issued a written order on October 24, 2014, indicating Applicant wished to withdraw his appeal and, therefore, dismissing the appeal. The Remittitur was issued on November 19, 2014.

### **CURRENT APPLICATION**

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistant [sic] of trial counsel;" and
  - a. "Failure to object to prosecutorial misconduct;"
  - b. "Failure to impeach State's witness Grace Trotman."
2. "Prosecutorial Misconduct."
  - a. "Giglio vs. U.S. violations."

In his amended application for post-conviction relief, Applicant raised the following grounds:

1. "Trial Counsel was ineffective in cross examining co-defendant;"
  - a. "Trial Counsel failed to properly cross examine the co-defendant as to her video taped statement where she admitted to striking [Victim] and this should have been shown to the



- jury.”
2. “Trial counsel failed to properly ask for a directed verdict;”
    - a. “Trial counsel failed to ask for a directed verdict on the issue of whether [Applicant] failed to render medical aid which resulted in the death of [Victim].”
  3. “Trial counsel failed to request jury instruction on the jury agreeing on means of death;”
    - a. “Trial counsel failed to ask for an instruction that the jury had to unanimously agree as to the means of causing the death of [Victim].”
  4. “Trial counsel failed to require the state to elect as to their theory of the case;”
    - a. “Trial counsel failed to require the State to elect as to which theory they were going to the jury on as the state argued several different means by which the alleged crime could have been committed.”
  5. “Trial counsel failed to object to the mug shot of co-defendant being introduced;”
    - a. “Trial counsel erred in allowing the mug shot of the co-defendant to be introduced showing she had bruises that were old and could not have been inflicted by the applicant. The State used the picture as evidence of abuse by the applicant and in their closing argument. Tr. At 665. Trial Counsel also failed to object to testimony from the co-defendant that [Applicant] had abused her. The testimony violated Rule 404b.”
  6. “Trial counsel failed to object to the expert of the state using hearsay testimony to form her opinion;”
    - a. “Trial counsel failed to object to the expert for the state relying upon the out of court statements of witnesses and thus deprived [Applicant] of [his] right to confront the witnesses against [him] in violation of Crawford v. Washington, 541 U.S. 36 (2004).”
  7. “Trial counsel failed to properly cross examine the expert for the state;”
    - a. “The trial counsel failed to object or question the expert for the state about the expert relying upon the false statement made by the co-defendant in her confession.”
  8. “Trial counsel failed to object to picture of [Victim] being introduced;”
    - a. “Trial counsel failed to object to the picture of [Victim] showing some bruises when the evidence established that [Applicant] was never accused of striking [Victim] in the face.”
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inconsistent facts as to the number of seizures and the timing of the seizures and as to the timing of the alleged abuse.”

10. “Trial counsel failed to move to quash the indictment;”
  - a. “Trial counsel failed to move to quash the indictment as the facts alleged there were so vague that the jury could have convicted [Applicant] for failing to render aid while [he] was at work and by contending that [he] failed to prevent the co-defendant from inflicting injuries while [he] was at work.”
11. “Trial counsel failed to object to an improper charge as to aiding and abetting homicide by child abuse being a lesser-included of homicide by child abuse;”
  - a. “Trial counsel failed to object to the judge charging that aiding and abetting homicide by child abuse is a lesser included offense of homicide by child abuse.”
12. “Trial counsel failed to object to statements about [Applicant’s] religious beliefs;” and
  - a. “Trial counsel failed to object to the testimony as to [Applicant’s] religious beliefs or lack of religious beliefs as to a belief in God. On pages 198 to 199 the co-defendant was permitted to testify as to my lackof [sic] a belief in God. Such testimony violates Rule 610 of the South Carolina Rules of Evidence.”
13. “Trial counsel failed to object to the appeal to racial prejudice through the testimony of co-defendant.”
  - a. “Without objection, the state was permitted to elicit testimony from [his] co-defendant that [Applicant] was racially prejudiced. This testimony was not relevant to any issue at trial. This is found on page 199 of the transcript.”

At the hearing, Applicant proceeded forward on the following allegations of ineffective assistance of counsel:

1. Failure to properly cross-examine the co-defendant as to her videotaped statement;
2. Failure to move for a directed verdict on the issue of whether Applicant failed to render medical aid, which resulted in Victim’s death;
3. Failure to require the State to elect which theory it would proceed forward on at trial;
4. Failure to object to the introduction of Applicant’s co-defendant’s mug shot;
5. Failure to object to the introduction of a picture of Victim;
6. Failure to quash the indictment;
7. Failure to object to statements regarding Applicant’s religious beliefs
8. Failure to object to statement regarding Applicant’s racial prejudices;



- and
9. Failure to object to the admissibility of the videotaped interview of Applicant by law enforcement in which law enforcement repeatedly told Applicant they knew he was lying.

#### **STATEMENT OF FACTS ADDUCED AT TRIAL**

During a pretrial hearing on September 12, 2012, Applicant moved to exclude photographs taken during Victim's autopsy. The State indicated it was only offering seven photographs from the autopsy, which were primarily of the trashcan used to dispose of Victim's body, and only one included a small part of the body itself. The purpose of the photographs was to "show the manner in which and the extent to which the defendants went to conceal the body," which was "very unique and very extensive," and to help the pathologist explain the "impact of that type of concealment on his examination of the body." 9/12/2012 Hearing Tr. 13, 56. The circuit court indicated it was not inclined to admit the photographs, but would have "to wait to hear and see" the evidence at trial. 9/12/2012 Hearing Tr. 56-57.<sup>1</sup>

The matter was called for a jury trial on October 8, 2012, before the Honorable R. Markley Dennis, Jr., Circuit Court Judge. There were no additional pre-trial motions prior to selection and seating of the jury.

Grace Trotman (Trotman), who pled guilty to homicide by child abuse in connection with Victim's death, testified she and Applicant were romantically involved from 2006 through 2010, and had two children together during that time. Tr. 189-95. In 2009, after the birth of their first child, Trotman and Applicant discovered Applicant had fathered Victim by another woman in 2007, and Victim started visiting them shortly thereafter. Tr. 199-200.

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<sup>1</sup>Prior to trial, the circuit court excluded the challenged autopsy photographs, and none were offered at trial.



In May 2010, Applicant and Victim's mother arranged for Victim to spend the summer with Applicant and Trotman. Tr. 332-33. Trotman described the relationship between Applicant and Victim as "really good" initially, but Applicant started getting their two year old daughter to slap, scratch, and drag Victim "to get him to toughen up." Tr. 208-09. Trotman testified Applicant believed Victim acted effeminately, and he ultimately started hitting Victim himself, leaving bruises. She stated she saw Applicant beat Victim around ten times, initially just kind of paddling him and popping him on the arm, but eventually hitting Victim's back or chest with a closed fist, or slapping "his head to the floor." Trotman was too scared to help Victim because Applicant also physically abused her. Tr. 210-29.

Trotman testified Victim had a "seizure" after Applicant "boxed him in his back" during the week prior to Victim's death. She described the seizure as Victim "grunting," with something weird going on with his eyes, and a loss of consciousness, but he seemed to "snap out of it" when they gave him some water. Tr. 214-15. The next morning, Trotman had to physically shake Victim to wake him up, which she thought was a second seizure because he usually woke very easily, but he seemed "okay" and acted normally after he got up. Tr. 216-17.

On Sunday, June 6, 2010, Victim had "poop on the back of his pants," and on the floor of his bedroom. Trotman testified Applicant got angry and took Victim into his bedroom, where she "just heard him kind of bumping and hitting him against the wall." When Trotman went into the bedroom later, Victim, was "sitting on the wall like he was in a daze." Tr. 218-23.

Trotman testified she was feeding her infant son the next morning (June 7), when Victim and her two year old daughter started fighting. When the two did not stop at her verbal command, she popped them on their arms, and Victim "fell to his bottom, lost his balance and hit his head on the wall." Tr. 224-25. Victim began "acting different, like the other days where he

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was having trouble breathing, like gasping for air,” and Trotman tried to perform CPR on him. She then heard Victim was breathing, and his heart was beating, so she ran outside to use a neighbor’s phone. Tr. 227-30.

Rather than call an ambulance, Trotman called Applicant at work. Applicant told her he would come home, but had to wait for a ride. Trotman then called Applicant a second time from another neighbor’s phone to say they needed to call an ambulance, but he told her not to call an ambulance and to wait until he got home. Rather than go inside to check on Victim, Trotman waited outside for Applicant. When he got home approximately an hour later, they went inside the home, where Applicant touched Victim’s chest and said “that boy dead.” Tr. 231-33.

Applicant devised a plan to dispose of Victim’s body, and told Trotman if the body was ever found, she should say Victim fell down the stairs and hit his head “just in case the autopsy came back with blunt force trauma.” Tr. 233. Applicant left the home, and returned with a trashcan and cement. He then removed Victim’s clothes, wiped the body clean with peroxide “[s]o he wouldn’t have any of his fingerprints on him,” took the body out to the garage, and wrapped it in trash bags and duct tape. Tr. 234-35.

After wrapping the body, Applicant put cement in the trashcan, and put Victim’s body in the trashcan headfirst. When he realized he did not have enough cement, he called a friend to bring him more cement, which he then used to fill the rest of the trashcan. Tr. 235.

The next day, Applicant and Trotman rented a truck and loaded the trashcan on it. They rode around looking for a remote area to dump it, but could not find one. They rented another truck the next day; and after Applicant got off work, they rode around again, ultimately putting the trashcan in a very remote, uninhabited area in Orangeburg County. Tr. 235-36.

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During the week of July 4<sup>th</sup>, Victim's mother wanted to visit with him. In the on-going effort to hide Victim's death, Applicant arranged for a rental car so Trotman could drive with her two children to the Battery in Charleston, where she pretended Victim went missing. The police arrived and assisted in the search for Victim. Tr. 244-53.

Eventually, the police took Trotman to the police station, where they questioned her for hours, during which she told many false stories as she and Applicant had previously planned. She ultimately told the police what happened, however, and took them to the place she and Applicant dumped Victim's body. Tr. 254-57.

Lieutenant Dean Kokinda, with the Forensic Services Division of the Berkeley County Sheriff's Office, testified he took photographs at the site where Victim's body was dumped. He described the site as extremely remote and heavily wooded, with the trashcan hidden under a discarded lounge chair. When the State offered the photographs as State's Exhibits 24 through 29, Applicant objected to Exhibits 28 and 29 as unduly prejudicial. The circuit court admitted Exhibit 28 (photograph of trashcan and recliner), but excluded Exhibit 29 (close-up photograph of trashcan). Tr. 360-69, State's Exhibits 24-29 [Photographs].

Nicholas Batalis, M.D., qualified as an expert in forensic pathology, performed the autopsy of Victim's body and determined the cause of death was "homicidal violence, including probably blunt head trauma" based on the condition in which the body was found, and two contusions he found on the scalp. Dr. Batalis further found there were no skull fractures followed by bleeding around the brain, and concluded Victim suffered a "concussive type phenomenon," or what is called an axonal injury, which can occur if the brain is re-injured when it has not completely healed from a prior injury. Tr. 460-68.

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Carol Jenny, M.D., qualified as an expert in pediatrics, forensic pediatrics, and abusive head trauma, testified Victim suffered from a diffuse axonal injury, meaning the brain cells were concussed and stopped functioning, over the weeks leading to his death. She opined Victim ultimately died because of "repeated head injuries which led to his eventual collapse." Based on the reports of Victim suffering from seizures and multiple episodes of lost consciousness, she concluded Victim had "multiple episodes of head injury/concussion," which made him vulnerable to repeated seizures due to "second impact syndrome." She stated medical intervention may have prevented Victim's death, but he may have developed problems later in life. Tr. 504-13.

Detective Bobby Shuler of the Berkeley County Sheriff's Office testified he participated in an audiotaped interview of Applicant on July 7, 2010. Tr. 548-54. During that interview, Applicant admitted he concocted the plan to hide Victim's body. He went to Lowe's, inquired about which cement dried the fastest, and purchased the trashcan and cement. When he returned to the house, they took Victim's clothes off, wrapped his body in trash bags, and encased him inside the trashcan with cement. State's Exhibit 66.

Applicant stated they rented a truck and took the trashcan out to a remote, secluded area, covered it with a discarded chair they found at the site, and left. They went back some time later to bury the trashcan, but left without burying it because the smell from the decaying body was too strong. State's Exhibit 66.

Applicant also admitted lying to Victim's mother to "buy time" after Victim's death. When the mother became insistent about seeing Victim over July 4<sup>th</sup>, Applicant told Trotman to go to Charleston and stage the missing child alert. State's Exhibit 66.

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Applicant's expert pathologist, Kimberly Collins, testified while Dr. Batalis found the cause of death was homicidal violence due to blunt force head trauma, due to the decomposed condition of the body, other forms of homicidal violence, such as asphyxia, commotion cordis, or the neck being wrenched to the side, could not be ruled out. Tr. 487-89. On cross-examination, she testified she agreed with the way Dr. Batalis called the case. Tr. 487-96.

During closing argument, the State referred to State's Exhibit 27 one time, describing it as the photograph of the trashcan with Victim's body inside, filled with cement and a couch over it, and stating it showed how the trashcan was concealed. The solicitor did not refer to Exhibit 28 during closing. Tr. 663-96.

#### **TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of James K. Falk, Esquire (hereinafter "Counsel"). Respondent also presented the testimony of Assistant Solicitor Anne M. Williams. This Court also had before it a copy of Applicant's trial transcript, the records of the Berkeley County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant first presented the testimony of Counsel. Counsel testified he has been practicing law since 1984 and was retained to represent Applicant on this case. He elaborated by the time he was retained, about June 5, 2012, the case had already been set for trial, so he only had the case for a couple of months. He further elaborated he had ample time to prepare for trial. He further testified there were some bad facts surrounding Applicant's case.

He also testified he never made a motion to quash the indictment and did not see a reason to do so. He elaborated the indictment alleged Applicant caused the death of Victim while



committed child abuse or neglect, and the death occurred in circumstances manifesting extreme indifference to human life. He further elaborated the indictment did not specifically allege exactly what Applicant did, and it did not indicate Applicant did not call an ambulance. Counsel also testified the indictment did not specifically state Applicant permitted Trotman to beat up Victim nor that Applicant delivered any blows to Victim. He testified the indictment is merely a notice document. Counsel further testified by the time he got this case, he was on notice of what the State expected to prove at trial because of the extensive amount of discovery. He explained based on the discovery, he believed the State would attempt to prove Applicant inflicted the injuries to Victim, rather than an act of omission. He further explained based on the discovery, he had no question as to with what Applicant was charged. He testified he did not know whether or not the indictment gave notice the State would allege Applicant's failure to call 911 was part of their theory of the case. Counsel testified from the indictment he knew Applicant was charged with homicide by child abuse. He further testified changing the indictment would not have changed the outcome at trial.

Counsel also testified he did not feel it was necessary to require the State to disclose its theory prior to trial. He elaborated he believed the State's theory was Applicant was the one who inflicted repeated abuse on Victim. He further elaborated he believed they were going to attempt to show Applicant did not call 911 in order to show Applicant was attempting to cover up the abuse. He testified based on the discovery and his investigation, he had a good idea as to what the State would attempt to prove at trial. He explained he met with the solicitors to review the discovery, and he knew everything they had against Applicant.

He testified there was no denying Applicant abused Victim. He further testified Applicant indicated he was going to man Victim up. He explained Applicant did not like that

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Victim stood with his hand on his hip, and Applicant called Victim a faggot. Counsel also testified in the three months in which Victim stayed with Applicant, there was no denying Applicant was abusing Victim. He testified in his interview, Applicant admitted to hitting Victim in the chest and the back, but never admitted to hitting him in the head.

Counsel also testified his defense was to generate reasonable doubt by implicating Trotman hit the final blow to Victim. He explained his theory was Trotman delivered the fatal blow, failed to render aid, and she was the one who was truly guilty of this homicide. He testified Trotman had pled guilty, so that was the causation to this defense. He testified in order to prove Trotman had a reason to abuse Victim, he attempted to introduce evidence of the relationship between Trotman and Applicant, which he argued during his closing argument. He elaborated his theory was Trotman was jealous of Victim's mother, because Victim and Trotman's child with Applicant were close in age, and Trotman abused Victim because he was not her child. He further elaborated Trotman was left to care for Victim.

He also testified at some point, they made the decision for Applicant to plead to desecration of human remains. He explained the strategy in this was to attempt to keep out a lot of the really bad photographs because they would not be relevant to the charges on which Applicant proceeded to trial. He further explained though they would not have been relevant to the homicide by child abuse charge, they would have been relevant to the desecration of human remains charge. Counsel also elaborated there was no dispute regarding the desecration charge.

Counsel testified he made a motion with respect to Rule 404(b), SCRE, evidence. He elaborated the purpose of this motion was to compel the State to inform him what 404(b) and *Lyle*<sup>2</sup> evidence they were planning to introduce. He testified the State verbally responded to that motion, but he did not recall what the response was. He further testified there was a pre-trial

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<sup>2</sup> *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

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hearing on that motion, and he was attempting to keep out reference to Applicant's drug use at trial, as well as some other issues. He elaborated he was successful in excluding any mention of Applicant's drug use.

He further testified Trotman testified Applicant had abused her at trial. He explained the testimony at trial indicated Applicant had committed domestic violence against Trotman. He further explained Applicant was not on trial for the domestic abuse of Trotman. Counsel testified he did not object to this line of testimony. He further testified he did not recall whether the State indicated it would use this line of testimony as 404(b) evidence. Counsel also testified Ishmael Rivers, a jailhouse snitch who testified at trial, also testified to the abuse Applicant bestowed upon Trotman, and Counsel did not object to that line of testimony. He further testified during its closing argument, the State referenced the manner in which Applicant treated Trotman, referencing that Applicant had multiple romantic relationships ongoing at the same time. He elaborated he did not believe the State, in its closing argument, referenced domestic violence by Applicant. He further elaborated in his closing argument he highlighted because of these multiple romantic relationships, Trotman was forced to care for someone else's child.

Counsel testified testimony arose at trial alleging Applicant was not a Christian. He further testified there was testimony at trial Applicant did not permit Victim to sing songs, but Counsel did not know to what songs the State was referring. He testified Applicant did not like it when Victim sang these church songs, which would have been a reason for Applicant not to like Victim. After reviewing the transcript, Counsel testified the songs referred to were church songs Victim had learned at school. He elaborated from the testimony Applicant did not want Victim singing these songs because he did not believe in God, the conclusion could be drawn Applicant's religious beliefs were being raised at trial. He explained this was the only time

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during the entire trial in which there was any reference to Applicant's belief in God. He further elaborated he had no indication from the discovery the State would ask about Applicant's religious beliefs. He also testified he did not remember anything about these songs, as there was so much about which he was worried. Counsel further testified he had a lengthy interview from Trotman with law enforcement, and he did not recall Applicant's religious beliefs being mentioned in that interview. He testified he did not object to this line of questioning. He explained, however, he was not anticipating the response, but he also testified he did not want to highlight Applicant's religious beliefs by objecting to this comments. He further explained he was hoping it would sort of play through, and it reads a lot worse than if you were listening from the jury box. Counsel explained it would have been one of those things where the more it was mentioned, the worse it was. He also testified this statement was not elicited to show Applicant did not believe in God, but rather to provide another reason as to why Applicant would abuse Victim.

Counsel also testified testimony was elicited at trial that Applicant did not want Victim to be taught by white people. He further testified up until Trotman made this statement, there had no been indication Applicant was prejudiced against white people. He elaborated he did not object to this statement for the same reason he did not object to the testimony regarding Applicant's religious beliefs.

Counsel testified he did not object to the introduction of Trotman's booking photo, which was taken when Trotman was arrested, at trial. He further testified he did not recall how long Trotman and Applicant had been separated at the time this photograph was taken. He also testified he did not recall any testimony from Trotman indicating Applicant had inflicted the wounds which allegedly appeared in this photograph. He testified the introduction of Trotman's

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mugshot did not concern him, so he did not object. He explained a lot of people take bad mugshot pictures, so he did not draw the conclusion the photograph showed domestic violence. He further elaborated he did not object based on trial strategy. He also testified the State alleged Applicant abused Victim, not Trotman. He testified he did not believe the introduction of Trotman's booking photograph hurt Applicant's case.

He also testified he attempted to introduce a video of Trotman's interview with law enforcement. He testified he alluded to that video during his opening statement. He elaborated there is a portion of that tape, which he believed would be beneficial; and that portion demonstrates the manner in which Trotman struck Victim. He further elaborated he did not recall whether or not Trotman indicated how Victim's head turned but did demonstrate how she struck him. Counsel explained he wanted to admit this videotape at trial as a prior inconsistent statement, and he was attempting to have Trotman deny hitting Victim. He testified Trotman admitted to the actions in the interview and never denied hitting Victim or mixing up the seizures. He further testified Trotman demonstrated the manner in which she hit Victim with a spoon in front of the jury, which was consistent with her demonstration during her interview. He further explained the trial court would not allow the videotape to come into evidence, though he tried multiple times to admit it, but he did not make a proffer of that videotape on the record. He elaborated the trial court did not think it was admissible under Rule 613, SCRE, because Trotman had not denied making the statement. He also testified tension was building during the course of this interview. Counsel further testified Trotman's testimony at trial was dramatic.

He further testified the State introduced a photograph of Victim at trial, which showed Victim had a black eye and a bump on his head, but was taken about a month prior to Victim's death. He testified he did not recall when the bump was supposed to have occurred, but it was

approximately during the spring of 2010, which was prior to the death of Victim. He further testified he did not object to the introduction of this photograph, and he did not object on the grounds that it could not have been relevant to the injury Victim suffered at the time of his death. Counsel also testified the scientific testimony at trial revealed Victim had axonal damage, meaning there was connective tissue which was damaged and which would have occurred sometime prior to Victim's death. He testified the State's theory was one of prolonged abuse of Victim by Applicant, and the photograph of Victim would have been relevant to show when Victim went to stay with Applicant, he would return with bruises. Counsel further testified Applicant and Trotman would blame their daughter, who was three months older than Victim, for bruising Victim.

Counsel also testified law enforcement interviewed Applicant for a lengthy period of time. He testified the video of this interview was introduced at trial. He elaborated it would not surprise him if law enforcement repeatedly told Applicant they knew he was lying during that interview, but law enforcement is allowed to confront the suspect with contradictory evidence which they have found. He also testified he believes law enforcement is permitted to tell a suspect they think he is lying in an interview. He further testified he did not make an objection to the video on the basis law enforcement told Applicant they knew he was lying, but he did not see any reason to object. He also testified he doubted whether or not a law enforcement officer would be able to testify as to whether or not they knew the suspect was lying.

Counsel testified the issue of the case was whether or not Applicant was the cause of Victim's death based on repeated axonal damage. He testified the State argued evidence of a guilty conscious through Applicant's failure to call an ambulance for Victim. He elaborated Trotman and a person at Applicant's place of work both testified she called Applicant and

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informed him Victim was not breathing. He explained he did not consider asking for a directed verdict or a jury instruction that Victim had to be alive when Trotman called him in order to be convicted of homicide by child abuse through omission, but it possibly could have helped Applicant's case. He further explained part of homicide by child abuse is failing to render aid, or an act of omission. He also testified the State repeatedly used Applicant's admission he and Trotman did not call the ambulance, but he did not believe the jury convicted Applicant for this failure. He elaborated the jury convicted Applicant of homicide by child abuse based on the evidence of the abuse Applicant exhibited towards Victim. He testified he did not recall whether or not the State introduced evidence at trial that Victim was breathing when Trotman called Applicant, but there was no medical aid Applicant could have rendered if Victim was already deceased by the time Trotman called Applicant. Counsel further testified he believed the State's theory to be that Applicant caused Victim's death through repeated abuse by hitting Victim multiple times in the head, causing Victim to suffer seizures. He elaborated Victim had had multiple seizures prior to his death, and there was not one fatal blow. He further elaborated that testimony, which was elicited through the expert, made the case more difficult for them. Counsel testified the State's expert testified to axonal damage through repeated abuse, and his medical expert could not disagree with the State's findings. He also testified during closing arguments, the State had two theories, one of which included Applicant's failure to call the ambulance made him liable. He elaborated the State argued Trotman told people in the neighborhood Victim was not breathing. He further elaborated an ambulance was not called after any of Victim's seizures, including the last one.

He also testified Trotman was the one who failed to call 911, because she was with Victim when he stopped breathing. He testified he does not believe there is any proof as to when

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exactly Victim died. He further testified Trotman testified at trial she did not immediately call 911, but rather called Applicant because she was afraid she would get into trouble with Applicant. He also testified Trotman testified she did not call 911 because Applicant told her not to do so. He further testified Trotman waited for Applicant after calling him for about an hour; and when Applicant returned home, he made a comment "that boy dead." He elaborated after realizing Victim was dead, Applicant got a trashcan and cement, undressed Victim, put Victim's body in the trashcan, and covered it with cement.

Following Counsel's testimony, Applicant testified on his own behalf. Applicant testified in the video of Trotman's interview with law enforcement, Trotman demonstrated popping Victim on the arm. He further testified Trotman indicated she shoved Victim in the shoulder, and then Victim hit his head against the wall. He elaborated in the video she showed the left side of Victim's head hitting the wall, but at trial, she testified the back of his head hit the wall. He also testified not being able to introduce this video at trial hurt his case because the jury believed Victim's head made direct contact with the wall. He testified Victim did not have broken bones, healed bones, fractures, nor intracranial hemorrhages, except on the left side of his head which Trotman demonstrated during her interview. Applicant testified Trotman gave many inconsistent statements. He explained at one point, Trotman indicated Victim was not breathing. He also testified law enforcement accused Trotman of lying, and she gave multiple stories. He elaborated some of those stories were consistent with his own stories.

Applicant also testified he believes Counsel was ineffective for not asking for a directed verdict upon failure to render medical aid. He testified Trotman snapped and hit Victim, but the State alleged while Applicant was at work, Trotman called and told him the children were playing. He elaborated based on this, he told Trotman not to call the police, but rather go to a

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neighbor. He testified by Counsel not requesting a directed verdict based on this, he was prejudiced because the jury used the fact he did not call 911 from work to convict him. He further testified the State alleged Victim had multiple seizures, but Counsel should have asked for a directed verdict on this because the evidence only showed Victim suffered from one seizure. He explained Trotman testified she did not see any evidence of Victim having seizures on Sunday or Monday, while Applicant was at work.

Applicant testified the photograph of Trotman introduced at trial prejudiced him. He explained in his opening argument, Counsel stated Trotman wanted to be a victim. He also testified Trotman testified at trial Applicant ripped her hair out and abuse her. He elaborated the introduction of the booking photograph bolstered Trotman's credibility. He further testified Trotman's booking photograph was taken in July, which was completely irrelevant to Victim's death, which happened in June. Applicant testified at that point, he and Trotman had been separated two weeks.

He further testified a photograph of Victim from spring of 2010 was introduced. He testified the medical experts testified at trial it typically takes a couple of weeks for an individual to recover from a concussion. Applicant further testified the State used this photograph to imply the injury in the photograph was the one the medical experts observed. He elaborated during closing arguments, the State indicated a knot could be seen on Victim's forehead, which was the same area in which the pathologist testified he observed a concussion. Applicant also testified the State failed to prove by clear and convincing evidence he was the one who caused the knot on Victim's head. He elaborated the State also failed to prove whether or not the knot was the result of an accident. He further elaborated Trotman told him their daughter caused the bruise to Victim.

Applicant testified the statement as to his religious beliefs was irrelevant and false. He explained this prejudiced his case because anybody who did believe in God would look at him differently afterwards. He testified the statement he did not want white people teaching Victim was false and prejudiced his case, because eight white jurors served on his jury. Applicant further testified Counsel should have objected.

Applicant also testified law enforcement officers told him multiple times during his interview with them they knew he was lying. He elaborated this prejudiced his case, because a person of authority stated Applicant was lying. He further elaborated, therefore, the jury would believe his defense was a lie. He also testified Counsel did not object, but there was no question the interview was admissible.

He further testified these errors collectively hurt his case. He explained from the videotape not being played, which showed Trotman denied making the statement, and a picture of Trotman making her look like a victim went against him. He further explained the introduction of the earlier photograph of Victim, which showed an injury that may have been accidental matching with the area in which the pathologist found a contusion, prejudiced him.

Applicant testified he pled guilty to desecration of human remains, which is not a issue presently because he was "totally wrong." He elaborated he pled before trial to the improper burial of Victim's body, but he was going to trial to attempt to prove he did not kill Victim. He further elaborated he did not kill Victim.

Applicant also testified Victim began staying with him in 2009. He elaborated before he and Trotman resumed their relationship, Victim was born in May of 2009. He further elaborated he cheated on Trotman with Victim's mother, and had children by both of them within three months of each other. Applicant also testified at first, he denied being Victim's father, but he



bought a paternity test at CVS to determine whether or not he was the father. He further testified when Victim began staying with him, Victim would sing songs and was a very happy child. He elaborated Victim remained happy and did not have a reason to become introverted nor unassertive. He testified he returned Victim to his mother once with bruises on him, which Trotman explained their daughter had pushed Victim into the wall. He also testified he did not encourage his daughter to hit Victim, but rather would encourage them to wrestle. He explained his children would always fight over the toys, and he would stop them from slapping each other by teaching them how to wrestle. He further explained he took a video of his children wrestling some time before Victim died. He elaborated in that video, Victim was crying. He further elaborated he would play the video when Victim's mother would call in order to deceive her after his death. Applicant testified he knowingly deceived Victim's mother and pretended as if Victim were still alive.

Applicant testified he popped Victim in the chest, but did not hit him in the back. He further testified he would discipline his children when they got out of line. He elaborated he would hit his children in the chest as "a formal way that [he] would pop [Victim]." He further elaborated he disciplined Victim once, and he would never admit to repeatedly abusing Victim. He also testified he would never admit to calling Victim a faggot, and he never used that word, but he did describe Victim as soft. He further testified he loved the fact Victim sang songs, and he would sing them with him.

He further testified he was not at home when Victim stopped breathing, so he does not know what happened. He explained he knows what Trotman told him. He also testified Trotman did not testify at trial Victim fell and hit his head that morning. He elaborated during

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Trotman's transcript<sup>3</sup>, she stated she popped Victim in his arm, Victim fell to the floor, then hit the back of his head. He further elaborated this was completely different from what Trotman stated in the video. He also testified at one point Trotman testified Victim hit his head, but later she referenced Victim hit the back of his head. Applicant testified Trotman called him after Victim fell and he began seizing, while Applicant was at work. He elaborated Trotman told him Victim was not breathing. He further elaborated he told Trotman not to call law enforcement, but he was not preventing her from receiving medical aid. He also testified he did not want law enforcement called because he had drugs in the house, and he does not deal with law enforcement. Applicant further testified he told Trotman to go to a neighbor to receive help. He explained Trotman had to go to the neighbors in order to borrow a phone because she did not have a cellphone and they did not have a phone in the house.

Applicant also testified their theory of the case was not that Trotman was pretending to be a victim and was the person who caused Victim's death. He explained he said Trotman was a loving, sweet girl, but he was the root of the problem. He further explained he did not try to blame anything on Trotman, and he has never said Trotman killed Victim.

He testified he and Trotman devised a plan for Trotman to go to the Battery and make a false police report that Victim had been kidnapped. He elaborated he came up with that plan, and Trotman followed along with it. He further elaborated when Trotman called him from the Battery he was with another woman, but he did speak with law enforcement. He also testified he did not give multiple statements to law enforcement. He testified he always denied hitting Victim and never blamed Trotman for this. He testified he was interviewed by two law enforcement officers, both of whom testified at trial. He further testified after Trotman led law enforcement to Victim's body, they came to interview him again. He explained law enforcement

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<sup>3</sup> It is unclear to which proceeding Applicant was referring.

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officers confronted him with the death of Victim because they had just found his body. He further explained in his first interview he insisted Victim was still alive and had been kidnapped. Applicant testified Victim's body was found in the woods in Orangeburg County in a cement-filled trashcan. He elaborated Victim had been there for about one month, and his body was decomposed. He further elaborated he had a hand in the state of Victim's body, and he pled guilty to desecration of the body. He testified he did not plead guilty in order to keep photographs of Victim out at trial, but pled guilty because that was what he did wrong and he owned up to it. He also testified he does not believe pictures of the manner in which Victim was found were introduced at trial. Applicant also testified on the morning of Victim's death, he felt responsible, which was why he placed Victim's body into a cement-filled trashcan. He elaborated, however, feeling responsible does not make him responsible.

Applicant testified he informed the court during his guilty plea he was very happy with the services of Counsel. He also testified at that time, Counsel had done everything he asked of him, but that was before trial.

Applicant further testified he believes Trotman testified Applicant did not want white people teaching Victim so that he would be convicted. He testified there was no way for Counsel to know that statement would be elicited beforehand, but he should have objected to it or asked for the trial court to give an instruction with regards to it.

Applicant then rested, and Respondent presented the testimony of Assistant Solicitor Anne Williams. Assistant Solicitor Williams testified she has been an assistant solicitor for ten years in South Carolina and also was a deputy prosecutor for ten years in Arkansas. She testified she and Assistant Solicitor Herring-Lash tried Applicant's case.

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She testified the State's theory of the case was Applicant and Trotman lived in a home with their two children, and Victim would come to visit every other weekend. She elaborated sometimes Victim would stay a little longer; and during this time, Applicant was trying to man Victim up. She further elaborated when Victim would return to his mother, he would often have bruises all over his body and different excuses were given for those bruises. Assistant Solicitor Williams also testified they learned through investigation and interviews that Applicant was unhappy with certain things about Victim, and would constantly hit him. She explained Applicant would hit Victim in the chest, and Victim would fall back and hit his head. She further explained Applicant hit Victim in the head, and Victim was constantly hitting his head and reinjuring his brain. She testified Victim was having multiple seizures because of this, and Trotman, who witnessed the seizures, described them. She further testified this was corroborated by some of the things Victim's mother stated as well. She testified the medical expert indicated the re-injury of the brain was similar to a concussion injury in football. Assistant Solicitor Williams testified there was not just one blow which killed Victim, but rather it was a series of blows over and over again. She also testified each time Trotman observed these blows, she never reported it, and neither Trotman nor Applicant would help Victim. She elaborated they never got any medical attention for Victim, and the accumulation of the blows killed him. She further elaborated there was an admission on both Trotman's and Applicant's part each time, not just after the final blow.

She further testified part of their theory was Trotman was complicit because she never reported the abuse and did not report the abuse on the final day because she was incapable of standing up to Applicant. She explained Trotman did not have a phone in the home, was not given any money, rarely had enough food, and was home all day with three children. She

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elaborated in the home, they found Trotman's, not Victim's, blood. She further explained these facts played against them as well, as Counsel used these facts to show Trotman's resentment towards Applicant. Assistant Solicitor Williams testified whatever Applicant would tell Trotman to do, she would do it. She explained the day of Victim's death, Trotman called Applicant, who told her not to call 911 and that he would come home. She testified when Applicant returned home, he and Trotman decided to get rid of the body. She elaborated they had a video of Applicant at Home Depot, purchasing concrete and a trashcan. She further elaborated Applicant got Trotman to rent a vehicle to transport the body. She testified although Trotman was certainly guilty to what she pled, their theory was Trotman was not the person who killed Victim, hit him multiple times, and devised the plan to desecrate his body. She further testified the abuse of Trotman needed to be introduced at trial in order to combat the defense's theory she was the one who, out of jealousy and vindictiveness, beat Victim.

She also testified Applicant would tell Victim's mother that his daughter was hitting Victim. She testified Applicant told investigators during one of his interviews, and also indicated in calls he made from the jail, Victim fell down the stairs. She further testified to other people, Applicant would indicate he hit Victim because he was standing a certain way and Victim was soft, so he needed to man him up. She elaborated Applicant did not like the way Victim would not be assertive, and Applicant's daughter was much more assertive. She further elaborated Applicant would hit Victim in an effort to toughen him up. She explained Applicant thought Victim was gay based on the way Victim stood, talked, and liked to play with "girl toys." She further explained Applicant wanted these tendencies beat out of Victim. Assistant Solicitor Williams also testified Applicant referred to Victim as a faggot. She testified it was

difficult to determine when the abuse started, but they had evidence Victim came home to his mother in the spring prior to his death with knots and bruises on his head, as well as a black eye.

She also testified they introduced a photograph of Victim into evidence at trial. She explained the photograph depicted how the child would look, at least once, after visiting Applicant, and Victim's mother described how Victim would return home with bumps and bruises. She further testified Trotman also told them and testified Victim was being repeatedly hit during this period of time. She testified the photograph was introduced to show a pattern of abuse. She also testified their theory was not that the prior beatings were prior bad acts, but rather part of the same act. She testified Counsel was aware their theory of the case was Trotman was in a position in which she could not stand up to Applicant.

Assistant Solicitor Williams testified Applicant called various women from jail. She elaborated in these phone calls Applicant would tell differing stories about different times Victim had gotten hit. She further elaborated Applicant explained, for example, Victim fell down the stairs once and once Applicant had to hit him because he ran away when he was outside. She testified Applicant never denied hitting Victim in these phone calls.

She further testified Applicant gave two different statements, and the interview with Detectives Pottieger and Shuler was admitted at trial, but the interview with Detective Baggett was not. She explained in the first statement Applicant acted as if Victim were still alive and stated he had taken Victim to see fireworks for the Fourth of July and had Victim in the hotel with him. She further explained in the second statement, Applicant indicated Victim had died, but it was an accident. She also testified law enforcement confronted Applicant with the fact they found Victim's body, and Applicant would then tell a different story. She further testified Applicant explained one of Victim's seizures after falling down the stairs, either in an interview

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or a phone call. She testified law enforcement knew Applicant was lying because they found Victim's body, but the interview with Detective Baggett was the one in which he constantly told Applicant he knew he was lying and that video was not introduced.

Assistant Solicitor Williams testified a medical expert from Brown University reviewed the autopsy reports, the statements by Trotman, the medical slides, and the radiology slides. She testified based on this review, the expert told them this was the type of brain injury that would have been the result of multiple blows to the head, whether from being pushed down, smashed against the floor, or hit directly on the head.

She testified she and Assistant Solicitor Herring-Lash met with Counsel many times prior to trial, including once for about six hours. She elaborated they discussed all of the evidence at length; and a lot of the evidence they introduced about Trotman, Counsel used to explain his theory of the case. She further elaborated Counsel was not too concerned with the booking photograph of Trotman being introduced because he was trying to show Trotman was the perpetrator, not Applicant. She testified Counsel was aware of their theory and the evidence against Applicant prior to trial. She also testified she does not specifically recall whether or not they had a specific conversation about 404(b) evidence, but Counsel was aware of all of the evidence that would be introduced at trial.

She also testified the booking photograph of Trotman was taken a week or two after she and Applicant were separated. She elaborated Trotman had gotten a job and was staying with her aunt at the time. She further testified the photograph does not depict an injury to Trotman. She explained Trotman always had dark circles under her eyes. She further explained Counsel wanted to depict that Trotman was, indeed, a criminal and was the perpetrator. Assistant Solicitor Williams testified at trial, Trotman appeared to be a different person than the woman in

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the photograph—she had gained weight, had her hair done, and wore makeup—which attributed to the introduction of the booking photograph.

She further testified the goal in her closing argument was to explain the statute to the jury and connect the dots with the evidence which was presented at trial. She explained there was ample testimony both from Applicant and Trotman, that Applicant repeatedly hit Victim, causing the death of Victim. She further explained, however, they argued the omission, not just the failure to call 911 after the final blow but by the fact they never got medical attention for Victim each time he was hit. She testified the State was not alleging Applicant merely failed to call 911 once. She further testified in closing, they tried to highlight the fact Trotman was beaten down in the relationship and did not have the ability to stand up to Applicant. She also testified her closing argument was based on the fact all of the evidence overlapped—Applicant's statement, eyewitness statements, medical testimony, and the video of Applicant buying concrete. She testified she did argue Applicant's own words—that neither he nor Trotman called the ambulance—were powerful, but it was a long closing argument. She elaborated this statement by Applicant made both Applicant and Trotman guilty, and she was arguing there was an omission throughout the duration of this abuse. She also testified the crime of homicide by child abuse cannot be committed if the child is already dead, but she did not believe Victim was already dead.

Assistant Solicitor Williams also testified several things were elicited through Trotman in establishing Applicant's motive. She explained Applicant did not like the fact Victim acted like a girl and was constantly singing songs about Jesus. She further explained Applicant would become enraged when Victim would sing these songs and hit Victim, and Victim eventually stopped signing these songs. She elaborated she was unaware why these songs enraged



Applicant, and she did not recall Trotman telling her prior to trial Applicant did not believe in God.

She testified in the line of testimony in which Trotman indicated Applicant did not want Victim taught by white people, they were attempting establish Applicant would not let the children go to school. She explained Counsel was attempting to establish Applicant was poor, and there was no money for school. She further explained the purpose of this line of testimony was not to elicit that Applicant did not want white people teaching Victim.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

#### *Ineffective Assistance of Counsel*

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

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable



professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Counsel's alleged failure to properly cross-examine the co-defendant*

Applicant alleges Counsel was ineffective for failing to properly cross-examine his co-defendant, Grace Trotman. Applicant contends Counsel was ineffective for failing to introduce Trotman's videotaped interview with law enforcement. "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement." Rule 613(b), SCRE. If a witness does not admit to making the statement, then extrinsic evidence of the statement is admissible. *Id.* However, if the witness admits to the statement, extrinsic evidence of that statement is inadmissible. *Id.* Here, Trotman never denied giving statements to law enforcement



and admitted she was aware those statements were recorded. Tr. 283. Moreover, Trotman admitted to popping Victim in the arm "kinda hard" and further admitted Victim fell back and hit his head on the wall after she hit him. Tr. 298-99, 304. She further admitted she demonstrated these actions, both by her and Victim, in her interview. Tr. 299-300. Trotman even went so far as demonstrating the manner in which she hit Victim before the jury. Because Trotman never denied making the statements and never denied hitting Victim, the video would have been inadmissible as extrinsic evidence of a prior inconsistent statement. In addition to eliciting the above testimony from Trotman during cross-examination, Counsel attempted to introduce the video of Trotman's interview at trial several times. See Tr. 294, 300. The trial court, however, was unwilling to admit the video, as Trotman had already admitted she was guilty of everything that happened on the day of Victim's death. Tr. 309. Based on the foregoing, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. During cross-examination, Counsel was able to elicit testimony from Trotman as to the manner in which and force with which she hit Victim. Furthermore, Counsel was not only able to elicit this testimony but also able to elicit a demonstration from Trotman as to the blow she dealt Victim. This in-court demonstration was similar to that in her interview. Additionally, Counsel testified at the evidentiary hearing Trotman's testimony at trial was dramatic, similar to her statement to law enforcement. Because Trotman did, in fact, not only describe but also demonstrate the manner in which she hit Victim, this Court finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

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*Counsel's alleged failure to move for a directed verdict on the issue of whether Applicant failed to render medical aid*

Applicant alleges Counsel was ineffective for failing to move for a directed verdict on the issue of whether Applicant failed to render medical aid, thereby resulting in Victim's death. When a person causes the death of a child while committing child abuse or neglect, and the death occurs under circumstance manifesting an extreme indifference to human life, or when a person knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child, that person is guilty of homicide by child abuse. S.C. Code Ann. § 16-3-85(A). "Child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare." S.C. Code Ann. § 16-3-85(B)(1). Furthermore, harm to the child occurs when a person: (1) inflicts, or allows to be inflicted, upon the child a physical injury; (2) fails to supply the child with adequate food, clothing, shelter, or medical aid, thereby causing physical injury or a condition resulting in death; or (3) abandons the child, which results in the child's death. S.C. Code Ann. § 16-3-85(B)(2). At trial, the State contended Applicant not only repeatedly abused Victim but also failed to seek medical attention for Victim *each time* a blow was dealt or Victim suffered a seizure. The State further contended Applicant failed to render medical aid on the date of Victim's death, as Trotman called Applicant for assistance and he instructed her not to call 911. After the close of the State's case-in-chief, Counsel made a directed verdict motion based on the lack of evidence tying Applicant to the death of Victim. *See* Tr. 557-59. He further argued there was a lack of medical proof as to the cause of death and Applicant's relationship to that cause of death. Tr. 558-59. There is no such requirement that trial counsel raise all potentially meritorious issues in arguing for a directed verdict. Here, Counsel made his strongest argument for a directed verdict at trial—that there was

f32

no medical evidence linking Applicant to Victim's death. Accordingly, this Court finds Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Larmand*, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing *Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. *State v. Hernandez*, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007). Even if Counsel had moved for a directed verdict on the issue of whether Applicant failed to render medical aid, the testimony presented at trial indicated Trotman called Applicant, while he was at work, to inform him Victim had stopped breathing. Tr. 230-32, 306. Applicant instructed her not to call 911, but he would return home. Tr. 231-32, 262, 306-07. An hour later, Applicant returned and responded: "That boy dead." Tr. 233. Based on the above presented testimony, it is unlikely a directed verdict on this issue would have been successful. Therefore, this Court finds Applicant has failed to suffer any resulting prejudice from the alleged deficiency. This allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to require the State to elect which theory it would proceed with at trial*

Applicant alleges Counsel was ineffective for failing to require the State to elect which theory it would proceed with at trial. Specifically, Applicant contends Counsel was ineffective by allowing the State to proceed on a theory Applicant both dealt the fatal blows to Victim and

failed to render medical aid to Victim. "Allegations may state in the alternative the manner and instrumentality of death." *State v. Owens*, 293 S.C. 161, 165, 359 S.E.2d 275, 277 (1987) (citing *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930)). Furthermore, when the State produces evidence "tending to show that the victim could have been killed by any one of the means alleged in the indictment," there is no material variance. *Id.* at 166, 359 S.E.2d at 277. In addition, there is no authority, which prohibits the State from asserting two different legal theories based on the facts of the case. *See State v. Blakely*, 402 S.C. 650, 665, 742 S.E.2d 29, 37 (2013) (affirming the appellant's convictions when the appellant failed to cite to any legal authority prohibiting the State from asserting two different theories). Here, the State presented evidence at trial that Applicant not only repeatedly abused Victim but also repeatedly failed to render medical aid on Victim's behalf, including on the date of Victim's death. There is no such requirement for the State to elect only one theory upon which it would proceed at trial. Therefore, this Court finds Applicant has wholly failed to establish Counsel was deficient or any resulting prejudice from the alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the introduction of the co-defendant's mugshot*

Applicant alleges Counsel was ineffective for failing to object to the introduction of Trotman's booking photograph at trial. Applicant contends the introduction of such a photograph inserted evidence of a different abuse, for which Applicant was not on trial, and was improper character evidence under Rule 404(b), SCRE. "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. However, such evidence may be admissible "to show motive,

identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” *Id.* “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.’” *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (quoting *State v. Owens*, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005)). Furthermore,

“when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the settling of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context . . . And where evidence is admissible to provide this full presentation of the offense, (t)here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.”

*Id.* at 635-36, 742 S.E.2d at 26 (quoting *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980); *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996)). A “‘jury is entitled to know the ‘setting’ of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge.’” *Id.* at 636, 742 S.E.2d at 26 (quoting *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980); *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996)). *See also State v. McGee*, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014) (finding the trial court did not abuse its discretion in allowing evidence of a theft of a truck as part of the res gestae of the crime when there was a sufficient nexus between the theft and the murder, evidence of the truck was circumstantially intimately connected and explanatory of the crime, and the evidence of the theft of the truck was needed to show the story of the attack on the victim).

Here, the abuse suffered by Trotman at the hands of Applicant was necessary to show why Trotman too would fail to provide Victim with any aid, medical or otherwise. Because Trotman was so afraid of Applicant, she first called Applicant when Victim stopped breathing, rather than 911. This further served to explain why Trotman failed to provide Victim with medical aid any of the other instances in which she witnessed Applicant abusing Victim or Victim seizing. Because the abuse suffered by Trotman was interconnected with and explanatory of Victim's own abuse and eventual death, the evidence of this abuse was necessary for a full presentation of the offense under the res gestae theory.

In addition, trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel testified he was not concerned with the introduction of the booking photograph because his theory of the case was Trotman was the one who actually abused Victim, thereby causing his death. Therefore, showing she was a criminal only served to enhance this theory. Based on all the foregoing, this Court finds Applicant has failed to establish any deficiency on the part of Counsel or any resulting prejudice therefrom. Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the introduction of a  
photograph of Victim*

Applicant alleges Counsel was ineffective for failing to object to a photograph of Victim, which was introduced at trial. In particular, Applicant contends because the photograph was taken sometime prior to Victim's death and showed a knot on Victim's head and a bruise under his eye, Counsel should have objected.

First, evidence of prior child abuse or neglect of a child victim is admissible to show the defendant's intent and absence of mistake or accident at the time of the child victim's death. *State v. Martucci*, 380 S.C. 232, 254, 669 S.E.2d 598, 610 (Ct. App. 2008). Indeed, when the prior abuse or neglect is so close in time to the infliction of the fatal injuries, the evidence is relevant and probative to demonstrate the defendant intended to hurt the child victim. *Id.* at 254, 669 S.E.2d at 609-10. Here, the photograph clearly depicted the manner in which Applicant would return Victim to his mother—with knots and bruises on his body. Additionally, the abuse inflicted upon Victim shortly after he began staying with Applicant, which was also a short period of time prior to Victim's death. Because the infliction of the injuries depicted in the photograph were so close in time to the fatal injuries, the introduction of the photograph was necessary to prove Applicant intended to hurt Victim.

Moreover, evidence of prior abuse or neglect is relevant to establish the defendant as the individual who fatally abused the child victim. *Id.* at 254, 669 S.E.2d at 610. Indeed, “[t]he fact that [the defendant] exhibited such cruelty and abuse toward Child within a relatively short period of time prior to his death circumstantially identified [the defendant] as Child’s killer.” *Id.* (citing *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)). After visiting with Applicant, Victim would return to his mother with bruises on his body. Clearly the photograph

which depicted this prior abuse was necessary to establish Applicant was the individual who had fatally abused Victim.

Furthermore, evidence of prior abuse or neglect “establishe[s] a pattern of continuous abuse or neglect necessary to prove homicide by child abuse and clearly support[s] the existence of a common scheme or plan.” *Id.* When such evidence is presented to establish a common scheme or plan, “a close degree of similarity between the prior bad act and the crime for which the defendant is on trial is necessary.” *Id.* at 255, 669 S.E.2d at 610 (citing *State v. Hough*, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997)). The evidence is admissible if it is of “such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect.” *Id.* (citing *State v. Raffaldt*, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995)). When the prior bad acts are directed towards the same victim and are similar in nature, those prior bad acts are admissible as a common plan or scheme. *Id.* (citing *State v. Weaverling*, 337 S.C. 460, 471, 523 S.E.2d 787, 792-93 (Ct. App. 1999)). Here, Applicant would repeatedly abuse Victim. He would hit Victim in the chest or back with such force that Victim would fall back and hit his head. This prolonged period of abuse led to Victim’s death, and the medical evidence revealed Victim suffered from axonal damage in the brain due to repeated head injuries. The injuries to Victim’s head and face in the photograph were clearly similar to the abuse which caused Victim’s death. Therefore, the photograph was necessary to establish a common plan or scheme of repeated abuse of Victim by Applicant.

Finally, evidence of prior child abuse or neglect is relevant to show a complete, whole story relating to the charge of homicide by child abuse. *Id.* at 258, 669 S.E.2d at 612. Such evidence “provides the context in which the crime occurred and demonstrates the culminating impact” on the child victim. *Id.* Moreover, the prior abuse is necessary to establish the

defendant's state of mind and whether or not he manifested an extreme indifference to the value of human life. *Id.* Here, the abuse Applicant bestowed upon Victim occurred in the months leading up to Victim's death. A photograph depicting this abuse was necessary to establish the full context of the abuse—that it was repeated rather than one fatal blow. Under the *res gestae* theory, the evidence of the prior abuse suffered by Victim was admissible.

For all the foregoing reasons, this Court finds Applicant has wholly failed to establish Counsel was deficient. Similarly, because the photograph would have been admissible under all of the theories outlined above, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to quash the indictment*

Applicant alleges Counsel was ineffective for failing to quash the indictments for homicide by child abuse on the grounds that the indictment was vague and did not specify the theory upon which the State would proceed at trial. Indictments are not jurisdictional in nature but are merely notice documents. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). When judging the sufficiency of an indictment, the court must determine “whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.” *Id.* at 102-03, 610 S.E.2d at 500 (citing *State v. Wilkes*, 353 S.C. 462, 578 S.E.2d 717 (2003)). “An indictment passes legal muster if it ‘charges the crime substantially in the language of the . . . statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.’” *State v. Reddick*, 348

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S.C. 631, 635, 560S.E.2d 441, 443 (Ct. App. 2002) (quoting S.C. Code Ann. § 17-19-20 (1985)). Moreover, “whether the indictment could be more definite or certain is irrelevant.” *Id.* at 103, 610 S.E.2d at 500.

Here, the indictment stated with sufficient certainty and particularity Applicant was charged with homicide by child abuse. Moreover, the indictments clearly apprised Applicant of the elements of each charged offense. In particular, the indictment for homicide by child abuse charged: “That [Applicant] did in Berkeley County on or between the dates of 5-20-10 and 6-07-10 cause the death of a child under the age of eleven while committing child abuse or neglect; and the death occurred under circumstances manifesting an extreme indifference to human life.” 2010-GS-08-1519. The indictment further alleged: “To Wit: inflicting, or allowing to be inflicted by act or omission, harm on [Victim] . . . causing his death; and/or failing by act or omission to supply [Victim] with adequate health care causing harm resulting in his death.” *Id.* This is precisely the same language as that of section 16-3-85 of the South Carolina Code, which states in pertinent part: “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). As the indictment specifically enumerated the offense with which Applicant was charged and described in relevant detail the crime substantially in the language of the statute prohibiting the crime, this Court finds this allegation must be denied and dismissed with prejudice.

Notwithstanding the sufficiency of this indictment, this Court finds Applicant has failed to establish any deficiency on the part of Counsel or any resulting prejudice. In particular, Counsel testified he was thoroughly aware of the crime with which Applicant was charged and

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the evidence the State was going to present at trial, particularly in light of the numerous times he met with the solicitors to review the case. He elaborated based on his review of the evidence, he was aware on which theory the State would proceed. From this, both Applicant and Counsel were clearly aware of each offense with which Applicant was charged, the particular elements of each offense, and the evidence against Applicant. Therefore, this Court finds Applicant has failed to meet his burden, and this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to statements made  
regarding Applicant's religious beliefs*

Applicant alleges Counsel was ineffective for failing to object to a statement made regarding Applicant's religious beliefs. Specifically, Applicant alleges Counsel was ineffective for failing to object when Trotman stated: "Because [Applicant] was like -- he wanted to -- he didn't believe in God. I mean he didn't believe in Jesus so he didn't want his son singing songs like that." Tr. 201-02. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). At the evidentiary hearing, Counsel testified he did not want to object to this comment for fear of highlighting it in the minds of the jurors. He elaborated he feared had he objected to it, the worse the comment



would seem. Accordingly, this Court finds Counsel employed a valid strategic decision in not objecting to this comment. This Court further finds Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. This was the only time during the course of the trial Applicant's religious beliefs, or lack thereof, were mentioned. Trotman did not mention it again after this one instance, no other witnesses were asked about Applicant's religious beliefs, and the State did not argue this point during its closing argument. Moreover, there was ample evidence from which the jury could have, and did indeed, convict Applicant. In particular, witnesses testified to the bruises they observed on Victim's body after he had spent time with Applicant and also testified to the change in Victim's demeanor. In addition, Applicant's co-defendant testified to the beatings she observed Applicant give Victim. It is unlikely such an innocuous comment regarding Applicant's religious beliefs would have affected the outcome of the trial. Accordingly, Applicant has wholly failed to establish any prejudice from this comment. This allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to comments regarding Applicant's racial prejudices*

Applicant alleges Counsel was ineffective for failing to object to testimony regarding his racial prejudices. Applicant specifically alleges Counsel should have objected when Trotman testified: "[Applicant] didn't want [Victim] to go to school. He felt like he was going to teach him when he needed to know. He didn't want white people to teach his kids." Tr. 202. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of



circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 689. Furthermore, “representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Similar to the comments outlined above, Counsel testified he did not want to object to this line of testimony because he did not want to highlight it in the minds of the jury. This Court finds Counsel employed a valid trial strategy in not objecting to this comment; and, therefore, Applicant has failed to show any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from the alleged deficiency. This was the only time in which Applicant’s “racial prejudices” were mentioned throughout the entire trial. Additionally, the strength of the evidence against Applicant in comparison to this innocuous comment was strong. Several witnesses testified to the change in demeanor in Victim after he had been staying with Applicant. Furthermore, Applicant’s co-defendant testified to the prolonged abuse Victim suffered at the hands of Applicant. Even if Counsel had objected to this comment, it is unlikely the result of the proceeding would have been different. Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the admissibility of Applicant's videotaped statement*

Applicant alleges Counsel was ineffective for failing to object to the admissibility of his videotaped interview with law enforcement. Specifically, Applicant contends Counsel should

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have objected to the admissibility of this video, not on *Miranda*<sup>4</sup> grounds, but rather on the grounds that law enforcement officers repeatedly told Applicant during the interview they knew he was lying. “[M]isrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible.” *State v. Von Dohlen*, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996) (citing *Frazier v. Cupp*, 394 U.S. 731 (1969); *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980)). When such misrepresentations occur, the relevant inquiry is “whether the defendant’s will was ‘overborne.’” *Id.* A defendant’s will is not overborne merely because he is led to believe law enforcement’s knowledge of his guilt is greater than it actually is. *Ledbetter v. Edwards*, 35 F.3d 1062, 1069 (6th Cir. 1994). Here, after hearing Applicant’s initial story about Victim, law enforcement officers confronted him with the fact they knew Victim was dead, as they had found his body. In particular, the officers informed Applicant they knew he was lying because they found Victim’s body. Applicant then told law enforcement officers another story. There is no indication Applicant’s statement was not voluntarily given. Applicant was clearly advised of his rights and voluntarily waived those rights to talk with law enforcement. *See* Tr. 177-78, 549-50. Indeed, Applicant concedes Counsel should not have challenged the videotaped interview based on *Miranda*. Therefore, despite the fact law enforcement officers told Applicant they knew he was lying, Applicant’s will was not overborne when he gave this statement. This Court finds Applicant has failed to establish any deficiency on the part of Counsel. This Court further finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. Even if Counsel objected to the introduction of this statement, it is unlikely the trial court would have suppressed it, particularly in light of the voluntary waiver of Applicant’s rights. Based on the foregoing, this allegation must be denied and dismissed with prejudice.

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<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

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### *Cumulative Error*

Applicant alleges the cumulative effect of Counsel's alleged errors constitutes ineffective assistance of counsel. "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); *see also Lorenzen*, 376 S.C. at 535 n. 3, 657 S.E.2d at 779 n.3. Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and, therefore, does not recognize a cumulative error analysis. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). This Court finds a cumulative error analysis would be inappropriate and therefore finds that this allegation must be denied and dismissed with prejudice.



## 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.

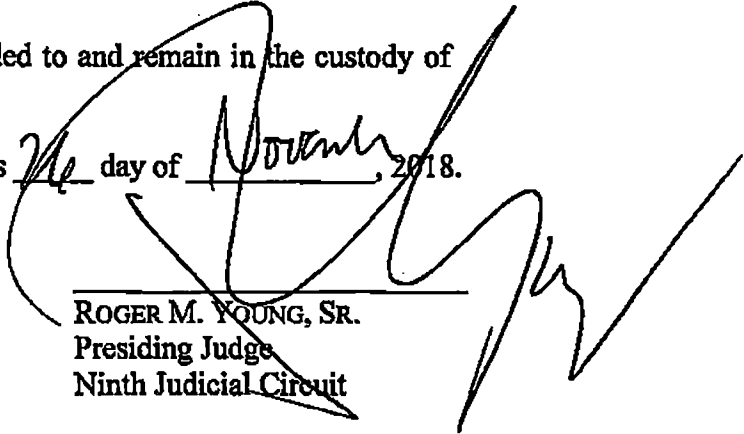
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief 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.

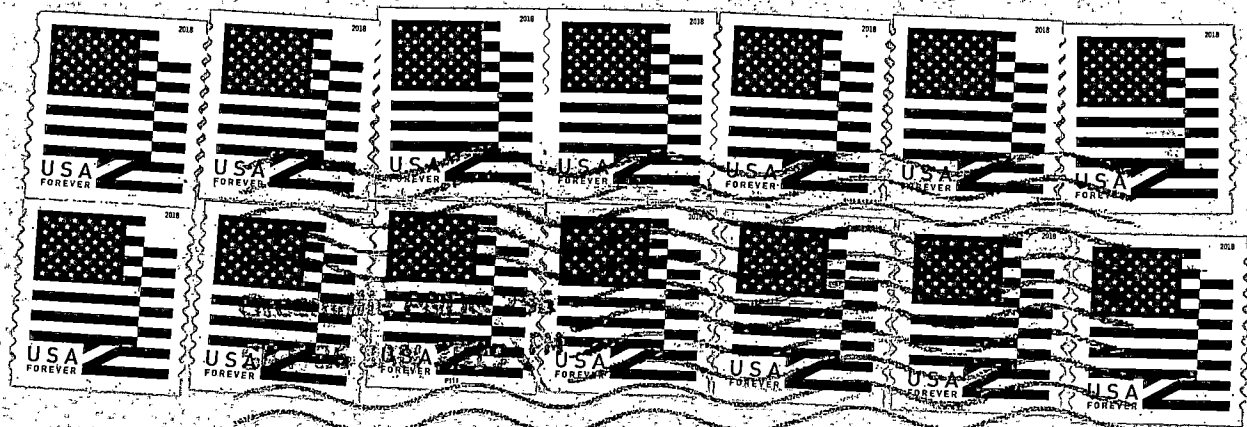
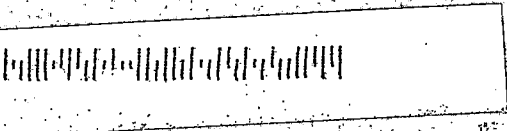
### IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 26 day of November, 2018.

  
\_\_\_\_\_, South Carolina

  
\_\_\_\_\_  
ROGER M. YOUNG, SR.  
Presiding Judge  
Ninth Judicial Circuit



Law