Vol. III of IV

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

JUL 01 2019

S.C. SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

NATHANIEL MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000069

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

LINDSEY MCCALLISTER
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Pages 1001-1500

INDEX

INDEX i

TRIAL TRANSCRIPT DATED MAY 13-17, 2002 1

INDICTMENT AND SENTENCING SHEET 1053

APPLICATION FOR POST-CONVICTION RELIEF FILED OCTOBER 8, 2007 1056

APPLICATION FOR POST-CONVICTION RELIEF FILED NOVEMBER 5, 2007 1066

RETURN AND MOTION TO DISMISS 1085

APPLICANT'S MOTION FOR DISCLOSURE OF DISCOVERY
FILED OCTOBER 8, 2007 1092

APPLICANT'S MOTION FOR APPOINTMENT OF COUNSEL
FILED OCTOBER 8, 2007 1107

ORDER GRANTING APPLICANT'S MOTION TO APPOINT COUNSEL AND MOTION
FOR DISCLOSURE OF DISCOVERY FILED SEPTEMBER 11, 2008 1109

AMENDMENT TO APPLICATION FOR POST-CONVICTION RELIEF 1111

APPLICANT'S MOTION FOR ABEYANCE AND/OR DISMISS WITHOUT PREJUDICE
FILED JANUARY 23, 2012 1114

RESPONSE TO APPLICANT'S MOTION TO HOLD PCR IN ABEYANCE AND/OR
DISMISS WITHOUT PREJUDICE FILED FEBRUARY 20, 2012 1135

ORDER OF APPOINTMENT FILED AUGUST 17, 2012 1139

ORDER TO HOLD POST-CONVICTION RELIEF APPLICATION IN ABEYANCE
FILED SEPTEMBER 14, 2015 1141

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR NEW TRIAL
FILED JANUARY 14, 2015 1144

TRANSCRIPT OF MOTION FOR NEW TRIAL DATED FEBRUARY 9, 2015 1177

TRANSCRIPT OF MOTION FOR NEW TRIAL DATED APRIL 16, 2015 1351

ORDER DENYING MOTION FOR NEW TRIAL FILED JULY 30, 2015 1405

AMENDMENT TO POST-CONVICTION RELIEF APPLICATION
FILED FEBRUARY 17, 2016 1410

AMENDMENT TO POST-CONVICTION RELIEF APPLICATION
FILED JUNE 6, 2016 1413

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JULY 12, 2016 1415

APPLICANT'S EXHIBIT NO. 1 (JURY NOTE) 1504

ORDER OF DISMISSAL FILED DECEMBER 14, 2018 1505

THAT.

WE HAPPEN TO HAVE IN THIS COUNTRY, UNFORTUNATELY FOR HIM, ONE OF THE TOP EXPERTS IN THE PEDIATRIC OPHTHALMOLOGY FIELDS. SHE'S ON AN INTERNATIONAL BOARD DOING STUDIES ABOUT THIS TO MAKE SURE PEOPLE DON'T MISTAKENLY CALL IT SHAKEN BABY. AND WHAT DOES SHE SAY? THERE'S NO DISPUTE. YEAH, YOU CAN GET RETINAL HEMORRHAGES FROM BRAIN SWELLING, BUT NOT IN THIS CASE. NOT IN THIS CASE, LADIES AND GENTLEMEN.

LET'S GET ONE OTHER THING STRAIGHT, TOO. SUBDURAL HEMATOMAS DON'T CAUSE RETINAL HEMORRHAGES. NOT JUST SUBDURAL, NOT JUST RETINAL HEMORRHAGES, NOT JUST SWELLING OF THE BRAIN. ANY ONE OF WHICH, LADIES AND GENTLEMEN, IS AN INDICATOR OF SHAKEN BABY.

THIS CASE IS OVERWHELMING. THIS ONE, IT'S NOT CLOSE. THERE IS NO OTHER EXPLANATION FOR HER INJURIES OTHER THAN THAT CHILD WAS VIOLENTLY SHAKEN.

NOW, IN THIS CASE WE ALSO KNOW THAT SHE WAS PROBABLY ALSO STRUCK IN THE FACE. WHAT SUPPORTS THAT? THE SIZE OF THE SUBDURAL HEMATOMA. REMEMBER, WHEN CONSIDERING THE REBLEED, ONE OF THE EXAMPLES THAT ONE OF THE DOCTORS GAVE YOU, I FALL

DOWN AND SKIN MY KNEE, IT SCABS UP. A REBLEED IN THE BRAIN IS THE SAME MANNER, YOU FALL DOWN AND INJURE IT AGAIN, YOU KIND OF KNOCK THE SCAB OFF.

THAT'S WHAT A REBLEED IS. IT DOESN'T BECOME A BIGGER INJURY THAN IT WAS BEFORE UNLESS THERE'S NEW TRAUMA, DOES IT?

THE SUBDURAL HEMATOMA. THIS IS THE UNDISPUTED TESTIMONY IN THIS CASE, WAS SO LARGE THAT EVEN IN DR. CLOSE'S OPINION, NOT ONLY WAS IT SHAKEN BABY, IT WAS HIT.

WHAT SUPPORTS DR. CLOSE? BECAUSE, LADIES AND GENTLEMEN, WE BROUGHT YOU EVIDENCE. WE BROUGHT YOU PHOTOGRAPHS OF THIS CHILD, AND WE AREN'T HERE TO ARGUE ABOUT WHEN THE BRUISE CAME UP. WE PUT THESE PICTURES IN.

YOU HEARD FROM DR. ABEL -- THAT IS A SHAKEN BABY, AN ABUSED BABY, A BATTERED BABY. WHAT DO WE HAVE TO PROVE THAT TO YOU? WE HAVE BRUISES. WE AREN'T HERE, LADIES AND GENTLEMEN, SPECULATING ABOUT A BRUISE ON THE BACK OF THE NECK, A BRUISE TO THE CHEST THAT COULD BE OTHERWISE EXPLAINED. WE AREN'T ASKING YOU TO DO THAT, NOT IN THIS CASE, BECAUSE THE EVIDENCE IN THIS CASE IS OVERWHELMING. WE'VE GOT LOTS OF BRUISES. YOU'VE GOT BRUISING EVERYWHERE. YOU HAVE TESTIMONY FROM OTHER

WITNESSES ABOUT OTHER BRUISES.

THIS ISN'T A CHILD THAT FELL DOWN AND HURT HERSELF. WE AREN'T ASKING YOU, AND I WOULDN'T ASK YOU. THIS CHILD HAS BRAIN DAMAGE, BRAIN HEMORRHAGES, SUBDURAL HEMATOMAS, AND BRUISING ALL OVER HER BODY.

YOU'VE HEARD FROM DR. HUBBIRD, AN EXPERT IN HIS FIELD, A PEDIATRIC INTENSIVIST. YOU HEARD FROM DR. CHRISTMANN, AN EXPERT IN HER FIELD ON SHAKEN BABY SYNDROME. SHE'S WRITING ARTICLES TO TEACH OTHER PEOPLE TO MAKE SURE THAT THEY DON'T MISTAKENLY IDENTIFY IT.

YOU'VE HEARD FROM DR. ABEL, AN EXPERT IN THE FIELD OF CHILD ABUSE. CLASSIC SHAKEN BABY, AN ABUSED AND BATTERED CHILD.

YOU'VE HEARD FROM DR. CLOSE, A RADIOLOGIST WHO IS AN EXPERT AT READING THESE C.T. SCANS. WHAT DID HE TELL YOU? HE SHOWED YOU. WE DON'T JUST ASK YOU TO RELY ON -- WE SHOWED YOU. CLASSIC SHAKEN BABY. ALSO A BLOW TO THE HEAD, AND WHAT CORROBORATES THAT? (INDICATING)

YOU HEARD FROM DR. BURNS WHO DID THE AUTOPSY IN THIS CASE. HE TOLD YOU THAT HIS FINDINGS WERE CONSISTENT AGAIN. EVERY INDICATOR WAS SHAKEN BABY. WHAT DID DR. BURNS DO? HE DID WHAT HE WAS

SUPPOSED TO DO AS A PATHOLOGIST. HE TOOK THE EYES AND CAREFULLY REMOVED THE LAYERS. WHAT DID HE FIND? MORE BLEEDING BEHIND THE LEFT EYE WHERE ALL THE RETINAL HEMORRHAGES WERE.

AS DR. CHRISTMANN TOLD YOU, HAVING THAT INFORMATION, THERE WAS NO QUESTION THAT THE ONLY WAY THIS CHILD GOT THIS, THESE INJURIES WAS FROM SHAKEN BABY SYNDROME.

THESE DOCTORS SAW THIS CHILD BACK IN MARCH. THEY FORMED THEIR OPINIONS THEN AND SINCE THEN OTHERS HAVE DONE NOTHING BUT SUPPORT THEM.

YOU ALSO HEARD FROM DR. NICHOLS, WHO CAME HERE AT MY REQUEST. HE LISTENED TO THE TESTIMONY OF THEIR EXPERT, AND HE TESTIFIED AS A FORENSIC PATHOLOGIST AND THEY KIND OF MADE IT -- GOVERNOR HODGES THINKS SO MUCH OF HIM THAT HE'S APPOINTED HIM TO A BOARD OF CHILD FATALITIES AND CHILD ABUSE. HE'S A LEADER IN HIS FIELD.

WHAT DID HE TELL YOU? HE TOLD YOU WHY THEIR EXPERT WAS WRONG. I'M GOING TO TALK TO YOU ABOUT THEIR EXPERT IN A MINUTE.

YOU ALSO HEARD FROM THE DAYCARE WORKERS, THE NURSERY SCHOOL WHERE MINOR WENT. THAT'S IMPORTANT IN THIS CASE. WHAT DID THEY TELL YOU ABOUT THE DAY BEFORE MINOR DID? SHE WAS A CHILD

WHO WAS PERHAPS DEVELOPMENTALLY DELAYED, BUT SHE WAS ALSO A SWEET AND LOVING CHILD. WE HEARD HOW JUST THE DAY BEFORE SHE SAW HER TEACHER AND RAN TO HER AND HUGGED HER. SHE COULD BE AN OUTGOING CHILD WITH THE PROPER CARE AND WITH THE PROPER ATTENTION.

THEY TOLD YOU ABOUT A LITTLE BRUISE ON HER FACE THAT THEY NOTICED. THIS IS IMPORTANT BECAUSE I'M GOING TO TALK ABOUT WHAT NATHANIEL MITCHELL SAYS OVER THE NEXT FEW DAYS, WHAT HE SAYS TO THE DOCTORS, WHAT HE SAYS TO THE POLICE, AND THE REASONS HE SAID THAT.

WHEN NATHANIEL MITCHELL IS ASKED ABOUT A BRUISE THAT JUST HAPPENS TO BE THERE THE DAY BEFORE SHE'S DEAD, SHAKEN TO DEATH, WHAT'S HIS ANSWER? IT'S A BUG BITE. WELL, THERE AREN'T MANY MOSQUITOES IN MARCH. USUALLY WHEN A SPIDER BITES, IT DOESN'T LOOK LIKE A BRUISE, THE FIRST THING.

ANOTHER THING, WHAT DID HE SAY ABOUT SHE AND H.G. ? THIS IS IMPORTANT. DID SHE GET UP THERE AND TELL YOU ABOUT HOW H.G. HAD BEEN GOING AFTER HIS SISTER? NO, THEY WERE PLAYING IN THE SAND BOX THAT DAY. VALERIE WILSON TOLD YOU ALL ABOUT THAT, LADIES AND GENTLEMEN.

YOU ALSO HEARD FROM THE STATE FROM N.G. .

YOU SAW HER TESTIMONY WHEN N.G. , TWO YEARS AFTER THIS EVENT WAS AS NERVOUS AS SHE WAS. YOU SAW HER. SHE GOT UP HERE AND SHE WAS ABLE TO TELL YOU WHAT SHE SAW THAT MORNING BECAUSE AS THE DEFENSE BROUGHT UP, SHE WOKE UP AND SHE RAN IN AND SHE HEARD SOMETHING.

BY THE TIME SHE GOT IN THERE, AND WE DON'T SPECULATE AND WE DON'T HAVE TO PROVE THE ORDER IN WHICH HE BEAT THIS CHILD, WE DON'T HAVE TO PROVE THAT, LADIES AND GENTLEMEN, SHE SAW HIM BEATING HER WITH THE BELT. SHE WAS NAKED ON THE BED AND HE WAS SPANKING HER WITH THE BELT. WAS HE SHAKING HER AS HE BEAT HER, OR HAD HE ALREADY SHAKEN HER AND CONTINUED TO BEAT HER?

WHAT CORROBORATES N.G. ? THIS IS VERY IMPORTANT BECAUSE IN THIS CASE, LADIES AND GENTLEMEN, THIS ISN'T REALLY A CASE ABOUT REASONABLE DOUBT BECAUSE EITHER YOU BELIEVE HIS STORY OR YOU BELIEVE THE EVIDENCE THAT THE STATE HAS GIVEN YOU.

N.G. DIDN'T -- SHE SAID THIS HAPPENED IN THE BEDROOM. SHE WAS VERY PRECISE ABOUT THAT, WITH THE BELT.

SHE WAS ABLE TO TELL YOU WHAT SHE COULD REMEMBER. SHE'S A VERY BRAVE LITTLE SIX YEAR OLD

CHILD; BUT LET'S GET ONE THING STRAIGHT, EITHER N.G. IS TELLING YOU THE TRUTH, BECAUSE IF YOU BELIEVE NATHANIEL MITCHELL, SHE'S MAKING UP THIS STORY.

ON CROSS-EXAMINATION, SHE TALKED ABOUT HOW YEAH, SHE CALLED 911. SHE WOULD HAVE CALLED 911 BECAUSE OF VICIOUSNESS OF THAT BEATING. SHE TRIED TO AND TALKED ABOUT HOW SHE WANTED TO DO HER BEST. SHE EVEN TALKED ABOUT THE NIGHT BEFORE SHE HAD BEEN FLIPPING ON THE LIGHT SWITCH. LOOK AT THE PICTURES. IT'S RIGHT THERE. SHE REMEMBERS DETAILS.

ON CROSS-EXAMINATION SHE BECAME SOMEWHAT FIDGETY AND THAT WAS AFTER THE DEFENSE HAD GOTTEN UP AND IMMEDIATELY ADDRESSED HER AS MINOR . DID THAT BOTHER HER? YOU BET, BUT SHE STILL WAS ABLE TO TESTIFY ANYWAY.

YEAH, SHE SAID THAT THE POLICE CAME THEY CAME AND TOOK HIM AWAY. THEY DID TAKE HIM AWAY. REMEMBER HER TESTIMONY, REMEMBER HER TESTIMONY. WHEN ASKED, EVERYTHING SHE SAID WAS CREDIBLE. ARE THE TIME PERIODS SIMILAR, LIKE WHO WAS IN WHAT ROOM? YEAH, MINOR WAS IN THE ROOM WITH HER.

WELL, MINOR WAS BEATEN AND SHE'S VERY SPECIFIC. SHE WAS BEATEN ON THE BED BY THAT MAN,

SO EITHER HE'S TELLING THE TRUTH OR SHE IS, BUT SOMEBODY IS NOT. IF THEY AREN'T TELLING THE TRUTH, WHAT ARE THEY COVERING UP?

YOU'VE HEARD FROM THEIR EXPERT. LET ME BE THE FIRST TO TELL YOU THE DEFENSE HAS NO DUTY TO BRING ANY EVIDENCE BEFORE YOU. THE BURDEN IS ON THE STATE, BUT ONCE THEY CHOOSE TO BRING WITNESSES UP HERE, THEN YOU CAN JUDGE THEM IN THE SAME MANNER, AND THE EXPERT THEY WERE ABLE TO FIND IN THIS CASE WAS NOT EVEN AN EXPERT IN THE FIELD OF SHAKEN BABY OR EVEN IN THE FIELD OF JUST PEDIATRICS.

HE'S NOT AN EXPERT IN CHILD ABUSE. THEY WENT TO PENNSYLVANIA AND THEY FOUND DR. ROSS. DR. ROSS, AND I BEG YOU, LADIES AND GENTLEMEN, JUDGE HIS CREDIBILITY, JUDGE HIS BIAS, HIS PREJUDICE.

WHAT I FOUND ASTOUNDING WAS BACK ON REDIRECT, THE FIRST THINGS OUT OF THEIR MOUTH WAS, "I AM NOT A HIRED GUN." DO YOU REMEMBER, THOSE AREN'T MY WORDS; THOSE ARE THEIR WORDS. "I'M NOT A HIRED GUN."

HAVE YOU HEARD THAT OLD SAYING? I DON'T KNOW EXACTLY WHAT IT IS -- "HE DOETH PROTEST TOO MUCH." DR. WAYNE ROSS. HE'S ON THE FACULTY AT PENN STATE

UNIVERSITY. HE HAS ONE STUDENT. I'M SURE MAYBE THE OTHER FACULTY AT PENN STATE WHO HAVE NEVER HEARD OF HIM WOULD ENJOY THAT ONE.

MR. STRICKLER: OBJECTION.

THE COURT: SUSTAINED. STRIKE IT FROM THE RECORD.

MS. CAMPBELL: HE CHARGES $325 AN HOUR AND HE ONLY GETS PAID IF HE'S WORKING ON A CASE. PRIOR TO COMING UP HERE HE PUT A WHOPPING THREE TO SIX HOURS ON THIS CASE. THREE TO SIX HOURS FOR HIM TO REVIEW 200 TREATISES, REVIEW ALL THE MEDICAL RECORDS, REVIEW THE C.T. SCANS, ALTHOUGH ADMITTEDLY HE HAS NO EXPERTISE IN THESE AREAS OTHER THAN HIS OPINION IN PATHOLOGY, AND IN 32 MINUTES HE WAS ABLE TO GET UP HER AND SUCCINCTLY, I WOULD SAY, HE TESTIFIED ABOUT HOW -- AND THIS IS HOW I REMEMBER IT, YOU CAN'T CONVICT IN THIS CASE EVEN THOUGH IT'S SUSPICIOUS OF CHILD ABUSE, YEAH, BECAUSE, YOU KNOW, WE DON'T KNOW WHO KNOCKED HER UPSIDE THE HEAD A MONTH AGO, AND THAT COULD CONTRIBUTE.

LADIES AND GENTLEMEN, I DO SUBMIT EXPERTS DISAGREE ALL THE TIME, BUT CONSIDER WHO GOT PAID IN THIS CASE. THAT DAY ALONE HE LEFT AT 6:00 A.M. AND ASSUMING HE DIDN'T GET HOME UNTIL 10:00 THAT

NIGHT, HE MADE $5,000, THAT DAY ALONE, TO COME IN HERE AND IN 32 MINUTES TO TELL YOU, NOT AS AN EXPERT IN ANY OF THESE AREAS, WHAT HE DID.

LADIES AND GENTLEMEN, THE DEFENSE CAN GET UP HERE AND THEY CAN TRY TO GET REASONABLE DOUBT. THEY CAN TRY TO TALK ABOUT SPECULATION, BUT IS HE CREDIBLE? HE WORKS SEVEN DAYS A WEEK. HE TESTIFIES COAST TO COAST. HE USUALLY TESTIFIES IN CAR WRECK CASES.

AT THE RATE HE'S GOING, $5,000 A DAY, EVEN I'LL GIVE HIM WEEKENDS OFF, I'LL GIVE HIM TWO WEEKS OF HOLIDAY, EVEN IF HE ONLY WORKS 250 DAYS A YEAR, HE'S MAKING $1.3 MILLION PLUS, BUT HE DOESN'T HAVE A REASON TO MAKE UP ANYTHING. HE DOESN'T HAVE A REASON TO TRY TO FASHION HIS TESTIMONY TO ACCOMMODATE THE DEFENSE.

AND, LADIES AND GENTLEMEN, MORE THAN THAT, JUST LOOK AT WHAT THE SUBSTANCE OF WHAT HE SAID. DID IT MAKE ANY SENSE?

EVERY QUESTION THAT WAS POSED TO HIM BY ME, HE HAD AN INSTANT READY ANSWER. MY GRANDMOTHER -- AND SHE WAS A SWEETHEART. SHE USED TO SAY BEWARE OF ANYONE WHO KNOWS THE ANSWER TO EVERYTHING, BECAUSE THAT USUALLY MEANS THAT THEY DON'T HAVE THE ANSWER TO ANYTHING.

HE'S NOT A HIRED GUN. I SUBMIT, LADIES AND GENTLEMEN, IF HE'S NOT, THEN WHO IS?

YOU HEARD FROM A NUMBER OF OTHER PEOPLE IN THE CASE, FRIENDS OF THE FAMILY OF THE MITCHELLS. THEY GOT UP HERE AND THEY TOLD YOU WHAT THEY KNEW, BUT WHAT THEY DID TELL YOU THAT WAS INTERESTING IS THAT THEY HAD NEVER SEEN HIM DISCIPLINE HIS CHILDREN. THEY DIDN'T KNOW ABOUT HIM BEATING THEM WITH A BELT.

MORE IMPORTANTLY, THEY TALKED TO YOU ABOUT MINOR BECAUSE IN THE MIDST OF ALL THIS ARGUING AND WRANGLING AND BIG WORDS OF WHICH I DON'T KNOW VERY MANY, THERE'S MINOR . YOU CAN'T FORGOT HER. THEY TOLD YOU SHE WAS A SWEET, SOMEWHAT SUBDUED CHILD.

THE ONE PERSON THAT WAS VERY INTERESTING WAS THEIR GOOD FRIEND WHO WAS ALSO A FOSTER PARENT AND SHE SAID THAT MINOR WAS DEVELOPMENTALLY DELAYED. SHE KNEW THAT FROM THE AMOUNT OF TIMES SHE WAS AROUND MINOR . SHE KNEW SHE WAS SOMEWHAT DELAYED. THAT'S IMPORTANT. WE'RE GOING TO TALK ABOUT POTTY TRAINING AND WHAT COULD SEND SOMEONE INTO A RAGE.

YOU HEARD FROM THOSE PEOPLE AND THEY TOLD YOU ABOUT MINOR YOU ALSO HEARD FROM THE D.S.S.

WORKERS, AND THAT'S IMPORTANT TOO, BECAUSE D.S.S. TRIED TO DO THEIR JOB, BUT WHAT IT REALLY IS, LADIES AND GENTLEMEN, AND WE ALL KNOW THIS FROM OUR EVERY DAY EXPERIENCE, IS THAT THINGS AREN'T ALWAYS WHAT THEY SEEM TO BE, AND UNFORTUNATELY SO FOR MINOR .

IN D.S.S.'S EXPERIENCE, IN ALL THOSE PEOPLE'S EXPERIENCE, AS MUCH AS THEY MAY TRY, YOU CAN'T PREDICT A MAN LIKE THAT.

NATHANIEL MITCHELL, WHO GOT UP HERE AND TALKED TO YOU, AND HE TOLD YOU HIS STORY. NOW, AND LADIES AND GENTLEMEN, YOU HAVE OR WILL HAVE THE STATEMENTS THAT HE GAVE THE POLICE BACK WHEN THIS HAPPENED. YOU ALSO WILL HAVE THE STATEMENTS THAT HE GAVE TO THE HOSPITAL.

WHAT DID NATHANIEL MITCHELL SAY IS WHAT I WANT TO TALK ABOUT AND WHAT HE SAID BACK WHEN IT HAPPENED FIRST AND THEN GET TO WHAT HE SAID TWO YEARS LATER. WHAT DID NATHANIEL MITCHELL SAY SPECIFICALLY BACK WHEN THIS HAPPENED?

WHEN SPECIFICALLY ASKED IN THE EMERGENCY ROOM WHAT WAS THE DEAL WITH MINOR , SHE WAS NORMAL YESTERDAY, NO PRIOR AILMENTS, NO PROBLEMS, NO TRAUMA. THEY SPECIFICALLY WANT TO KNOW IF THE CHILD HAS SUFFERED OR BEEN HIT OR SUFFERED A FALL.

REMEMBER, NO TRAUMA.

MAYBE AT THAT POINT RIGHT AS SHE PRESENTED, HE DIDN'T UNDERSTAND THAT BEATING A CHILD WITH A BELT IS TRAUMA, BUT THEN YOU HEARD FROM DR. HUBBIRD. DR. HUBBIRD TOLD YOU THAT SPECIFICALLY HE WENT AND ASKED IF THIS CHILD HAD SUFFERED ANY BLOWS OF ANY SORT. SPECIFICALLY HE SAID HE ASKED THAT.

AT THAT POINT NATHANIEL MITCHELL'S ANSWER WAS NO. HE DIDN'T TELL HIM ABOUT THE SPANKING, BECAUSE IF HE HAD JUST BEEN SPANKING, LADIES AND GENTLEMEN, I SUBMIT HE WOULD HAVE. THEY'RE RIGHT, SPANKING WOULDN'T HAVE KILLED THIS CHILD.

DR. RABON, THE ONLY REASON HE CAME FORWARD WAS TO TELL YOU WHAT THE DEFENDANT SAID TO HIM, HE ASKED SPECIFICALLY WAS THERE ANY ABNORMAL BEHAVIOR, SIGNS OF INFECTION, AN ABNORMAL TRAUMA. THE ANSWER WAS NO.

MINOR WAS IN THE BATHROOM THIS MORNING, THEN WENT IN THE BEDROOM AND THESE ARE HIS WORDS. HE DOESN'T KNOW WHAT ROOMS ARE INVOLVED. WENT INTO THE BEDROOM AND FELL OUT, NOT IN THE HALLWAY, NOT AFTER BEING BEATEN WITH A BELT, BUT THAT'S ALL THAT HAPPENED THAT MORNING, SIMPLE.

BECAUSE NATHANIEL MITCHELL FROM THE FIRST DAY

THAT MINOR WAS IN THE HOSPITAL CLINICALLY BRAIN DEAD WAS ALREADY COVERING HIS TRACKS. WHO WAS GOING TO CATCH HIM? HE DIDN'T KNOW, BUT HE DIDN'T THINK IT WAS THE BEST PEDIATRICS PROGRAM IN THE UNITED STATES.

TWO DAYS LATER ON THE 30TH THE DEFENDANT IS CONFRONTED. LET'S GET ONE THING STRAIGHT, HE'S ADVISED OF HIS RIGHTS. HIS RIGHTS ARE OBSERVED, LADIES AND GENTLEMEN. THERE'S NO DISPUTE ABOUT THAT. HE'S READ HIS RIGHTS, AND HE UNDERSTANDS THEM, BY HIS OWN ADMISSION.

WHEN HE COMES TO THE POLICE TWO DAYS LATER WHAT DOES HE TELL THEM? THIS IS A SUMMARY; YOU'LL HAVE THE ACTUAL STATEMENT. MINOR , NO PROBLEMS, NO BRUISES, DID NOT SPANK HER. BY THAT TIME, LADIES AND GENTLEMEN, THEY HAD DISCOVERED THE SEVERE BRUISING ON MINOR 'S BOTTOM, SO THEY ASKED HIM SPECIFICALLY, "DID YOU SPANK MINOR ?", "NO." WHY DID HE DENY IT? BECAUSE HE DIDN'T THINK HE WOULD GET CAUGHT.

WHAT HAPPENED THAT MORNING? MINOR GOT UP, WENT TO THE POTTY, WALKED INTO HIS BEDROOM. HE WAS PUTTING HER PULL-UPS ON. SHE STIFFENED UP, DID NOT RESPOND. CALLED HIS WIFE, N.G. AND H.G. WERE IN THEIR CHAIRS IN THE LIVING ROOM.

HE DID NOT SHAKE MINOR , WHEN ASKED SPECIFICALLY. "I DID NOT SHAKE MINOR N." THAT'S HIS INITIAL STORY TO THE POLICE.

MINOR HOLLERED MAMA A COUPLE OF TIMES IN THE CAR. HER LEGS AND ARMS WERE STIFF. SHE WAS STILL BREATHING WHEN SHE GOT TO THE HOSPITAL. LADIES AND GENTLEMEN, YEAH, SHE WAS STILL BREATHING. SHE BREATHED ONE TIME PER MINUTE. IN MY BOOK, THAT'S NOT BREATHING, BUT HE WANTED TO MAKE SURE SHE WAS STILL ALIVE WHEN SHE GOT TO THE HOSPITAL.

THEN HE SIGNED THE STATEMENT, AND THE DEFENDANT GOT UP HERE, AND HE TOLD YOU THAT HE WAS FORCED TO SIGN THE STATEMENT SO THAT HE COULD GIVE THE SECOND STATEMENT, THAT DALE JONES AND BRIAN METZS FORCED HIM.

LADIES AND GENTLEMEN, I JUST ASK ONE THING, IS THAT CREDIBLE IN THIS CASE? BECAUSE IF THEY WERE GOING TO FORCE HIM TO SIGN A STATEMENT, WOULDN'T IT BE ONE THAT MAYBE IMPLICATED HIM IN SOMETHING? NOT ONE WITH HIS WORDS, BECAUSE HE KNOWS WHERE EVERYTHING IS IN THE HOUSE. LOOK AT ALL THE INFORMATION IN THIS WHOLE DOCUMENT AND LOOK AT THE LAST THING. "IS THERE ANYTHING YOU NEED TO ADD OR CHANGE?" "NO, SIR."

IF THERE HAD BEEN A -- IF THEY HAD MADE HIM SIGN A STATEMENT, THEY'RE GOING TO GET HIM TO SIGN A STATEMENT THAT SAYS HE DID SOMETHING, AND THEN HE WENT AND TALKED TO ANOTHER INVESTIGATOR.

HE WAS CONFRONTED WITH THE EVIDENCE ABOUT THE INJURIES AND ABOUT THE FACT THAT SHE WASN'T GOING TO LIVE.

HE WANTED TO MAKE A SECOND STATEMENT. THIS IS VERY IMPORTANT. WHAT MAKES THIS STATEMENT CREDIBLE -- AND SHE TALKS ABOUT HOW THERE'S NO VIDEOTAPE, THERE'S NOTHING. LADIES AND GENTLEMEN, I SUBMIT IF THERE WAS A VIDEOTAPE HE WOULD JUST SAY THE POLICE TOLD ME TO SAY THAT BECAUSE I SAID THAT.

THAT'S WHAT HE'S DOING HERE ISN'T IT, BECAUSE THIS IS HIS SIGNATURE. WHAT IS HE SAYING HERE -- AND THIS IS IMPORTANT, BECAUSE IN HIS SECOND STATEMENT, LADIES AND GENTLEMEN, HE DOESN'T BLAME HIMSELF. IT'S A CLASSIC DEFENSE OF A SHAKEN BABY CASE. EVEN HE'S ACKNOWLEDGING THE EXTENT OF THE INJURIES AT THAT POINT.

SO WHAT DOES HE DO? HE BLAMES H.G. :. THAT'S WHAT MAKES THIS STATEMENT CREDIBLE. THE POLICE DIDN'T BLAME H.G. :. AGAIN, IF THEY'RE GOING TO MAKE A STATEMENT AND MAKE HIM SIGN IT, I

THINK THEY WOULD MAKE IT IMPLICATE HIM.

HE SAYS IT'S NOT HIS FAULT. YEAH, HE SPANKED THE CHILDREN, BUT H.G. WENT AFTER MINOR AND THAT'S WHEN SHE WENT DOWN, AFTER H.G. DID THAT TO HER.

THE SUBSTANCE OF THAT STATEMENT MAKES IT HIS WORDS, MAKES IT CREDIBLE. I JUST SHOOK HER A LITTLE WHEN I WAS TRYING TO REVIVE HER. HE HAD TO TRY TO EXPLAIN THE SHAKING SOMEHOW, BUT IT WASN'T HARD.

THEN AT THE END OF THE STATEMENT, "DO YOU HAVE ANYTHING YOU WANT TO ADD?" AND GUESS WHAT HE ADDS? HE GOES BACK TO HIS FAVORITE EVENTS ON THAT DAY, H.G. DID IT.

LADIES AND GENTLEMEN, THERE'S NO DISPUTE, NO THREE YEAR OLD DID THIS. "ASK THE TEACHERS, H.G. HAS BEEN GOING AFTER HER." THEY DON'T EVEN GO TO THE SAME CLASSROOM BUT FOR A DAY AND YOU HEARD FROM THE TEACHER, H.G. WASN'T GOING AFTER HER.

LADIES AND GENTLEMEN, I WANT TO TALK JUST A SECOND ABOUT WHAT HE SAID WITH HIS OWN MOUTH WHEN TWO YEARS LATER HE COMES BEFORE YOU. AFTER BEING IN THIS COURTROOM ALL WEEK HE TESTIFIED. WHAT DID HE TESTIFY TO? YEAH, HE DID THE SPANKING BECAUSE

THERE'S NO WAY TO GET AROUND THOSE BRUISES, IS THERE, THE PICTURES OF THEM.

ONE OF THE CLASSIC OLD DEFENSES. ADMIT A LITTLE BIT OF ALL, BUT DENY THE MAIN PART. WHAT DID HE TELL YOU? THINK ABOUT THE HISTORY OF THIS CHILD, THE HISTORY OF THE BRUISES. THEY'RE IN THERE THAT MORNING. SHE'S PLAYING IN THE POTTY. HE DIDN'T SPANK HER THEN, BUT THEN HE PUTS ANOTHER KID WITH HER ON THE NEXT POTTY, LEAVES A TWO YEAR OLD IN THERE AND THEN HE HAS TO SPANK THEM THERE IN THE BATHROOM.

SEE, EITHER HE'S TELLING THE TRUTH OR N.G. IS TELLING THE TRUTH, BUT ONE OF THEM AIN'T. THEN THEY RAN OUT. THEN ALL OF THE SUDDEN FOR THE FIRST TIME YOU HEAR HOW SHE'S LAYING DOWN FACE DOWN. HE PICKS HER UP. SHE'S NOT REALLY MOVING. HE TAKES HER TO THE NEXT ROOM AND THEN SHE STIFFENS UP, AND WHEN THAT HAPPENS, HE BECOMES A LITTLE ALARMED, DOESN'T HE? SO WHAT DOES HE DO? HE CALLS HIS WIFE.

LADIES AND GENTLEMEN, I THINK THIS IS THE MOST TELLING PART ABOUT HIS STORY. HE CALLS HIS WIFE. WHAT HE TESTIFIED TO YESTERDAY IS WHEN HE CALLED HIS WIFE, HE SAID THESE WORDS, "MINOR HAS STIFFENED UP." I ASKED HIM SPECIFICALLY IS THAT

ALL HE SAID.

WHAT WAS SONYA MITCHELL'S REACTION? SONYA MITCHELL HAD WANTED THESE CHILDREN, THINK ABOUT IT. IN A NORMAL RELATIONSHIP WITHOUT AN ABUSER IN THE HOUSEHOLD, IF SOMEONE CALLS UP THEIR WIFE AND SAYS SO AND SO STIFFENS UP, YOUR REACTION IS I'M COMING RIGHT AWAY, GET A BLANKET AND MEET ME -- BECAUSE SONYA MITCHELL KNEW. SHE HAD SEEN THOSE BRUISES AND SHE KNEW WHERE THEY CAME FROM. SHE RUSHED HOME AND THAT PART OF HIS STORY ALONE SAYS IT ALL. HE TOOK HER TO THE HOSPITAL, BUT UNFORTUNATELY FOR HIM, HE PICKED THE WRONG HOSPITAL.

HE CHANGED HIS STORY. HE GOT UP HERE AND HE TOLD YOU HOW THE POLICE FORCED HIM TO DO ALL THAT STUFF, AND WHY IS THAT? BECAUSE HE DOESN'T WANT TO ADMIT TO THE DEATH OF THAT CHILD. HE DOESN'T WANT ANY PART OF IT. WHAT A GREAT DEFENSE, ALWAYS BLAME THE POLICE. THEY'RE HANDY.

LADIES AND GENTLEMEN, IN THIS CASE THERE WEREN'T ANY POLICE. THE ONLY PERSON THAT IS CHANGING THEIR WHOLE STORY IS THAT MAN, NATHANIEL MITCHELL.

I ASKED MYSELF WHEN I WAS PREPARING FOR THIS CASE, YOU KNOW, WHAT DOES A CHILD ABUSER LOOK

LIKE? WHAT DOES A CHILD MOLESTER LOOK LIKE? FOR THAT MATTER WHAT WOULD A CHILD ABUSER OR RAPIST LOOK LIKE. WOULDN'T IT BE NICE IF YOU COULD LOOK IN A PERSON'S EYES AND SEE IT SO THE POLICE COULD JUST DO IT, LOOK AT SOMEONE AND THEN ARREST THEM, BUT UNFORTUNATELY, LADIES AND GENTLEMEN, YOU CAN'T BECAUSE YOU CAN'T SEE INTO THE SICK SOUL THAT DRIVES SOMEONE TO PREY ON THE INNOCENT, THE MOST VULNERABLE.

IN OUR EVERYDAY EXPERIENCE WE KNOW ESPECIALLY WITH CHILD ABUSE, IT CAN BE ANYONE. IT CAN BE THE NEXT DOOR NEIGHBOR, THE ART TEACHER, THE PRIEST AT THE LOCAL RECTORY.

FORTUNATELY, LADIES AND GENTLEMEN, IN OUR SOCIETY WE HAVE A SYSTEM IN PLACE, THIS SYSTEM. WITH THIS SYSTEM THE STATE HAS THE RIGHT AND THE DUTY TO BRING FORTH THE CREDIBLE EVIDENCE.

AND, LADIES AND GENTLEMEN, IN THIS CASE ALL THE EVIDENCE POINTS ONE WAY, AND THAT IS TO THE GUILT OF NATHANIEL MITCHELL.

IT'S HARD TO BELIEVE. YOU DON'T WANT TO BELIEVE IT. I DON'T WANT TO BELIEVE THAT ANYONE WOULD DO THIS, WOULD ABUSE, WOULD SHAKE, WOULD BEAT. IT DOESN'T MATTER WHAT BELT HE USED. HE ABUSED A CHILD SO SEVERELY HER BRAIN WAS MUSH.

SHE DIED. IT'S HARD TO BELIEVE ANYONE COULD DO THAT, BUT, LADIES AND GENTLEMEN, THE EVIDENCE IN THIS CASE IS OVERWHELMING. THREE DAYS AGO, FOUR DAYS AGO, YOU TOOK AN OATH TO DETERMINE WHAT THE FACTS WERE AND TO APPLY THE LAW.

AS I TOLD YOU EARLIER, IN THIS STATE, HOMICIDE BY CHILD ABUSE, WHICH WE ARE NOT ALLEGING THAT NATHANIEL MITCHELL INTENDED TO CAUSE THE DEATH OF MINOR THAT MORNING. THAT'S NOT WHAT THE STATE HAS TO PROVE.

THIS STATUTE RECOGNIZES THAT YOUNG CHILDREN UNDER THE AGE OF 11 ARE ESPECIALLY VULNERABLE. WHAT WE MUST PROVE IS THAT NATHANIEL MITCHELL CAUSED THE DEATH OF THIS CHILD BY ABUSE OR NEGLECT.

IN THIS CASE, LADIES AND GENTLEMEN, IT WASN'T THE LESSER. HE ABUSED THIS CHILD. WE ONLY HAVE TO PROVE THE ABUSE THAT OCCURRED ON MARCH 28TH AND THAT'S NOT IN DISPUTE.

NATHANIEL MITCHELL, THIS IS HIS DAY IN COURT AND HE DESERVES HIS DAY IN COURT. THE STATE HAS MET ITS BURDEN, LADIES AND GENTLEMEN, AND WE HAVE DONE OUR JOB. WE'VE BROUGHT IN THE DOCTORS, THE MEDICAL TESTIMONY. WE HAVE BROUGHT IN THE DAYCARE WORKERS. THE POLICE HAVE INVESTIGATED THIS CASE

AND THEY ADVISED HIM OF HIS RIGHTS. THIS ISN'T A CASE OF POLICE MISCONDUCT AND THERE IS NO ISSUE CONCERNING THAT.

NATHANIEL MITCHELL, HE'S HAD HIS DAY IN COURT. WHAT ABOUT MINOR , BECAUSE THIS IS HER DAY IN COURT, TOO.

LADIES AND GENTLEMEN, MINOR , SHE ENTERED THIS WORLD, AND THE ODDS WERE AGAINST HER, BUT SHE WAS OR SHE WANTED TO BE A SURVIVOR BECAUSE DESPITE BEING BORN PREMATURELY, COCAINE ADDICTED, SHE FOUGHT, AND SHE TRIED BECAUSE SHE WANTED TO SURVIVE.

SHE WANTED TO HAVE THE FUTURE THAT SHE DESERVED, BUT ON MARCH 28TH OF THE YEAR 2000, NATHANIEL MITCHELL, HE PUT AN END TO ALL THAT, TO HER FIGHT TO SURVIVE BECAUSE NATHANIEL MITCHELL, AROUND 7:15 THAT MORNING, HE SHOOK MINOR BECAUSE HE WAS MAD. SHE HAD WET THE BED.

HE STRIPPED HER NAKED AND ALL 25, 30 POUNDS OF HER, HE TOOK A BELT AND HE BEAT HER AND HE SHOOK HER AND HE BEAT HER.

HE MADE SURE THAT TWO YEAR OLD MINOR WOULD NEVER WET THE BED AGAIN. SHE LEARNED HER LESSON.

NATHANIEL MITCHELL HAD CHOICES. MINOR

DID NOT.

ALL THE STATE ASKS IS THAT YOU HOLD HIM RESPONSIBLE FOR THE CHOICES HE MADE THAT DAY AND THAT YOU GIVE MINOR THE JUSTICE SHE DESERVES.

THANK YOU.

THE COURT: ALL RIGHT. MADAM FOREPERSON, LADIES AND GENTLEMEN, WE'RE GOING TO TAKE A SHORT BREAK BEFORE I CHARGE YOU ON THE LAW. IT TAKES ME ABOUT 30 MINUTES TO DO THAT. WHILE YOU'RE TAKING YOUR BREAK, SOMEONE WILL COME BACK AND TAKE YOUR LUNCH ORDER. WE'LL FEED YOU LUNCH TODAY. NO SMOKING ON THIS BREAK, PLEASE. ABOUT TEN MINUTES, OR LONG ENOUGH TO GET A BREAK AND LUNCH ORDER, ALL RIGHT? SO, IF YOU ALL WILL JUST GO WITH THE BAILIFF, SOMEONE SHOULD BE THERE IN JUST A SECOND.

(WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY 11:00.)

(WHEREUPON, A SHORT BREAK WAS TAKEN.)

THE COURT: OKAY. BRING THE JURY IN.

(WHEREUPON, THE JURY CAME INTO OPEN COURT AT APPROXIMATELY 11:15.)

THE BAILIFF: THE JURY IS ALL PRESENT, YOUR HONOR.

JURY CHARGE

THE COURT: MADAM FORELADY, LADIES AND GENTLEMEN. IT'S MY JOB TO GIVE YOU A SET OF LEGAL INSTRUCTIONS OR PRINCIPLES THAT YOU'LL NEED TO APPLY DURING YOUR DELIBERATIONS. FIRST, AS A REMINDER, AS I TOLD YOU AT THE OUTSET OF THE TRIAL, IT HAS BEEN MY RESPONSIBILITY AS THE TRIAL JUDGE TO RULE ON THE ADMISSIBILITY OF THE EVIDENCE.

UNDER THAT AUTHORITY, LADIES AND GENTLEMEN, YOU ARE TO CONSIDER ONLY THAT TESTIMONY THAT WAS ALLOWED INTO THE RECORD AND YOU ARE TO DISREGARD ANY TESTIMONY SUCH AS WHERE AN OBJECTION WAS SUSTAINED OR TESTIMONY OR ARGUMENTS WERE ORDERED STRICKEN FROM THE RECORD.

YOU BASE YOUR DECISION SOLELY ON THE EVIDENCE THAT HAS BEEN PRESENTED TO YOU FROM THE WITNESS STAND ALONG WITH ANY PHYSICAL EVIDENCE.

NOW, THE SECOND PART OF MY RESPONSIBILITY, LADIES AND GENTLEMEN, IS TO GIVE YOU THESE INSTRUCTIONS THAT YOU NEED TO HAVE DURING YOUR DELIBERATIONS.

UNDER YOUR OATH YOU'RE OBLIGATED TO ACCEPT AND APPLY THE LEGAL PRINCIPLES AS YOÚ'RE INSTRUCTED. IF YOU HAVE A PRECONCEIVED IDEA OF

WHAT THE LAW IS OR OUGHT TO BE IN THIS CASE AND IT DOES NOT AGREE WITH YOUR INSTRUCTIONS, I WOULD ASK YOU TO ABANDON YOUR PRECONCEIVED IDEA, AND APPLY THE LAW AS I GIVE IT TO YOU AND AS IS YOUR SWORN DUTY.

NOW, LADIES AND GENTLEMEN, THE SAME CONSTITUTION THAT GIVES ME THE RIGHT TO INSTRUCT YOU ON THE LEGAL PRINCIPLES AND TO RULE ON THE ADMISSIBILITY OF EVIDENCE MAKES YOU THE SOLE AND EXCLUSIVE JUDGES OF THE FACTS OF THE CASE. OUR STATE CONSTITUTION CONTAINS A UNIQUE PROVISION THAT PROHIBITS A TRIAL JUDGE IN THIS STATE FROM MAKING ANY COMMENT OR INFERRING TO THE JURY OR SUGGESTING TO A JURY ANYTHING ABOUT THE FACTS OF A CASE OR ABOUT WHAT YOUR VERDICT SHOULD BE. I HAVE NOT INTENTIONALLY DONE SO.

HOWEVER, IF YOU HAVE INFERRED FROM ANYTHING I HAVE SAID OR DONE IN PRESIDING OVER THE TRIAL OR ANYTHING THAT I HAVE SAID OR DONE OR ANYTHING I MIGHT SAY OR DO NOW THAT I HAVE AN OPINION ABOUT WHAT THE FACTS ARE OR ABOUT WHAT YOUR VERDICT SHOULD BE, I WOULD ASK YOU TO DISREGARD THAT BECAUSE I WOULD NOT WANT TO INVADE YOUR RIGHTS AS A FACT FINDER ANY MORE THAN I WANT YOU TO INVADE MY RIGHT AS A LAW GIVER.

LADIES AND GENTLEMEN, AS JURORS IT'S YOUR JOB TO DETERMINE THE EFFECT, THE VALUE, THE WEIGHT OF THE EVIDENCE AND TRUTH AS ITS BEEN PRESENTED TO YOU. NECESSARILY, YOU'LL HAVE TO ASSESS THE CREDIBILITY OF THE EVIDENCE AND THE BELIEVABILITY OF WITNESSES THAT HAVE BEEN PRESENTED DURING THE COURSE OF THE TRIAL.

CREDIBILITY IS SIMPLY A LEGALISTIC TERM FOR BELIEVABILITY. IT'S YOUR DUTY, LADIES AND GENTLEMEN, TO ANALYZE AND EVALUATE THE EVIDENCE AND DETERMINE WHAT EVIDENCE CONVINCES YOU OF ITS TRUTH.

NOW, THE LAW PROVIDES SOME TOOLS TO ASSIST YOU IN ASSESSING CREDIBILITY OR BELIEVABILITY OF WITNESSES AND THE EVIDENCE IN THE CASE.

YOU MAY BELIEVE ONE WITNESS AS AGAINST SEVERAL WITNESSES OR SEVERAL WITNESSES AGAINST ONE. YOU MAY BELIEVE PART OF A WITNESS'S TESTIMONY AND REJECT THE REMAINING PART OF THAT SAME WITNESS'S TESTIMONY. FOR A GOOD AND SOUND REASON, LADIES AND GENTLEMEN, YOU MAY BELIEVE A WITNESS'S TESTIMONY IN ITS ENTIRETY OR YOU MAY REJECT A WITNESS'S TESTIMONY IN ITS ENTIRETY.

YOU MAY CONSIDER WHETHER OR NOT ANY WITNESS HAS EXHIBITED TO YOU ANY INTEREST, ANY BIAS, ANY

PREJUDICE OR OTHER MOTIVE IN THE CASE.

YOU MAY EVALUATE THE DEMEANOR OF A WITNESS. THAT MEANS THE MANNER, THE APPEARANCE, AND THE STYLE OF A WITNESS WHILE HE OR SHE WAS RESPONDING TO QUESTIONS. YOU MAY ALSO CONSIDER WHETHER OR NOT A WITNESS'S TESTIMONY AS BEEN IMPEACHED OR CHALLENGED BY SHOWING THAT HE OR SHE PREVIOUSLY MADE STATEMENTS WHICH ARE INCONSISTENT WITH THEIR PRESENT TESTIMONY.

EARLIER CONTRADICTORY STATEMENTS ARE ALSO ADMISSIBLE TO ESTABLISH THE TRUTH OF THESE STATEMENTS. IT IS WITHIN YOUR PROVINCE, LADIES AND GENTLEMEN, TO DETERMINE THE CREDIBILITY TO BE GIVEN TO EARLIER STATEMENTS AND TO BE GIVEN TO THE TESTIMONY OF A WITNESS WHOSE TESTIMONY HAS BEEN IMPEACHED OR CHALLENGED.

IF A WITNESS IS SHOWN KNOWINGLY TO HAVE TESTIFIED FALSELY CONCERNING A MATERIAL MATTER, YOU MAY CONSIDER THIS IN DETERMINING WHETHER TO TRUST SUCH WITNESS'S TESTIMONY IN OTHER PARTICULARS. YOU MAY REJECT ALL THE TESTIMONY OF THAT WITNESS OR GIVE ALL OR PART OF THAT SUCH TESTIMONY THE CREDIBILITY THAT YOU THINK IT DESERVES IN THIS CASE.

YOU MAY ALSO CONSIDER, LADIES AND GENTLEMEN,

THE OPPORTUNITY FOR KNOWLEDGE ABOUT THOSE THINGS WHICH A WITNESS HAS TESTIFIED TO, AS WELL AS THE REASONABLENESS OF THEIR TESTIMONY.

NOW, THESE TOOLS THAT I HAVE OUTLINED FOR YOU, LADIES AND GENTLEMEN, YOU DON'T EXERCISE OR USE ARBITRARILY. IF IN YOUR GOOD JUDGMENT THERE IS SOUND REASON IN THE RECORD FOR YOU TO USE ONE OR MORE OF THESE TOOLS YOU MAY DO SO BECAUSE YOUR OBJECTIVE IN THE CASE IS TO FIND THE TRUTH WHETHER IT COMES FROM A WITNESS OR WITNESSES FROM THE STATE OR THE DEFENDANT.

I WOULD TELL YOU, HOWEVER, LADIES AND GENTLEMEN, THAT TRUTH IS NOT DETERMINED FROM COUNTING THE NUMBER OF WITNESSES WHO MIGHT TESTIFY FROM ONE SIDE OR THE OTHER.

NOW, IN A FEW MINUTES YOU'LL BEGIN A DELIBERATION PROCESS. THAT'S A MENTAL PROCESS WHEREIN YOU'LL BE DEBATING AND DECIDING WHAT YOU CONSIDER TO BE TRUE ABOUT THE FACTS IN THIS CASE. THE LAW SIMPLY REQUIRES OF YOU IN YOUR DELIBERATION THAT YOU USE YOUR GOOD JUDGMENT, YOU USE YOUR COMMON SENSE, YOUR SENSE OF LOGIC AND REASONING, AND YOUR EXPERIENCES IN LIFE.

YOU THEN APPLY THOSE ATTRIBUTES TO THE EVIDENCE AND DETERMINE WHAT YOU THE JURY CONSIDER

TO BE TRUTHFUL EVIDENCE TO THOSE TRUE STATEMENTS OF FACT AS YOU FIND THEM TO BE, THEN YOU WOULD APPLY THESE LEGAL PRINCIPLES THAT I HAVE NOW GIVEN TO YOU AND THAT IS HOW YOU WOULD ARRIVE AT YOUR VERDICT.

NOW, LADIES AND GENTLEMEN, YOUR VERDICT SHOULD NOT BE THE RESULT OF ANY MINOR , PREJUDICE, OR SYMPATHY. BY YOUR VERDICT YOU HAVE NO FRIENDS TO REWARD NOR ENEMIES TO PUNISH, BUT RATHER YOUR VERDICT SHOULD SIMPLY SPEAK THE TRUTH BASED ON THE EVIDENCE AND THE LAW IN THE CASE.

NOW, THERE ARE TWO TYPES OF EVIDENCE WHICH ARE GENERALLY PRESENTED DURING THE TRIAL. ONE IS CALLED DIRECT EVIDENCE, THE OTHER IS CALLED CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN EYEWITNESS. DIRECT EVIDENCE MAY ALSO BE ESTABLISHED BY THE USE OF ANY ONE OF OUR FIVE SENSES, TASTE, TOUCH, SOUND, SMELL, OR SIGHT.

CIRCUMSTANTIAL EVIDENCE, LADIES AND GENTLEMEN, IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT.

THE LAW MAKES ABSOLUTELY NO DISTINCTION

BETWEEN THE WEIGHT OR VALUE TO BE GIVEN EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. NOR IS ANY GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN THAT OF DIRECT EVIDENCE.

YOU ARE REQUIRED TO WEIGH ALL THE EVIDENCE IN THE CASE. AFTER WEIGHING ALL THE EVIDENCE, IF YOU'RE NOT CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT, YOU MUST FIND HIM NOT GUILTY.

WITH REGARD TO CIRCUMSTANTIAL EVIDENCE, CONJECTURE, SPECULATION, SUSPICION, OR PROBABILITY DOES NOT CONSTITUTE CIRCUMSTANTIAL EVIDENCE.

NOW, LADIES AND GENTLEMEN, THE FACT THAT THE DEFENDANT WAS ARRESTED, CHARGED, AND INDICTED IN THIS CASE IS NOT EVIDENCE IN THE CASE, NOR DOES IT CREATE ANY INFLUENCE OR PRESUMPTION OF GUILT IN THE CASE. IT IS MERELY THE PROCEDURAL PROCESS BY WHICH THE STATE HAS MADE THE CHARGE AGAINST THE DEFENDANT AND HAVING DONE SO THEY MUST NOW COME FORWARD AND MEET THEIR BURDEN OF PROOF.

THE DEFENDANT IN THIS CASE HAS PLED NOT GUILTY TO THE INDICTMENT AND THAT PLEA CASTS THE BURDEN OF PROOF UPON THE STATE TO PROVE THE DEFENDANT GUILTY.

THAT IS BECAUSE A PERSON CHARGED WITH COMMITTING A CRIMINAL OFFENSE IN OUR STATE IS NEVER REQUIRED TO PROVE HIMSELF INNOCENT.

IT IS A CARDINAL AND IMPORTANT RULE OF LAW AND EVIDENCE THAT A DEFENDANT IN A CRIMINAL TRIAL, NO MATTER WHAT THE SERIOUSNESS OF THE CHARGE MADE AGAINST HIM MAY BE, WILL ALWAYS BE PRESUMED INNOCENT OF THE CRIME FOR WHICH HE STANDS INDICTED UNTIL AND UNLESS HIS GUILT HAS BEEN PROVEN BY EVIDENCE SATISFYING YOU OF THAT FACT BEYOND A REASONABLE DOUBT.

THIS PRESUMPTION OF INNOCENCE, LADIES AND GENTLEMEN, DOES NOT CEASE WHEN YOU RETIRE TO DELIBERATE, BUT IT HAS ACCOMPANIED THE DEFENDANT THROUGHOUT ALL OF THE PROCEEDINGS AND WILL CONTINUE THROUGH YOUR DELIBERATIONS UNTIL AND UNLESS YOU ARRIVE AT A UNANIMOUS VERDICT OF GUILT BASED UPON EVIDENCE SATISFYING YOU OF THAT BEYOND A REASONABLE DOUBT.

OUR SUPREME COURT HAS SAID THAT THE PRESUMPTION OF INNOCENCE IS LIKE A ROBE OF RIGHTEOUSNESS PLACED ABOUT THE SHOULDERS OF A DEFENDANT AND IT REMAINS WITH HIM AND ASSIGNS HIM TO A CLASS KNOWN AS THE INNOCENT.

UNTIL THAT PRESUMPTIVE ROBE OF RIGHTEOUSNESS

HAS BEEN STRIPPED FROM HIS PERSON BY EVIDENCE SATISFYING YOU OF HIS GUILT BEYOND A REASONABLE DOUBT.

THE PRESUMPTION OF INNOCENCE, LADIES AND GENTLEMEN, IS NOT A MERE LEGAL THEORY. IT'S NOT JUST A LEGAL PHRASE. IT IS CERTAINLY NOT A LEGAL TECHNICALITY. IT IS A SUBSTANTIAL RIGHT TO WHICH EVERY DEFENDANT IS ENTITLED UNLESS YOU THE JURY ARE SATISFIED FROM THE EVIDENCE OF HIS GUILT BEYOND A REASONABLE DOUBT.

THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. SOME OF YOU MAY HAVE SERVED AS JURORS IN A CIVIL CASE WHEREIN YOU WERE TOLD THAT IT'S ONLY NECESSARY TO PROVE THAT A FACT IS MORE LIKELY TRUE THAN NOT.

IN OUR SYSTEM OF JURISPRUDENCE, WE HAVE THREE LEVELS OF PROOF. IN CIVIL CASES IT'S BY THE GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE, IT SIMPLY MEANS THAT SOMETHING IS MORE LIKELY TRUE THAN NOT. THE SECOND IS TYPICALLY USED IN FRAUD TYPE CASES BY CLEAR AND COGENT AND CONVINCING EVIDENCE, THAT'S THE NEXT LEVEL OF PROOF. IN CRIMINAL CASES THE STATE'S PROOF MUST BE MORE POWERFUL THAN THAT. IT MUST BE BEYOND A REASONABLE DOUBT, WHICH IS THE THIRD BURDEN OF

PROOF.

PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF A DEFENDANT'S GUILT. THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY, AND IN CRIMINAL CASES THE LAW DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT.

IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE THE DEFENDANT IS GUILTY OF THE CRIME CHARGED, YOU MUST FIND HIM GUILTY. IF ON THE OTHER HAND YOU THINK THERE IS A REAL POSSIBILITY HE IS NOT GUILTY, YOU MUST GIVE HIM THE BENEFIT OF THE DOUBT AND FIND HIM NOT GUILTY.

NOW, THE RULES OF EVIDENCE DON'T ORDINARILY PERMIT WITNESSES TO TESTIFY AS TO OPINIONS OR CONCLUSIONS, BUT THERE IS AN EXCEPTION TO THAT RULE KNOWN AS THE EXPERT WITNESS RULE.

THOSE ARE WITNESSES WHO BY EDUCATION AND EXPERIENCE HAVE BECOME EXPERT IN SOME ART, SCIENCE, PROFESSION, OR CALLING.

UNDER THE RULE THEY MAY STATE AN OPINION AS TO SOME RELEVANT AND MATERIAL MATTER WHICH THEY PROFESS TO BE AN EXPERT AND THEY MAY ALSO GIVE YOU THEIR OPINION, GIVE YOU THEIR REASONS FOR THEIR OPINIONS. YOU SHOULD CONSIDER ANY EXPERT OPINION

RECEIVED IN EVIDENCE IN THIS CASE AND GIVE IT SUCH WEIGHT AS YOU THINK IT DESERVES.

IF YOU SHOULD DECIDE THAT THE OPINION OF AN EXPERT WITNESS IS NOT BASED UPON SUFFICIENT EDUCATION AND EXPERIENCE OR IF YOU SHOULD CONCLUDE THAT THE REASONS GIVEN IN SUPPORT OF THE OPINION ARE NOT SOUND OR THAT THE OPINION IS OUTWEIGHED BY OTHER EVIDENCE, YOU MAY DISREGARD THE OPINION IN ITS ENTIRETY.

AN EXPERT'S TESTIMONY IS TO BE GIVEN NO GREATER WEIGHT THAN THAT OF ANY OTHER WITNESS SIMPLY BECAUSE HE OR SHE IS AN EXPERT AND YOU ARE NOT REQUIRED TO ACCEPT A PURPORTED EXPERT'S OPINION EVEN THOUGH IT NEED NOT BE UNCONTRADICTED.

A STATEMENT ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT HAS BEEN ADMITTED INTO EVIDENCE IN THIS CASE. WHILE THE COURT HAS DETERMINED THE STATEMENT IS ADMISSIBLE, I INSTRUCT YOU THAT YOU MAKE THE ULTIMATE DECISION OF WHETHER OR NOT THE DEFENDANT MADE THE STATEMENT.

IF THE DEFENDANT DID MAKE THE STATEMENT, YOU MUST DETERMINE WHETHER THE STATEMENT WAS MADE BY THE DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL. IT JUST MEANS THAT THE STATEMENT WAS NOT CAUSED BY PRESSURE, FORCE, FEAR, THREATS,

COERCION, OR INTIMIDATION OR BY HOPE OR A PROMISE OF LENIENCY OR A REWARD OF ANY KIND.

IN DETERMINING WHETHER THE STATEMENT WAS VOLUNTARY, YOU SHOULD CONSIDER BOTH THE CHARACTERISTICS OF THE DEFENDANT AND THE DETAILS OF THE QUESTIONING.

SOME OF THE FACTORS THAT YOU MUST CONSIDER ARE THE AGE OF THE DEFENDANT, THE DEFENDANT'S EDUCATION OR LACK OF EDUCATION, THE DEFENDANT'S MENTAL ABILITY OR CAPACITY, DEFENDANT'S I.Q. OR INTELLIGENCE, THE DEFENDANT'S BACKGROUND AND ENVIRONMENT, PLACE AND LENGTH OF DETENTION, THE NATURE OF THE QUESTIONING AND THE ADVICE OR LACK THEREOF TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS INCLUDING BUT NOT LIMITED TO THE RIGHT TO REMAIN SILENT, THAT ANY STATEMENT COULD BE USED AGAINST HIM IN A COURT OF LAW, THE RIGHT TO HAVE A LAWYER PRESENT, IF HE COULD NOT AFFORD A LAWYER, A LAWYER WOULD BE APPOINTED TO REPRESENT HIM WITHOUT ANY COST, AND THAT HE COULD STOP MAKING A STATEMENT AT ANY TIME.

YOU MUST CAREFULLY CONSIDER ALL THE SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO THE ALLEGED STATEMENT. THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT

THAT THE ALLEGED STATEMENT WAS VOLUNTARY.

IF YOU DETERMINE IT WAS, THEN YOU MAY GIVE THE STATEMENT ANY FURTHER CONSIDERATION THAT YOU DEEM PROPER. YOU MUST DECIDE WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO THE ALLEGED STATEMENT. IF YOU DETERMINE THE ALLEGED STATEMENT WAS NOT THE FREE AND VOLUNTARY STATEMENT OF THE DEFENDANT, YOU SHOULD NOT CONSIDER THAT STATEMENT AT ALL.

NOW, LADIES AND GENTLEMEN, THE DEFENDANT HAS BEEN CHARGED UNDER SECTION 16-3-85, WHICH IS ENTITLED HOMICIDE BY CHILD ABUSE.

LET ME TALK WITH YOU FIRST OF ALL ABOUT THE DUTY OF A PARENT OR A PERSON IN LOCO PARENTIS. A PARENT OR A PERSON IN LOCO PARENTIS HAS A SPECIFIC AND INDELIBLE DUTY TO SERVE THE BEST INTERESTS OF HIS OR HER CHILD AND SHOULD MAKE EVERY EFFORT NOT TO KNOWINGLY PLACE HIS OR HER CHILD IN HARM'S WAY.

UNDER THE STATUTE THE STATE ALLEGES A VIOLATION OF SECTION 16-3-85, SECTION A-1, WHICH READS IN PART "A PERSON IS GUILTY OF HOMICIDE BY CHILD ABUSE WHO CAUSES THE DEATH OF A CHILD UNDER THE AGE OF 11 WHILE COMMITTING CHILD ABUSE OR NEGLECT AND THE DEATH OCCURS UNDER CIRCUMSTANCES MANIFESTING AN EXTREME INDIFFERENCE TO HUMAN LIFE."

WITH REGARD TO THE ELEMENTS, THEREFORE, THE STATE MUST PROVE THAT THERE WAS THE DEATH OF A CHILD WHO WAS UNDER THE AGE OF 11 AND THAT IT OCCURRED WHILE THERE WAS ABUSE OR NEGLECT AND THAT THE CIRCUMSTANCES SURROUNDING THE SITUATION WERE SUCH THAT THERE WAS AN EXTREME INDIFFERENCE TO HUMAN LIFE. THOSE ARE ESSENTIALLY THE ELEMENTS OF THE OFFENSE.

NOW, WITH REGARD TO THIS PARTICULAR CASE THE STATE BRINGS, I CHARGE YOU THAT UNDER SECTION 20-7-490, UNDER THE SOUTH CAROLINA CODE, AN ABUSED OR NEGLECTED CHILD MEANS A CHILD WHOSE DEATH RESULTS FROM OR WHOSE PHYSICAL OR MENTAL HEALTH OR WELFARE IS HARMED OR THREATENED WITH HARM AS DEFINED BY SECTION 3 BY THE ACTS OR OMISSION OF THE CHILD'S PARENT, OR GUARDIAN, OR OTHER PERSON RESPONSIBLE FOR THE CHILD'S WELFARE.

UNDER SECTION 3 HARM IS DEFINED AS FOLLOWS. "HARM TO A CHILD'S HEALTH OR WELFARE CAN OCCUR WHEN A PARENT OR GUARDIAN OR OTHER PERSON RESPONSIBLE FOR THE CHILD'S WELFARE INFLICTS OR ALLOWS TO BE INFLICTED UPON A CHILD PHYSICAL OR MENTAL INJURY, INCLUDING INJURIES SUSTAINED AS A RESULT OF EXCESSIVE CORPORAL PUNISHMENT, BUT EXCLUDING CORPORAL PUNISHMENT OR PHYSICAL

DISCIPLINE WHICH IS ADMINISTERED BY A PERSON -- BY A PARENT OR PERSON IN LOCO PARENTIS. IT'S PERPETRATED FOR THE SOLE PURPOSE OF RESTRAINING OR CORRECTING THE CHILD, IT'S REASONABLE IN MANNER AND MODERATE IN DEGREE, IT HAS NOT BROUGHT ABOUT PERMANENT OR LASTING DAMAGE TO THE CHILD, AND LASTLY IS NOT RECKLESS OR GROSSLY NEGLIGENT BEHAVIOR BY THE PARENTS OR PARENT."

NOW, WITH REGARD TO THIS CASE, LADIES AND GENTLEMEN, THE ISSUE OF PROXIMATE CAUSATION IS ONE FOR YOU TO DECIDE AND TO DETERMINE WHAT WAS, IN FACT, THE CAUSE OF THE CHILD'S DEATH.

WHEN A PERSON INFLICTS A FATAL INJURY ON ANOTHER PERSON AND THAT PERSON DIES AT A LATER TIME, YOU MUST BE CONVINCED BEYOND A REASONABLE DOUBT THAT THE INFLICTION OF THE FIRST INJURY WAS THE PROXIMATE CAUSE OF THE PERSON'S DEATH.

PROXIMATE CAUSE IS THE DIRECT CAUSE. IT IS THE IMMEDIATE CAUSE. IT IS THE EFFICIENT CAUSE. IT IS THAT CAUSE WITHOUT WHICH THE DEATH OF THE PERSON WOULD NOT HAVE RESULTED.

THERE MUST BE A CHAIN OF CAUSATION FROM THE TIME THE INJURY IS INFLICTED BY THE DEFENDANT UNTIL THE TIME OF THE PERSON'S DEATH. PROXIMATE CAUSE DOES NOT NECESSARILY MEAN THAT IT OCCURRED

IMMEDIATELY PRIOR TO DEATH. THERE MAY BE MORE THAN ONE PROXIMATE CAUSE.

THE DEFENDANT'S ACT MAY BE REGARDED AS A PROXIMATE CAUSE IF IT IS A CONTRIBUTING CAUSE OF THE DEATH OF A PERSON. THE FACT THAT OTHER CAUSES ALSO CONTRIBUTE TO THE DEATH OF A PERSON DOES NOT RELIEVE THE DEFENDANT FROM RESPONSIBILITY. THE DEFENDANT'S ACTS NEED NOT BE THE SOLE CAUSE OF THE DEATH, BUT MUST BE A PROXIMATE CAUSE CONTRIBUTING TO THE DEATH OF THAT PERSON.

THE DEFENDANT HAS PRESENTED EVIDENCE OF HIS GOOD REPUTATION AND CHARACTER TO SHOW THAT IT WOULD BE INCONSISTENT WITH THE DEFENDANT COMMITTING THE CRIME. THE WEIGHT YOU GIVE TO THAT TESTIMONY LIKE ALL OTHER TESTIMONY IN THE CASE IS FOR YOU TO DECIDE IN YOUR OWN GOOD JUDGMENT. YOU MAY CONSIDER THE TESTIMONY OF THE DEFENDANT'S GOOD CHARACTER ALONG WITH ALL OTHER EVIDENCE IN DECIDING WHETHER OR NOT THE DEFENDANT COMMITTED A CRIME.

MADAM FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, THERE ARE TWO POSSIBLE FORMS OF THE VERDICT. THE ORDER IN WHICH I GIVE THEM TO YOU HAS NO MEANING WHATSOEVER. I MUST GIVE YOU ONE BEFORE I GIVE YOU THE OTHER. IF YOU FIND THAT THE STATE OF

SOUTH CAROLINA HAS PROVED EACH AND EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT, YOUR VERDICT WOULD BE GUILTY. ON THE OTHER HAND IF YOU FIND THAT THE STATE OF SOUTH CAROLINA HAS FAILED TO PROVE EACH AND EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT, YOU WOULD FIND THE DEFENDANT NOT GUILTY.

THE INDICTMENT WILL GO BACK TO YOU, LADIES AND GENTLEMEN, FOR PURPOSES OF TRANSMITTING THE VERDICT THAT YOU THE JURY FIND. ON THE BACK SIDE, MADAM FOREPERSON, THERE IS A VERDICT BOX. I REVERSED THE ORDER, EITHER WRITE THE WORDS NOT GUILTY OR GUILTY AND SIGN AND DATE AND WRITE THE JURY'S DECISION.

THE VERDICT THAT YOU REACH, LADIES AND GENTLEMEN, MUST BE UNANIMOUS. THAT SIMPLY MEANS THAT ALL 12 OF YOU MUST AGREE TO WHATEVER VERDICT YOU REACH.

THE INDICTMENT, LADIES AND GENTLEMEN, IS NOT EVIDENCE. IT'S SIMPLY, AS I INDICATED, A PAPER TRAIL THAT ALLOWS THE CASE TO GO FORWARD.

NOW, A COUPLE OF THINGS ABOUT DELIBERATION.

I'M AWARE THAT SOME OF YOU SMOKE. THAT'S YOUR OWN CHOICE, BUT IF YOU TAKE A BREAK FOR A SMOKE BREAK, PLEASE STOP DELIBERATIONS. DO NOT

DISCUSS THE CASE WITHOUT ALL 12 PERSONS BEING IN THERE, EVEN ON BATHROOM BREAKS AND THAT TYPE OF THING. BE SURE THAT EVERYBODY IS THERE WHEN YOU'RE DISCUSSING AND DELIBERATING.

YOU CAN DECIDE IT HOWEVER YOU WISH TO PROCEED. WE'LL HAVE LUNCH HERE BY 12:30 OR THEREABOUTS. YOU CAN STOP AND EAT. IF YOU WANT TO GO AHEAD, THAT'S FINE TOO. IF YOU HAVE A PROBLEM OR QUESTION DURING THE COURSE OF YOUR DELIBERATIONS, MADAM FOREPERSON, IF YOU'LL WRITE IT OUT IN QUESTION FORM AND GIVE IT TO THE BAILIFF, HE WILL LET US KNOW. WE'LL TRY TO ASSIST YOU TO THE EXTENT THAT WE CAN, REMEMBERING THAT YOU ARE THE JUDGES OF FACTS IN THE CASE.

DO NOT BEGIN YOUR DELIBERATIONS, HOWEVER UNTIL YOU GET THE PHYSICAL EVIDENCE ALONG WITH THE INDICTMENT BACK THERE. THERE MAY HAVE BEEN SOMETHING THAT I MIGHT HAVE MISSTATED AND IF SO, I MIGHT NEED TO BRING YOU ALL BACK OUT AND CORRECT IT.

JUST WAIT UNTIL YOU GET THIS BEFORE YOU START YOUR DELIBERATIONS. WHEN YOU'VE REACHED A VERDICT, JUST KNOCK ON THE DOOR AND LET THE BAILIFFS KNOW THAT YOU'VE GOT THAT.

WE'LL GET THE MATERIAL TO YOU IN JUST A FEW

1042

MINUTES. THANK YOU, MA'AM.

(WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY 11:36.)

THE COURT: EXCEPTIONS OR REJECTIONS OF THE CHARGE FROM THE STATE?

MS. CAMPBELL: NO, SIR.

THE COURT: FROM THE DEFENSE?

MR. STRICKLER: ONLY TO REPEAT MY PREVIOUSLY STATED -- I'D ASK THE RECORD TO REFLECT MY PREVIOUSLY STATED OBJECTION TO YOUR DECISION NOT TO CHARGE THE CAUSATION CHARGE I SUBMITTED TO YOUR HONOR.

THE COURT: ALL RIGHT.

MR. STRICKLER: AND RENEW ALSO AT THIS TIME MY OBJECTION TO YOUR FAILURE TO CHARGE INVOLUNTARY MANSLAUGHTER --

THE COURT: OKAY.

MR. STRICKLER: -- OR YOUR DECISION NOT TO CHARGE INVOLUNTARY MANSLAUGHTER.

THE COURT: OKAY. I NOTE THAT.

MR. STRICKLER: NOTHING IN ADDITION, YOUR HONOR.

THE COURT: I NOTE THE OBJECTIONS AND OVERRULE THEM.

ALL RIGHT. MAKE SURE YOU HAVE YOUR EVIDENCE

ACCOUNTED FOR, AND TELL THEM IF THEY NEED TO SEE THE VIDEO, THEY'LL HAVE TO LET US KNOW.

MS. CAMPBELL: DO YOU WANT US TO JUST LEAVE THE VIDEO OUT HERE THEN?

THE COURT: NO, I'D SEND IT BACK THERE SO THEY'RE AWARE IT EXISTS.

(WHEREUPON, THE JURY BEGUN ITS DELIBERATIONS AT 11:45.)

(WHEREUPON, A NOTE WAS SENT OUT BY THE JURY.)

(WHEREUPON, COURT'S EXHIBIT 7 WAS MARKED FOR IDENTIFICATION ONLY.)

THE COURT: ALL RIGHT. BRING IN THE JURY.

THE BAILIFF: I'LL BE GLAD TO, YOUR HONOR.

THE COURT: NO OUTBURSTS OR REACTIONS. THERE MAY BE SOME FAMILY MEMBERS IN HERE. THAT APPLIES TO ANYBODY IN HERE. IT'S HARD ENOUGH ON THESE JURORS.

(WHEREUPON, THE JURY RETURNED TO OPEN COURT WITH THE VERDICT AT 2:39.)

THE BAILIFF: THE JURY'S ALL PRESENT, YOUR HONOR.

THE COURT: MADAM FOREPERSON, I UNDERSTAND THE JURY HAS REACHED A UNANIMOUS VERDICT; IS THAT CORRECT?

THE FOREPERSON: YES, SIR.

THE COURT: ALL RIGHT. IF YOU'LL HAND IT TO THE BAILIFF, PLEASE.

(THE FOREPERSON COMPLIES.)

VERDICT

THE CLERK: 2000-GS-40-50660, STATE OF SOUTH CAROLINA VS. NATHANIEL MITCHELL, INDICTMENT FOR HOMICIDE BY CHILD ABUSE, THE VERDICT IS GUILTY, SIGNED BY DOROTHY ROGERS AS FORELADY. MADAM FORELADY, IS THIS YOUR VERDICT AND THE VERDICT OF THIS ENTIRE JURY?

THE FOREPERSON: YES, IT IS.

THE COURT: ALL RIGHT. ANYTHING FURTHER FROM THE STATE?

MS. CAMPBELL: NOTHING, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MS. COGGIOLA: YOUR HONOR, IF THE JURY COULD BE POLLED, PLEASE.

THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, AS THE CLERK CALLS YOUR NAME, ANSWER THE FOLLOWING QUESTION, WAS THIS YOUR VERDICT, IS IT STILL YOUR VERDICT. ANSWER THE QUESTION ACCORDING TO YOUR CONSCIENCE.

MADAM CLERK.

THE CLERK: RUTHI ANDREWS, WAS THIS YOUR

VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: PATRICIA RANDOLPH, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: ARTHUR BROWN, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: WANDA HAYNES, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: SUSAN WILSON, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: BILLIE MCKIE, WAS THIS YOUR

VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: DOROTHY ROGERS, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: CHRISTOPHER BARKER, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: JANICE ABEL, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: JEFF DIETRICH, WAS THIS YOUR VERDICT?

THE JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

THE JUROR: YES.

THE CLERK: ERIN GRADDICK, WAS THIS YOUR

WORK EXCUSE, HOW YOU GET PAID, AND ALSO YOUR EXEMPTION STATUS, AS WELL.

WE'RE IN THE PROCESS OF DOING PROBATION VIOLATIONS OUT HERE, SO THAT'S THE REASON WE HAVE SUCH A LARGE NUMBER IN THE COURTROOM AT THIS MOMENT.

SO IF YOU'D LIKE TO LEAVE NOW, THAT'S FINE. IF YOU WANT TOO STAY THAT'S FINE.

MADAM SOLICITOR.

MS. CAMPBELL: YOUR HONOR, AS FAR AS ANY PRIOR RECORD, AS YOU ARE AWARE, HE DOES NOT HAVE ANY PRIOR RECORD, HOWEVER, I THINK IN THIS CASE YOU'VE HEARD ALL THE TESTIMONY FROM THE DOCTORS, THE INJURIES SPEAK FOR THEMSELVES, AND I HAVE NOTHING ELSE TO ADD TO THAT.

THE COURT: ALL RIGHT. DO YOU WANT TO COME AROUND FOR SENTENCING, PLEASE.

MR. STRICKLER: IF IT PLEASE THE COURT, YOUR HONOR, OF COURSE, PRIOR TO SENTENCING AND FOR THE RECORD, WE WOULD AT THIS POINT MOVE FOR A NEW TRIAL IN THIS MATTER. WE ALSO SPECIFICALLY RENEW OUR PREVIOUSLY STATED MOTIONS FOR A DIRECTED VERDICT MADE AT THE END OF THE STATE'S CASE AND THE DEFENSE CASE.

THE ADDITIONAL BASIS, IN ESSENCE, TO

RECONSIDER YOUR RULINGS IN THAT MATTER IN CONSIDERING YOUR REQUEST FOR A NEW TRIAL, I'D ADDITIONALLY SUBMIT TO THE COURT AS A BASIS FOR A NEW TRIAL THE FACT THAT DELIBERATION WAS THREE HOURS AND IT WAS A COMPLEX CASE, I SUBMIT THAT THAT ADDITIONALLY SUPPORTS A REQUEST FOR A NEW TRIAL IN THIS MATTER.

THE COURT: ALL RIGHT. MADAM SOLICITOR.

MS. CAMPBELL: YES, SIR.

THE COURT: ANY OF THE ISSUES THAT I RULED ON, DO YOU FEEL LIKE THEY NEED TO BE ADDRESSED FURTHER AT THIS TIME?

MS. CAMPBELL: NO, SIR. I THINK EVERYTHING HAS BEEN WELL ADDRESSED ON THE RECORD, AND I DON'T HAVE ANYTHING ELSE TO ADD.

MR. STRICKLER, AS TO YOUR MOTION FOR A NEW TRIAL, I WOULD DENY THAT ON ALL GROUNDS.

MR. STRICKLER: THANK YOU, SIR.

THE COURT: MS. COGGIOLA, MR. STRICKLER.

MS. COGGIOLA: YES, YOUR HONOR.

MR. STRICKLER: MAY IT PLEASE THE COURT, YOUR HONOR. YOU'VE HEARD -- YOU'VE HAD THE OPPORTUNITY TO HEAR FROM MR. MITCHELL HIMSELF. YOU JUST DON'T GET AN OPPORTUNITY TO HAVE THAT MUCH INPUT FROM THE DEFENDANT PRIOR TO SENTENCING. THE COURT

KNOWS NOW PRETTY MUCH HIS WHOLE BACKGROUND. YOU CERTAINLY KNOW HE HAS NO PRIOR RECORD WHATSOEVER.

I WON'T SPEAK TO THE FACTS IN THE CASE. I WON'T SPEAK TO THE FACT THAT THERE'S NOTHING IN THE BACKGROUND TO INDICATE ANY PROPENSITY FOR ACTIONS LIKE THIS. HE CERTAINLY -- HE AND HIS WIFE AT THAT TIME WERE ACTIVELY ENGAGED IN TRYING TO ADOPT AND REUNIFY A FAMILY THAT HAD BEEN SPLIT BY ACTIONS OF PERSONS OTHER THAN THEMSELVES.

I THINK THAT SPEAKS HIGHLY OF HIM. I'D ASK THAT YOU TAKE INTO CONSIDERATION HIS LACK OF A PRIOR RECORD, THE FACT THAT HE'S WORKED ALL HIS LIFE, AND THE GOOD THAT YOU HEARD ABOUT DURING HIS TESTIMONY, BOTH FROM HIMSELF AND FROM THE PEOPLE WHO CAME TO SPEAK ON HIS BEHALF.

I UNDERSTAND WHAT THE POSSIBLE PENALTIES ARE IN THIS CASE. WE'VE BEEN INFORMED OF THAT. WE'D ASK THAT YOU HAVE MERCY IN REGARD TO SENTENCING.

MS. COGGIOLA: YES, YOUR HONOR, I'VE WORKED WITH NATE FOR TWO YEARS NOW, AND ACTUALLY HAVE KNOWN HIS FAMILY IN THE PAST, AND I JUST WANT TO SAY THAT THERE IS A VERY GENTLE SOUL IN HERE, AND WE RESPECT THE JURY'S VERDICT, BUT I ASK YOU FOR ANY MERCY BASED ON THE FACT OF HIS BACKGROUND, HIS LACK OF ANY CRIMINAL RECORD, AND THE HISTORY OF

HIS LIFE IN GENERAL. WE WOULD ASK YOU TO CONSIDER A MINIMUM SENTENCE WITHIN OBVIOUSLY THE GUIDELINES OF THE COURT.

THE COURT: WELL, AS YOU KNOW THE SENTENCING RANGE IS NOT LESS THAN 20.

MR. STRICKLER: YES, SIR, IT'S 20 TO LIFE, WE UNDERSTAND THAT.

THE COURT: DOES HE HAVE ANY JAIL TIME CREDIT?

MR. STRICKLER: WE CAN GET THOSE NUMBERS.

MS. CAMPBELL: WE CAN GET THOSE NUMBERS FOR YOU, YOUR HONOR.

MR. STRICKLER: HE GOT OUT -- JULY, BEG THE COURT'S INDULGENCE ONE MOMENT, YOUR HONOR.

(PAUSE)

112 DAYS, SORRY.

THE COURT: ALL RIGHT. THE SENTENCE ON 2000-GS-40-50660, THE SENTENCE IS THAT YOU, NATHANIEL MITCHELL, BE CONFINED TO THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 25 YEARS WITH CREDIT FOR 112 DAYS JAIL TIME.

THE SERVICE -- THE ATTORNEYS DID NOT TELL YOU IT'S SUBJECT TO 85 PERCENT; YOU SERVE AT LEAST 85 PERCENT OF THAT. IT'S A NON-PAROLABLE OFFENSE.

MR. STRICKLER: THANK YOU, SIR.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH, LADIES AND GENTLEMEN, FOR YOUR SERVICE.

(WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY 2:49.)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, KAREN TRACY, OFFICIAL COURT REPORTER FOR THE 5TH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 13TH THROUGH THE 17TH DAYS OF MAY, 2000.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

SEPTEMBER 4, 2002

Karen Tracy

KAREN TRACY, COURT REPORTER

MY COMMISSION EXP: 07/06/04

1053

WITNESSES

D. L. Jones, Jr., RCSD

ARREST WARRANT NO. G419357

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

Amended 3/22/02 mm

VERDICT

Guilty

Foreman of Jury

3/17/02
Date

DOCKET NO. 2000-GS-40-5066

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#42 JUNE TERM 2000

THE STATE

vs.

NATHANIEL MITCHELL

Indictment for

HOMICIDE BY CHILD ABUSE

S. C. Code Section 16-3-85(A)(1)(B)(1) Felony
2356

ATTEST
A TRUE COPY
Richard A. Harris
Clerk of Court, R. & G. P. & G. P.

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT FOR
HOMICIDE BY CHILD ABUSE

At a Court of General Sessions, convened on June 14, 2000,
the Grand Jurors of RICHLAND County present upon their oath:

That NATHANIEL MITCHELL did in Richland County on or about March 28, 2000 did cause the death of a child under the age of eleven to wit: MINOR , while committing child abuse or neglect and the death occurs under circumstances manifesting an extreme indifference to human life, all in violation of South Carolina Code Section 16-3-85(A)(1)(B)(1).

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

Warren B Giese
SOLICITOR

ATTEST
A TRUE COPY
Barbara C. Seals
C. C. C. P.

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE VS.)
Nathaniel Mitchell)
AKA:)
Race: B Sex: M Age: 38)
DOB: / / SS#:)
Address: [redacted])
Cola SC)
DL#_____ SID#:_____)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
00 GS- 40 - 50660
A/W#: G414357
Date of Offense: 3/28/00
S.C. Code §: 16-3-85(A)(B)(C)
CDR Code #: 213516
☐ CASE RESTORED
SENTENCE
☐ PLEA ☑ TRIAL

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO Homicide by child Abuse
in violation of § 16-3-85(A)(B)(C) of the S.C. Code of Laws, bearing CDR Code # 213516
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor _____ Defendant _____ Attorney for Defendant _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for 112 days/months jail time.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐Heard, ☐Waived, ☐Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:_____
☐ set by SCDPPPS_____
_____
Recipient:_____
*Fine: . . . . . $_____
§14-1-206 (Assessments 100%). . . $_____
§14-1-211(A)(1) (Surcharge) . . . . . $_____
§14-1-211(A)(2) (Surcharge) . . . . . $_____
§56-5-2995 (DUI Assessment). . . . $_____
3% to County (if paid in installments). . . $_____
TOTAL . . . . . $_____

PTUP ___
_____days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling ___
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____

Barbara A. Scott
Clerk of Court/ Deputy Clerk

PRESIDING JUDGE [signature]
Judge Code: 181505
Sentence Date: 5-17-02

Court Reporter: Tracey

White - Clerk Green - Corrections County - Probation Pink - Defendant

Barbara A. Scott
C. C. C. P. & G.

1056

FORM 5 2007CP400-6693

STATE OF SOUTH CAROLINA)
County of Richland 2842467)
Nathaniel Mitchell)
Full name and prison number (if any) of Applicant)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR POST-CONVICTION RELIEF

FILED
07 OCT -8 PM 12:31
BARBARA A. SCOTT
C.C.C. & G.S.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Corr. Inst. 386 Redemption Way McCormick SC 29899

2. Name and location of Court which imposed sentence Richland County Court Of General Sessions

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 06-GS-40-50660

(b) _____

(c)

5. The date upon which sentence was imposed and the terms of the sentence:

(a) May 13 – May 17, 2002 ;

(b) Twenty-Five ; Eighty-Five percent

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court OF Appeals

ii. appeal

iii. Petition For Rehearing

(b) the result in each such Court to which you appealed:

i. denied

ii. affirmed

iii.

(c) the date of each such result:

i. January 16, 2005

ii. April 22, 2005 ✓

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Opinion No. 3918

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b)

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of Counsel, prosecutori

(b) al misconduct, Structural due process errors.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) "See Supporting Memorandum of Law"

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Civil / Constitutional

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Denied

ii. affirmed

iii.

iv.

(d) the date of each such disposition:

i. March 11, 2005

ii. April 22, 2005

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Opinion No. 3918

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

ii.

iii.

(b) the proceedings in which each ground was raised:

i. Court of appeal / on appeal / Petition for

ii. Rehearing

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of Counsel, prosecutorial

(b) misconduct, Structual due process errors

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Doug Strickler, and Lee Coggiola; P.O. Box 2766, Columbia, S.C. 29201

ii. Robert M. Dudek; 1205 Pendleton St, Rm 306 Columbia, S.C. 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Richland General Sessions Court, South Carolina

ii. Court of Appeals OF South Carolina.

iii. _____

Revised 3/2003

19. State clearly the relief you seek in filing this application:

Reversal and vacating, sentence, Judgement

20. Are you now under sentence from any other court that you have not challenged?

Not to Knowledge

STATE OF SOUTH CAROLINA)
)
County of Richland)

VERIFICATION

#284407

I, Nathaniel Mitchell, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Nathaniel Mitchell

SWORN to and subscribed before me this 20 day of Oct, .

Joyce L Young (L.S.)
Notary Public

My Commission Expires: 8-28-2011

WITNESSES

D. L. Jones, Jr., RCSD

Donald L. Jones, Jr.

ARREST WARRANT NO. G419357

ACTION OF GRAND JURY

TRUE BILL

Jimmy L Lillen
Foreman of Grand Jury

Amended 3/22/02 mwe

VERDICT

Guilty

Dorothy B. Rogers 5/17/02
Foreman of Petit Jury Date:

DOCKET NO. 2000-GS-40-5046D

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

942 JUNE TERM 2000

THE STATE

vs.

NATHANIEL MITCHELL

Indictment for

HOMICIDE BY CHILD ABUSE

S. C. Code Section 16-3-85(A)(1)(B)(1) Felony
2356

ATTEST'D
A TRUE COPY
Barbara A. Peters
CLERK C. C. P. & G. R.

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT FOR
HOMICIDE BY CHILD ABUSE

At a Court of General Sessions, convened on June 14, 2000,
the Grand Jurors of RICHLAND County present upon their oath:

That NATHANIEL MITCHELL did in Richland County on or about March 28, 2000 did cause the death of a child under the age of eleven to wit: MINOR , while committing child abuse or neglect and the death occurs under circumstances manifesting an extreme indifference to human life, all in violation of South Carolina Code Section 16-3-85(A)(1)(B)(1).

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

Warren B Giese
SOLICITOR

ATTEST:
A TRUE COPY
Barbara C. Seate
C. C. C. P. & G. S.

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE VS.)
Nathaniel Mitchell)
AKA:)
Race: B Sex: M Age: 38)
DOB: / / SS#:)
Address: [redacted])
Cola SC)
DL#_____ SID#:_____)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
00 GS 40 50660
A/W#: G414357
Date of Offense: 3/28/00
S.C. Code §: 16-3-85(A)(1)(b)(c)
CDR Code #: 213516
☐ CASE RESTORED
SENTENCE
☐ PLEA ☑ TRIAL

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Homicide by child Abuse
in violation of § 16-3-85(A)(1)(b)(c) of the S.C. Code of Laws, bearing CDR Code # 213516
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor _____ Defendant _____ Attorney for Defendant _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to So. Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ The Defendant is to be given credit for 112 days/months jail time.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:_____
☐ set by SCDPPPS_____
_____
Recipient:_____
*Fine: .....$_____
§14-1-206 (Assessments 100%). . .$_____
§14-1-211(A)(1) (Surcharge) .....$_____
§14-1-211(A)(2) (Surcharge) .....$_____
§56-5-2995 (DUI Assessment). . . .$_____
3% to County (if paid in installments). . .$_____
TOTAL . . . . . .$_____

PTUP ___
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling ___
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____

PRESIDING JUDGE _____
Judge Code: 181506
Sentence Date: 5-17-02

Barbara A. Scott
Clerk of Court/ Deputy Clerk

Court Reporter Tracey

White - Clerk Green - Corrections Canary - Probation Pink - Defendant

Barbara A. Scott
SCCA217(1/98)
C. C. C. P. & G. S.

ARREST WARRANT

G-419357

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
RICHLAND COUNTY

THE STATE
against

NATHANIEL MITCHELL
Address: [redacted]
COLUMBIA SC 29223 - 0000
Phone: [redacted] SSN: [redacted]
Sex: M Race: B Height: 6 3 Weight: 289
DL State: SC DL #: [redacted]
DOB: [redacted]63 Agency ORI #:
Prosecuting Agency: RICHLAND COUNTY SHERIFF'S
Prosecuting Officer: DALE L. JONES JR
Offense: HOMICIDE BY CHILD ABUSE
Offense Code: 2356
Code/Ordinance Sec: 16-03-0085(A)(1)

This warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☐ Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant NATHANIEL MITCHELL on 3/28/00 1755

_____
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
RICHLAND COUNTY BOND COURT
201 JOHN MARK DIAL DRIVE
COLUMBIA SC 29209 - 0000

AFFIDAVIT

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
RICHLAND COUNTY

Personally appeared before me the affiant DALE L. JONES JR who being duly sworn deposes and says that defendant NATHANIEL MITCHELL did within this county and state on 3/28/00 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: HOMICIDE BY CHILD ABUSE

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THAT ON OR ABOUT MARCH 28, 2000 WHILE AT [redacted] IN THE DENTSVILLE MAGISTERIAL DISTRICT OF RICHLAND COUNTY, ONE NATHANIEL MITCHELL DID COMMIT THE CRIME OF HOMICIDE BY CHILD ABUSE IN THAT HE DID WILLFULLY BEAT WITH A BELT, ONE MINOR A TWO YEAR OLD FEMALE CHILD, THUS INFLICTING UNNECCESSARY PAIN AND INJURY UPON HER BODY AND THEN BEGAN SHAKING THE VICTIM UNTIL SHE LOST CONSCIOUSNESS. THE VICTIM DIED AT PALMETTO RICHLAND MEMORIAL HOSPITAL IN THE PEDIATRIC INTENSIVE CARE UNIT FROM THESE INJURIES. DEFENDANT HAS BEEN IMPLICATED BY A WITNESS TO THIS INCIDENT WHO KNOWS HIM BY NAME AND SIGHT.

Sworn to and subscribed before me on 3/30/00

_____ (L.S.)
Signature of Issuing Judge

_____
Signature of Affiant
Affiant's Address: SHERIFF'S DEPARTMENT
COLUMBIA SC 29223 - 0000
Affiant's Telephone: 803 691-9000

AFFIANT AND OTHERS ARE WITNESS TO PROVE THE SAME.

ARREST WARRANT

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
RICHLAND COUNTY

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are [illegible] that on 3/28/00 defendant NATHANIEL MITCHELL did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) as set forth above.

DESCRIPTION OF OFFENSE: HOMICIDE BY CHILD ABUSE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

_____ (L.S.)
Signature of Issuing Judge
Judge Code: GS

Judge's Address: 1400 HUGER ST
COLUMBIA SC 29202 - 0000
Judge's Telephone: 803 748-4746
Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

RECEIVED
APR 13 2000
CLERK OF COURT
CRIMINAL RECORDS

ORIGINAL

SCBP

FORM 5

STATE OF SOUTH CAROLINA 284/07

County of Richland

IN THE COURT OF COMMON PLEAS

2007-CP-40-6693

Nathaniel Mitchell

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR POST-CONVICTION RELIEF

RICHLAND COUNTY FILED
07 NOV -5 AM 9:17
BARBARA A. SCOTT
C.C.C. & G.S.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Mc. Cormick Corr. Inst. 386 Redemption way McCormick SC 29899

2. Name and location of Court which imposed sentence Richland County Court Of General Sessions

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 06-GS-40-30660

(b) _____

3 OF 16

6 OF 27

C/A
case #2002601
Bot #15-P
Src #91213

ATTORNEY GENERAL'S OFFICE
RECEIVED 11/17/07
ADMINISTRATIVE INSTRUCTIONS
FILE OPEN END
HAVE COPIES MADE
ROUTE TO
TRANSCRIPT
OPEN RECORDS CLERK RECORDS

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) May 13 – May 17, 2002;

(b) Twenty-Five; Eighty-Five percent

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Cardina Court of Appeals

ii. appeal

iii. Petition For Rehearing

(b) the result in each such Court to which you appealed:

i. denied

ii. affirmed

iii. _____

(c) the date of each such result:

i. January 10, 2005

ii. April 22, 2005

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Opinion No. 3918

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of Counsel, prosecutori
(b) al misconduct, Structural due process errors.
(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) "See Supporting Memorandum of Law"
(b) _____
(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? yes
(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
(d) any other petitions, motions or applications in this or any other Court? yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:
i. Civil / Constitutional
ii. _____
iii. _____
iv. _____
(b) the name and location of the Court in which each was filed:
i. South Carolina Court of Appeals
ii. _____
iii. _____
iv. _____

(c) the disposition thereof:

i. Denied

ii. affirmed

iii.

iv.

(d) the date of each such disposition:

i. March 11, 2005

ii. April 22, 2005

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Opinion No. 3918

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

ii.

iii.

(b) the proceedings in which each ground was raised:

i. Court of appeal / on appeal / Petition for

ii. Rehearing

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of Counsel, prosecutorial

(b) misconduct, Structual due process errors

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Doug Strickler, and Lee Coggiola; P.O. Box 2766, Columbia, S.C. 29201

ii. Robert M. Dudek; 1205 Pendleton St, Rm 306 Columbia, S.C. 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Richland General Sessions Court, South Carolina

ii. Court of Appeals OF South Carolina.

iii. _____

1072

19. State clearly the relief you seek in filing this application:
Reversal and vacating, sentence, Judgement

20. Are you now under sentence from any other court that you have not challenged?
Not to Knowledge

STATE OF SOUTH CAROLINA)
)
County of Richland)

VERIFICATION

I, Nathaniel Mitchell, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Nathaniel Mitchell

SWORN to and subscribed before me this 10 day of Sept, ____.

Tonya L Young (L.S.)
Notary Public

My Commission Expires: 8-28-2011

Revised 3/2003

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 19, 2006

Assistant Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mitchell, Nathaniel

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

October 19, 2006."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

DES/jj
CLERK

cc: Senior Assistant Attorney General Harold M. Coombs, Jr.
Warren Blair Giese, Esquire
The Honorable Barbara Scott
The Honorable Kenneth Richstadt

RECEIVED
OCT 19 2006

State Of South Carolina County Of Richland Nathaniel Mitchell Applicant -Vs.- State Of South Carolina Respondant	In The Court Of Common Pleas Judicial Circuit Case No. _____ Memorandum Of Law In Support Of P.C.R. application

Hereforth cometh the applicant, before this Honorable court, pursuant to the rules and principles and Statues, that governs, such iniating and commencing Of P.C.R. actions, pursuant to U.S. Constitution sixth and Fourteenth Amendment, rule 71.1 SCRCP., and Statutory 17-27-10 - 17-27-200, such being iniated, based on the fact Of the matter, the applicant has a right to redress, and to petition the government, and has a Liberty interest in Federal and State, created rights.

Procedural History

On May 17, 2002; applicant was found guilty, by the Richland County grand Jury; and was sentenced by the Hon. Judge Floyd to -

a Continement of Twenty-Five years eighty Five percent, upon the Orders of the Richland County General Sessions Court.

On January 10, 2005, the South Carolina Court of appeals Filed, applicant's brief, and affirmed such, (Opn. No. 3918), of the same a Petition For Rehearing was submitted on March 11, 2005, by Appellate Counsel (Robert M. Dudek), and a return to such, by the Respondant's March 15, 2005. April 22, 2005, the Court of Appeals of South Cardina, affimed such petition for Rehearing.

On October 19, 2006, applicant recieved an official Letter of documentation, by The South Cardlina Supreme Court, officially denieng relief. OF such, this P.C.R. action is as Follows:

Statement OF Fact(s) and Arguments

) The State Courts, erroneously applying OF Statutory Law, and Failure to give charge and Instructions of a proper and Lesser charge based on evidence and the totality of Circumstance.

J. The State Courts, erroneously applying of Statutory Law, and failure to give charge and Instructions of a proper and Lesser charge based on evidence and the totality of circumstance.

First and foremost, applicant would contend in the case at bar, before this court, that based on evidence, the elements, and the surrounding facts) of the

totality of the circumstances that such case, did not warrant, a charge of "Homicide by child abuse", and that such Law was erroneously applied in the case

at bar, whereas State, should have either opted, or additionally given a proper and Lesser charge, based on the circumstances in the perticular case at bey, based on

the Followings Facts):
See: 20-7-490 (A)(V), State Vs. Knoten; 555 S.E.2d. 391 (2001); State Vs. Grubbs; 577 S.E.2d. 493, 496 (Ct. App. 2003).

1.) That the minor, was more vunerable based on unusual medical problems

2.) That there was a prior incident, by State (DSS) caseworker, not documented or reported.

3.) That such could have occured, based on the Minor's brother, accidently clipping the minor.

4.) The possibility; or reasonable probability that any parent(s), would have panicked and reacted in the same like manner.

5.) or were the Hospital, possibly at Fault by neglect, or the agency whom allowed such adoption by possibly unqualified person.

6.) Or Further, the Fact OF the matter OF undue prejudice, that there were several expert witnessess, for the State, but not the applicant.

that, obviously Law does arises from Facts(), upon which the Jurors, are indeed the Trier OF the Facts, based on application OF Law in relation to those Facts,

State Of South Carolina County Of Richland	In The Court Of Comm Pleas Judicial Circuit
Nathaniel Mitchell applicant	Case No. _____
-Vs.-	Certificate Of
State Of South Carolina Respondant	Service

I, Nathaniel Mitchell. Certify and declare under the penalty of perjury, that I have served on the Following address below, on this __ day of Sept. 2007; An application for Post-Conviction relief, A motion for disclosure of discovery, a memorandum of Law in support of P.C.R., with Orders of the Court of appeals, and a Certificate Of Service, by depositing such in the Mc. Cormick-Corr.-Inst. Mail room office.

Nathaniel Mitchell

Sworn to and subscribed before me this 10 day of Sept. 2007.

Joyce L Young
Notary

Exp 6-28-2011

Nathaniel Mitchell;
S.C. Dept. Of Corr.
F-3-B; 128
386 Redemption Way
Mc. Cormick, S.C. 29899

Original: Honorable Barbara A. Scott;
Clerk Of Court
P.O. Box 2766
Columbia, S.C. 29202-2766

16 of 17 19 of 27

"Exhibit B"

Case No. 07-CP-40-6693;

Returned Filed Oct. 8, 2007;

Only; 3 OF 16 – 8 OF 16;

Missing Filed returned, 1 OF 16 – 2 OF 16;

and 9 OF 16 – 16 OF 16.

"Exhibit B"

WITNESSES

T. L. Jones, Jr., RCSD

Thomas L. Jones, Jr.

ARREST WARRANT NO. G419357

ACTION OF GRAND JURY

TRUE BILL

Jimmy L. Sellers

Foreman of Grand Jury

Amended 3/22/02 WMB

VERDICT

Foreman of Petit Jury

Date: 5/17/02

CERTIFIED TRUE COPY OF ORIGINAL FILED
C.C.S.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

DOCKET NO. 2000-GS-40-50660

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#42 JUNE TERM 2000

THE STATE

vs.

NATHANIEL MITCHELL

Indictment for

HOMICIDE BY CHILD ABUSE

S. C. Code Section 16-3-85(A)(1)(B)(1) Felony
2356

FORM 32 - 12/97

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT FOR
HOMICIDE BY CHILD ABUSE

At a Court of General Sessions, convened on June 14, 2000
the Grand Jurors of RICHLAND County present upon their oath:

That NATHANIEL MITCHELL did in Richland County on or about March 28, 2000 did cause the death of a child under the age of eleven to wit: Passion Gardner, while committing child abuse or neglect and the death occurs under circumstances manifesting an extreme indifference to human life, all in violation of South Carolina Code Section 16-3-85(A)(i)(B)(1).

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

Warren B. Giese
SOLICITOR

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Barbara A Scott RD
C.C.C.P. & G.S.
RICHLAND COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE VS.)
Nathaniel Mitchell)
AKA:)
Race: B Sex: M Age: 38)
DOB: / / SS#:)
Address: 312 Forest [illegible] Dr.)
Cola SC)
DL#_____ SID#:)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE
00 GS 40 10660
A/W#: G419357
Date of Offense: 3/28/00
S.C. Code §: 16-3-85(A)(1)(a)
CDR Code #: 213516
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Homicide by child Abuse
in violation of § 16-3-85(A)(1)(a) of the S.C. Code of Laws, bearing CDR Code # 213516
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor _____ Defendant _____ Attorney for Defendant _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years; ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for 112 days/months jail time.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____
*Fine: ..... $_____
§14-1-206 (Assessments 100%) ..... $_____
§14-1-211(A)(1) (Surcharge) ..... $_____
§14-1-211(A)(2) (Surcharge) ..... $_____
§56-5-2995 (DUI Assessment) ..... $_____
3% to County (if paid in installments) ..... $_____
TOTAL ..... $_____

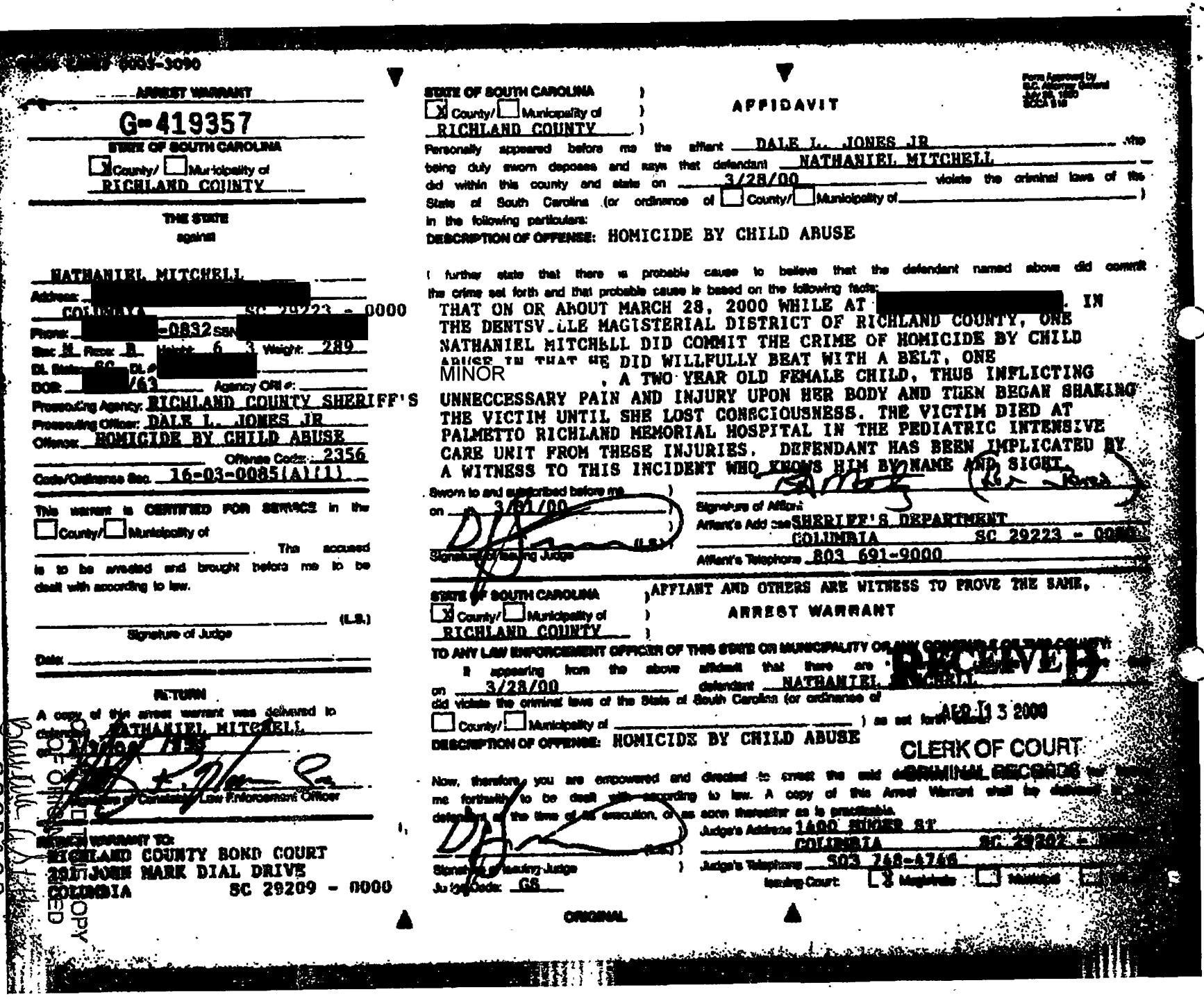
PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/F beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

Barbara A. Scott
Clerk of Court/ Deputy Clerk
Court Reporter Tracy

PRESIDING JUDGE _____
Judge Code: _____
Sentence Date: 5-27-02

CERTIFIED TRUE COPY
C.C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

White - Clerk Green - Corrections Canary - Probation



ARREST WARRANT

G-419357

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
RICHLAND COUNTY

THE STATE
against

NATHANIEL MITCHELL
Address: [redacted]
COLUMBIA SC 29223 - 0000
Phone: [redacted]-0832 SSN: [redacted]
Sex: M Race: B Height: 6 3 Weight: 289
DL State: SC DL #: [redacted]
DOB: [redacted]/63 Agency ORI #:
Prosecuting Agency: RICHLAND COUNTY SHERIFF'S
Prosecuting Officer: DALE L. JONES JR
Offense: HOMICIDE BY CHILD ABUSE
Offense Code: 2356
Code/Ordinance Sec. 16-03-0085(A)(1)

This warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☐ Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant NATHANIEL MITCHELL on 3/29/00 at 1115 hrs.

_____
Signature of Certified Law Enforcement Officer

☐ This warrant was not executed because _____

RETURN WARRANT TO:
RICHLAND COUNTY BOND COURT
201 JOHN MARK DIAL DRIVE
COLUMBIA SC 29209 - 0000

COPY
CERTIFIED

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
RICHLAND COUNTY

AFFIDAVIT

Form Approved by S.C. Attorney General

Personally appeared before me the affiant DALE L. JONES JR who being duly sworn deposes and says that defendant NATHANIEL MITCHELL did within this county and state on 3/28/00 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: HOMICIDE BY CHILD ABUSE

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THAT ON OR ABOUT MARCH 28, 2000 WHILE AT [redacted]. IN THE DENTSVILLE MAGISTERIAL DISTRICT OF RICHLAND COUNTY, ONE NATHANIEL MITCHELL DID COMMIT THE CRIME OF HOMICIDE BY CHILD ABUSE IN THAT HE DID WILLFULLY BEAT WITH A BELT, ONE MINOR , A TWO YEAR OLD FEMALE CHILD, THUS INFLICTING UNNECCESSARY PAIN AND INJURY UPON HER BODY AND THEN BEGAN SHAKING THE VICTIM UNTIL SHE LOST CONSCIOUSNESS. THE VICTIM DIED AT PALMETTO RICHLAND MEMORIAL HOSPITAL IN THE PEDIATRIC INTENSIVE CARE UNIT FROM THESE INJURIES. DEFENDANT HAS BEEN IMPLICATED BY A WITNESS TO THIS INCIDENT WHO KNOWS HIM BY NAME AND SIGHT.

AFFIANT AND OTHERS ARE WITNESS TO PROVE THE SAME.

Sworn to and subscribed before me on 3/29/00

_____ (L.S.)
Signature of Issuing Judge

Signature of Affiant: _____
Affiant's Address: SHERIFF'S DEPARTMENT
COLUMBIA SC 29223 - 0000
Affiant's Telephone: 803 691-9000

ARREST WARRANT

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
RICHLAND COUNTY

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are probable grounds to believe that on 3/28/00 defendant NATHANIEL MITCHELL did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) as set forth above.

DESCRIPTION OF OFFENSE: HOMICIDE BY CHILD ABUSE

RECEIVED
APR 13 2000
CLERK OF COURT
CRIMINAL RECORDS

Now, therefore, you are empowered and directed to arrest the said defendant and bring him forthwith before me to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

_____ (L.S.)
Signature of Issuing Judge

Judge's Address: 1400 HUGER ST
COLUMBIA SC 29202 -
Judge's Telephone: 803 748-4746
Issuing Court: ☒ Magistrate ☐ Municipal ☐

Judge Code: GS

ORIGINAL

C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Mitchell, Nathaniel, 284407 Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS 2007-CP-400-6693 RETURN AND MOTION TO DISMISS

In response to the post-conviction relief application filed October 8, 2007, the Respondent would show this Court:

I.

The Applicant was indicted at the June 2000 term of the Richland County Grand jury for Homicide by Child Abuse (2000-GS-40-50660). Doug Strickler, Esquire and Lee Coggiola, Esquire represented applicant. On May 17, 2002, the Applicant was convicted by jury trial of Homicide by Child Abuse. He was sentenced by the Honorable Henry F. Floyd, to confinement for a period of twenty-five years (25) years. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Mitchell, Op. No. 3918 (S.C. Ct. App. filed January 10, 2005), cert. denied S.C. Sup. Ct., October 19, 2006.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject convictions. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current application for post conviction relief the Applicant alleges that he is entitled to post-conviction relief for the following reasons:

1. INEFFECTIVE ASSISTANCE OF COUNSEL, PROSECUTORIAL MISCONDUCT, STRUCTURAL DUE PROCESS ERRORS.
2. THE STATE COURTS, ERRONEOUSLY APPLYING OF STATUTORY LAW, AND FAILURE TO GIVE CHARGE AND INSTRUCTIONS OF A PROPER AND LESSER CHARGE BASED ON EVIDENCE AND THE TOTALITY OF THE CIRCUMSTANCE. FIRST AND FOREMOST, APPLICANT WOULD CONTEND IN THE CASE AT BAR, BEFORE THIS COURT, THAT BASED ON EVIDENCE, THE ELEMENTS, AND THE SURROUNDING FACT(S) OF THE TOTALITY OF THE CIRCUMSTANCES THAT SUCH CASE, DID NOT WARRANT, A CHARGE OF "HOMICIDE BY CHILD ABUSE", AND THAT SUCH LAW WAS ERRONEOUSLY APPLIED IN THE CASE AS BAR, WHEREAS STATE, SHOULD HAVE EITHER OPTED, OR ADDITIONALLY GIVEN A PROPER LESSER CHARGE, BASED ON THE CIRCUMSTANCES IN THE PARTICULAR CASE AT BEY, BASED ON THE FOLLOWING FACT(S): SEE: 20-7-490 (A)(V), STATE VS. KNOTEN; 555 S.E. 2D 391 (2001); STATE VS. GRUBBS; 577 S.E. 2D 493, 496 (CT. APP. 2003).
    a. THAT THE MINOR, WAS MORE VULNERABLE BASED ON UNUSUAL MEDICAL PROBLEMS
    b. THAT THERE WAS A PRIOR INCIDENT, BY STATE (DSS) CASEWORKER, NOT DOCUMENTED OR REPORTED.
    c. THAT SUCH COULD HAVE OCCURRED, BASED ON THE MINOR'S BROTHER, ACCIDENTALLY CLIPPING THE MINOR.
    d. THE POSSIBILITY; OR REASONABLE PROBABILITY THAT ANY PARENT(S), WOULD HAVE PANICKED AND REACTED IN THE SAME LIKE MANNER.
    e. OR WERE THE HOSPITAL, POSSIBLY AT FAULT BY NEGLECT, OR THE AGENCY WHOM ALLOWED SUCH ADOPTION BY POSSIBLY UNQUALIFIED PERSON.
    f. OR FURTHER, THE FACT OF THE MATTER OF UNDUE PREJUDICE, THAT THERE WERE SEVERAL EXPERT WITNESSES, FOR THE STATE, BUT NOT THE APPLICANT.
3. THAT, OBVIOUSLY LAW DOES ARISES FROM FACT(S), UPON WHICH THE JURORS, ARE INDEED THE TRIER OF THE FACTS, BASED ON APPLICATION OF LAW IN RELATION TO THOSE FACTS.

III.

The Respondent submits that the current application should be summarily dismissed because the Applicant's allegation(s) consist mainly of the issues raised and decided on direct appeal, i.e. lesser included offenses.[1]

Lesser Included Offense: Considering the decision on appeal and the extensive jury charge dialog conducted by trial counsel, any claims that the Applicant was denied proper instructions on lesser included offenses should be summarily dismissed. Trial transcript p. 942-962.

Unusual Medical Problems: Any allegations regarding the purported pre-existing conditions of the victim should be summarily dismissed. Trial counsel covered this issue extensively, arguing foreseeability, and even eggshell skull concepts (Trial Transcript, p. 960 & 946-954), in addition to the testimony of Dr. Ross (Trial Transcript, p. 547-630) and trial counsel's closing arguments (Trial Transcript, p. 954-957 & 978-994).

Brother could have caused injury: Any allegations regarding the Applicant's claims that the brother could have caused such severe and deadly injuries to the victim are and were directly contradicted by expert testimony, (Trial Transcript, p. 300-302 & 175-179). Additionally, the Applicant's testified that he did far more than "clip" the victim, in that he repeatedly "spanked" the two (2) year-old child with a leather belt.

Applicant simply panicked: Any allegations regarding the Applicant's claims that he is entitled to PCR because he panicked as any parent may have should be summarily dismissed. The Applicant explained his behavior when he testified, (Trial Transcript, p. 774-891).

Hospital or agency was at fault, Number of expert witnesses: The Respondent construes Applicant's remaining claims as an allegation of infringement upon the Applicant's constitutional rights. However, the Applicant does not explain with any specificity the grounds upon which

[1] http://www.sccourts.org/opinions/displayOpinion.cfm?caseNo=3918

these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985).

Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum *prima facie* showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act.

The respondent submits that the applicant's allegations are without merit because the applicant has failed to specifically set forth the grounds upon which his application is based in accordance with S.C. Code Ann. §17-27-50. Additionally, the vast majority of the Applicant's claims are directly related to the issues decided on Direct Appeal and are not PCR issues. The respondent moves for summary dismissal pursuant to South Carolina Code Ann. §17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that this allegation should be dismissed as a matter of law. S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to state a claim upon which relief can be granted pursuant to the Post Conviction Procedure Act.

IV.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

V.

WHEREFORE, Respondent moves to summarily dismiss the application because the Applicant has failed to allege any genuine issue of material facts or state a claim upon which relief can be granted.

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: _____
Attorneys for the Respondents

March 4, 2008

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND

2007-CP-400-6693

Nathaniel Mitchell, 284407

Applicant,

vs) AFFIDAVIT OF SERVICE BY MAIL

State of South Carolina,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Nathaniel Mitchell, 284407
MCCORMICK CORRECTIONAL INSTITUTION
386 Redemption Way
McCormick, South Carolina 29899

DATED this 5th day of March, 2008.

Jean R. Indriago, Legal Assistant
For Respondent

Nathaniel Mitchell; 284407
S.C. Dept. OF Corr.
F-3-B; 128
386 Redemption Way
Mc. Cormick, S.C. 29899

Sept. — 2007

FILED
2007 OCT -8 PM 12:54
BARBARA A. SCOTT
C.C.C. & G.S.

Hon. Barbara Scott;
Clerk OF Court
P.O. Box 2766
Columbia, S.C. 29202-2766

Re: P.C.R. No. _____;

Dear Hon. Scott;

Please, upon reciept, OF such, find enclosed of the tollowing, A Motion for disclosure OF discovery, a Post-conviction relief application, a Memorandum OF Law in support OF P.C.R., Orders of the court of appeals, and a Certificate OF Service, to be "Clocked-date-Stamped" Filed by this office, and a clocked, in copy OF the same returned to me as soon as possible.

Notice: Copy requested pursuant to rule 602 SCACR, as provision of SCDC policy will not permit copies OF Handwritten.

With the Kindest Regards,
Nathaniel Mitchell
Nathaniel Mitchell

State Of South Cardina County Of Richland Nathaniel Mitchell applicant -Vs.- State Of South Carolina Respondant	In The Court Of Common Pleas Judicial Circuit Case No. _____ FILED 2007 OCT -8 PM 12:54 BARBARA G. SEBERT C.C.C.P. Motion For Disclosure Of Discovery, Pursuant to rules) 26, 29, 37, and Statutory 17-27-150(A)

Henceforth cometh the applicant, (Sub Judice), before this Honorable court of South Cardina and in accordance with the South Carolina rules of Civil procedures, and Statutory Law, pursuant to rules) 26, 29, 37 and South Carolina Code of Laws, 17-27-150(A).

The applicant would so move, before this Honorable court of South Cardina, for reproduction of case file, to include police reports, arrest warrants, search warrants, statements and Indictments. Notice: Reserve request to amend upon reciept of Transcript(s).

Sworn to and subscribed Nathaniel Mitchell
before me this 10 day of Sept. 2007 Nathaniel Mitchell;

Notary

Exp. 8 28 2011 20F16

FORM 5 2007CP400-6693

STATE OF SOUTH CAROLINA)
County of Richland 28406)
Nathaniel Mitchell)
Full name and prison number (if any) of Applicant)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

RICHLAND COUNTY FILED
07 OCT -8 PM 12:31
BARBARA A. SCOTT
C.C.C.&G.S.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Corr. Inst. 386 Redemption Way McCormick SC 29899

2. Name and location of Court which imposed sentence Richland County Court Of General Sessions

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 06-GS-40-50660

(b) _____

1094.

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) May 13 – May 17, 2002;

(b) Twenty-Five; Eighty-Five percent

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Caroline Court of Appeals

ii. appeal

iii. Petition For Rehearing

(b) the result in each such Court to which you appealed:

i. denied

ii. affirmed

iii. _____

(c) the date of each such result:

i. January 10, 2005

ii. April 22, 2005 ✓

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Opinion No. 3918

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of Counsel, prosecutori
(b) al misconduct, Structural due process errors.
(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) "See Supporting Memorandum of Law"
(b) _____
(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? yes
(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
(d) any other petitions, motions or applications in this or any other Court? yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:
i. Civil / Constitutional
ii. _____
iii. _____
iv. _____

(b) the name and location of the Court in which each was filed:
i. South Carolina Court of Appeals
ii. _____
iii. _____

iv. _____

(c) the disposition thereof:

i. Denied

ii. affirmed

iii. _____

iv. _____

(d) the date of each such disposition:

i. March 11, 2005

ii. April 22, 2005

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Opinion No. 3918

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. Court of appeal / on appeal / Petition for

ii. Rehearing

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of Counsel, prosecutorial

(b) misconduct, Structual due process errors

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Doug Strickler, and Lee Coggiola; P.O. Box 2766, Columbia, S.C. 29201

ii. Robert M. Dudek, 1205 Pendleton St, Rm 306 Columbia, S.C. 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Richland General Sessions Court, South Carolina

ii. Court of Appeals OF South Carolina.

iii. _____

Revised 3/2003

19. State clearly the relief you seek in filing this application:

Reversal and Vacating, sentence, Judgement

20. Are you now under sentence from any other court that you have not challenged?

Not to Knowledge

STATE OF SOUTH CAROLINA)
)
County of Richland)

VERIFICATION

#284407

I, Nathaniel Mitchell, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Nathaniel Mitchell

SWORN to and subscribed before me this 10 day of Sept, .

Notary Public (L.S.)

My Commission Expires: 8-28-2011

Revised 3/2003

State Of South Carolina County Of Richland	In The Court Of Common Pleas Judicial Circuit
Nathaniel Mitchell applicant -Vs.- State Of South Carolina Respondant	Case No. _____ Memorandum Of Law In Support Of P.C.R. application

Henceforth cometh the applicant, before this Honorable court, pursuant to the rules, and principles and Statues, that governs, such iniating and commencing of P.C.R. actions, pursuant to U.S. Constitution sixth and fourteenth Amendment, rule 71.1 SCRCP; and Statutory 17-27-10 - 17-27-200, such being iniated, based on the fact of the matter, the applicant has a right to redress, and to petition the government, and has a Liberty interest in federal and State, created rights.

Procedural History

On May 17, 2002; applicant was found guilty, by the Richland County Grand Jury;

and was sentenced by the Hon. Judge Floyd. to a Confinement of Twenty-five years eighty five percent, upon the orders of the Richland County General Sessions Court,

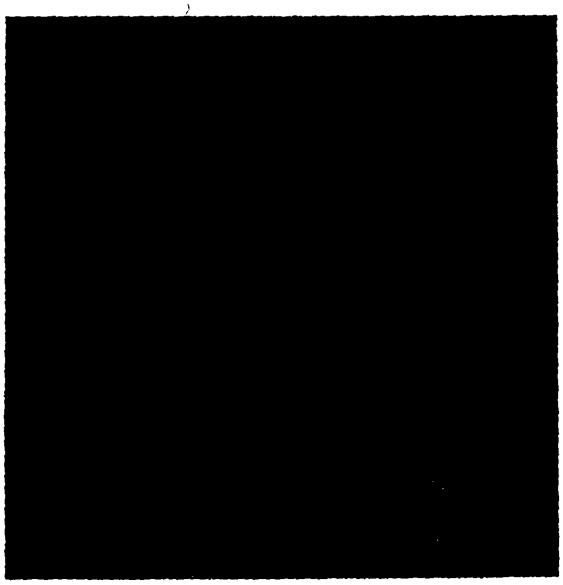
On January 10, 2005, the South Carolina Court of appeals Filed, applicant's brief, and affirmed such, Opn. No. 3918l, of the same a petition for rehearing was submitted on March 11, 2005,

by appellate Counsel (Robert M. Dudek), and a return to such, by the respondant's March 15, 2005, April 22, 2005, the court of appeals of South Carolina, affirmed such petition for rehearing.

On October 19, 2006, applicant recieved an official letter of documentation, by the South Carolina Supreme Court, officially denieng relief. of such, this P.C.R. action is as follows:

Statement OF Facts) and Arguments

) The State courts, erroneously applying of statutory Law, and failure to give charge and Instructions OF a Proper and Lesser charge based on evidence and the totality OF circumstance.



) The State Courts, erroneously applying of Statutory Law, and failure to give charge and Instructions of a proper and Lesser charge based on evidence and the totality of circumstance.

First and Foremost, applicant would Contend in the case at bar, before this court, that based on evidence, the elements, and the surrounding Fact(s) of the totality

of the circumstances that such such case, did not warrant, a charge of "Homicide by Child abuse", and that such Law was erroneously applied in the case at bar,

Whereas State, should have either opted, or additionally given a proper and Lesser charge, based on the circumstances in the perticular case at bey, based on the

Following Facto): , See: 20-7-490(A)(V), State Vs. Knoten; 555 S.E.2d. 391 (2001); and State Vs. Grubbs; 577 S.E.2d. 493, 496 (Ct. app. 2003)

1.) That the minor, was more vunerable based on unusual medical problems.

2.) That there was a prior incident, by State (DSS) caseworker, not documented or reported.

3.) That such could have occurred, based on the minor's brother, accidently clipping the minor.

4.) The possibility; or reasonable probability that any parent(s), would have panicked and reacted in the same Like manner.

5.) or were the Hospital, possibly at Fault by neglect, or the agency whom allowed such adoption by possibly unqualified person.

6.) Or Further, the Fact OF the matter OF undue prejudice, that there were several expert witnessess, For the State, but not the applicant.

that, obviously Law does arises From Fact(s), upon which the Jurors, are indeed the Trier OF the Facts, based on application OF Law in relation to those Facts,

In such situation, such Law could not be applied in relation to the facts, being rather unique, as such law did not fit, based on other elements, See: State Vs. Chatman; 519 S.E.2d 100 (1999); and Bozeman Vs. State; 414 S.E. 2d. 144 (1992), as well as State-Vs-Burnett; 63 S.E.2d 57; and Singleton-Vs.-State; 200 S.E.2d. 507.

OF which was defined by that particular statue, in which said case, the State allowed For Burden-shifting, OF the trier of the facts; to shift the weight OF reasonable

doubt, on the defense, See: State Vs. Tate; ; instead OF the prosecution, being a major Flaw, and procedural error, denieng the applicant; Equal protection OF the

Law; and a Fundamentally Fair trial; see: In Re: Winship in which more and likely the proceedings would have been different, IF

the State had not utilized an illegal-Strategic tactic, OF a political scheme; to shift-the burden OF proof on the defense.

State Of South Cardina
County Of Richland

Nathaniel Mitchell
Applicant

-Vs.-

State Of South Cardina
Respondant

In The Court Of Common Pleas Judicial Circuit

Case No.

Certificate Of Service

FILED
2007 OCT -8 P 12:53
BARBARA A. SCOTT
C.C.C. & G.S.

I, _____. Certify and declare under the penalty of perjury, that I have served on the following address below; on this __ day of sept. 2007; An application for Post-Conviction relief, A motion for disclosure of discovery, a memorandum of Law in support of P.C.R., with Orders of the court of appeals, and a Certificate of Service, by depositing such in the Mc. Cormick Corr.-Inst. Mail room office.

Nathaniel Mitchell

Nathaniel Mitchell;
S.C. Dept. Of Corr.
F-3-B; 128
386 Redemption Way
Mc. Cormick, S.C. 29899

Sworn to and subscribed before me this 10 day of 2007.

Joyce L Yancy
Notary

Exp. 8/28/2011

Original: Honorable Barbara A. Scott;
Clerk Of Court
P.O. Box 2766
Columbia S.C. 29202-2766

57

Nathaniel Mitchell;
S.C. Dept. Of Corr.
F-3-B; 128
386 Redemption Way
Mc. Cormick, S.C. 29897

Nov. 29 2007

Hon. Barbara A. Scott;
Clerk Of Court
P.O. Box 2766
Columbia, S.C. 29202

FILED
07 DEC -3 AM 9:29
CLERK
C.C.P. & G.S.
SCOTT

Re: P.C.R. No. 07-CP-40-693.
Motion for Appointment Of
Counsel

Dear Hon. Scott;

Please, upon reciept of such, please find enclosed, a motion for appointment Of Counsel, with a declaration Of Service, to File, in your office and

a Filed copy of the same returned to me as soon as possible.

With the Kindest Regards,
Nathaniel Mitchell
Nathaniel Mitchell

State Of South Cardina County OF Richland	In the Court OF Common Pleas
Nathaniel Mitchell applicant -Vs.-	_ Judicial Circuit Case No. 07-CP-40-6693
State Of South Cardina respondant	Motion for Appointment OF Counsel

Hence forth, cometh the applicant before this Honorable court, pursuant to Loca, rule(s), to so move before this Honorable Court, according to rule 71.1(D) SCRCP;

for appointment of Counsel, to assist, the applicant, in the prepatory and development of such case, and in all Legal aspects, as at current

Status, the applicant is indigent, and a ward of the State.

Nathaniel Mitchell

State Of South Carolina County Of Richland	In The Court Of Common Pleas
Nathaniel Mitchell applicant	_ Judicial Circuit
-Vs.-	Case No. 07-CP-40-6693
State Of South Carolina Respondant	Declaration Of Service

That I, Nathaniel Mitchell; declare and certify under the penalty of perjury, pursuant to (28 U.S.C.A. 1746), that I have by U.S. postal, postage prepaid, served on the address below, on this _ day of 2007; A Motion for appointment of Counsel, by depositing such in the U.S. postal Services, of Mc. Cormick Corr.-Inst., and that such is True and Correct.
Exacuted on. Nov-29-2007

Nathaniel Mitchell
Nathaniel Mitchell,
S.C. Dept. Of Corr.
F-3-B; 128
386 Redemption Way
Mc. Cormick, S.C. 29899

Orig.; Hon. Barbara H. Scott;
Clerk Of Court
P.O. Box 2766
Columbia, S.C. 29202

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

2007-CP-40-6693

Nathaniel Mitchell,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER GRANTING APPLICANT'S MOTION TO APPOINT COUNSEL AND APPLICANT'S MOTION FOR DISCLOSURE OF DISCOVERY

RICHLAND COUNTY FILED
2008 SEP 11 PM 3:20
BARBARA A. SCOTT C.C.C. & G.S.

This matter came before the Court pursuant to Applicant's Motion to Appoint Counsel and Motion for Disclosure of Discovery. A hearing was held on the matter, on April 15, 2008, at the Broad River Correctional Institution.

A. Applicant's Motion to Appoint Counsel

In Applicant's Motion to Appoint Counsel, Applicant argues that he is indigent and a ward of the state. "The United States Supreme Court has never held that an indigent party has a constitutional right to counsel in a civil case." Ex Parte Robert W. Dibble, et al. v. State of South Carolina, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (citing Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.E.2d 810 (1976)). However, "courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." Id. South Carolina courts have held that "this inherent power must necessarily include the power to appoint lawyers to serve without compensation where it appears reasonably necessary for the court to do justice." Id. Additionally, Section 17-27-60 of the South Carolina Code provides for the appointment of counsel to represent applicants seeking post conviction

relief where the applicant is "unable to pay court costs and expenses of representation, including ...legal services." S.C. Code Ann. § 17-27-60 (1976). Thus, while not constitutionally required to appoint counsel, this Court shall appoint counsel to Applicant if the Court finds him to be indigent.

This Court finds that Applicant is indigent and therefore, entitled to appointment of counsel. Thus, Applicant's Motion to Appoint Counsel **IS GRANTED** and the Court hereby appoints Tricia A. Blanchette to represent Applicant in this matter.

B. Applicant's Motion for Disclosure of Discovery

In non-capital cases, discovery is available if, and to the extent that, the judge in the exercise of discretion and for good cause shown, grants leave to do so. S.C. Code Ann. § 17-27-150(A) (1976). In capital cases, discovery is available. S.C. Code Ann. § 17-27-150(B) (1976). This Court finds that Applicant is entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure. Therefore, Applicant's Motion for Disclosure of Discovery is hereby **GRANTED.**

AND IT IS SO ORDERED this 11th day of September, 2008.

J. Michelle Childs

The Honorable J. Michelle Childs
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Nathaniel Mitchell, #284407, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 2007-CP-40-6693 AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF

The Applicant, by and through appointed counsel, Tricia A. Blanchette, would amend his Application for Post Conviction Relief filed on October 8, 2007 and respond to the State's Return and Motion to Dismiss submitted on March 4, 2008, by making the following allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to raise the statutory indictment issue at the beginning of trial and failure to advise Applicant accordingly. Transcript pp. 680-691.

2. Ineffective assistance of trial counsel for failure to make contemporaneous objections during the trial testimony of Dr. Defelice regarding the forensic interview and treatment of the child witness (N.G.).

3. Ineffective assistance of counsel for failure to move to remove the juror that wrote the court about his/her reaction to the allegations of child abuse and/or move for a mistrial. Transcript p. 135.

4. Ineffective assistance of appellate counsel for failure to properly raise all meritorious issues on appeal, specifically but not limited to the following issues: 1) Failure to address the Jackson v. Denno hearing, 2) Failure to address defense counsel's motion regarding the use of the child witness's video testimony, 3) Failure to address defense counsel's objection to the utilization of pictures during the testimony of Dr. Anne Abel, 4) Failure to address defense counsel's objections to the introduction of testimony regarding prior signs of abuse reported by childcare worker, 5) Failure to address defense counsel's motion for a mistrial due to juror misconduct, and 6) Failure to address the court's ruling to limit the defense's reply witnesses.

Respectfully submitted,

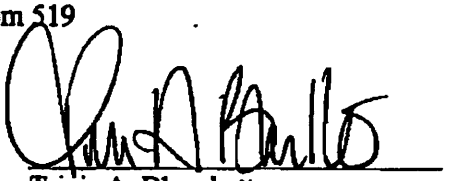
Tricia A. Blanchette
Attorney for Applicant
Post Office Box 12725
Columbia, South Carolina 29211

March 2, 2012
Columbia, SC

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Nathaniel Mitchell, #284407,)	2007-CP-40-6693
Applicant,)	
v.)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
Respondent.)	

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I that I hand delivered this 2ND day of March 2012, a copy of an Amendment to Application for Post Conviction Relief to Robert D. Corney of the Attorney General's Office, at:

Office of the Attorney General
Att: Robert D. Corney, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Applicant

March 8, 2012

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Nathaniel Mitchell, #284407,)	2007-CP-40-6693
Applicant,)	
v.)	MOTION FOR ABEYANCE
)	AND/OR DISMISSAL
State of South Carolina,)	WITHOUT PREJUDICE
Respondent.)	
)	

2012 JAN 23 PM 4:21
JEAN H. TOAL BRADE
C. Price C.C.P.

COMES NOW the Applicant, by and through his undersigned appointed attorney, and requests that this Court hold his Post Conviction Relief Application in abeyance and/or enter a dismissal without prejudice due to a matter of newly discovered scientific evidence that should be raised pursuant to Rule 29(b), SCRCrimP, in the Court of General Sessions.

This matter comes before the Court by way of an Application for Post Conviction Relief filed on October 8, 2007. The State submitted a Return and Motion to Dismiss on or about March 4, 2008. On April 15, 2008, a hearing was held at Broad River Correctional Institution in front of the Honorable J. Michelle Childs on the Applicant's Motion to Appoint Counsel and Motion for Discovery. On September 11, 2008, the Honorable J. Michelle Childs issued an Order Granting Applicant's Motion to Appoint Counsel and Applicant's Motion for Disclosure of Discovery. By way of said Order, undersigned counsel was appointed to represent the Applicant.

In or around March 2011, Applicant's counsel reviewed and discussed the attached article regarding Shaken Baby Syndrome published by the New York Times with the Applicant, Brian T. Petrano, Assistant Attorney General, and provided a copy to Lesley M. Coggiola, Esquire (trial counsel). Applicant's counsel also has made repeated

attempts to meet with and/or discuss this article with Douglas S. Strickler, Esquire (trial counsel). Applicant's counsel was successful in reaching Dr. Patrick Barnes featured in the article, and he assisted counsel in contacting several of his colleagues. Unfortunately, counsel was not able to move forward with Dr. Barnes or his colleagues since she does not have access to the records needed for their review or the financial resources to obtain their services.

In August 2011, Applicant's counsel was finally given the opportunity to review the Richland County Public Defender's Office. Upon review, it was clear that significant time and financial resources were invested in pursuing a defense expert on shaken baby syndrome for trial, but trial counsel was limited by the accepted scientific theories regarding shaken baby syndrome. It also appears that trial counsel had access to the materials needed for an expert to review the Applicant's case, along with the knowledge of what theories and/or avenues were previously pursued on the Applicant's behalf. Clearly, trial counsel and/or the Richland County Public Defender's Office are better situated to pursue a claim of newly discovered evidence on the Applicant's behalf[1].

Furthermore, counsel submits that this matter of newly discovered evidence should be presented and resolved in the Court of General Sessions prior to addressing claims of ineffective assistance of counsel via Post Conviction Relief in the Court of Common Pleas. Simply put, this matter is not ripe for adjudication in the forum of Post Conviction Relief in the Court of Common Pleas. Therefore, the Applicant, through counsel, would respectfully request that this Court either hold the Application for Post

[1] As appointed PCR counsel for the Applicant, counsel does not have access to discovery materials or financial resources without Order from the Court and approval of the S.C. Commission on Indigent Defense. Furthermore, the Commission of Indigent Defense has previously suspended funding for PCR

Conviction Relief in abeyance or dismiss the Application **without prejudice** until the resolution of a Motion pursuant to Rule 29(b), SCRCrimP, in the Court of General Sessions. Additionally, Applicant, through counsel, would respectfully request that this Court remand the Applicant's case to Court of General Sessions and direct the Richland County Public Defender's Office to reopen the Applicant's case to address the matter of newly discovered scientific evidence[2].

I so move,

Tricia A. Blanchette
Attorney for the Applicant
PO Box 12725
Columbia, SC 29211

I consent,

Nathaniel Mitchell
Applicant

January 16, 2012
Columbia, South Carolina

---

appointments, which is a serious concern in retaining renowned experts from out of state that require payment for their services.

[22] Since counsel is appointed for the limited purposes of Post Conviction Relief in the Court of Common Pleas, counsel cannot file a Motion pursuant to Rule 29(b), SCRCrimP, in the Court of General Sessions, without appointment in the Court of General Sessions for the limited purposed of filing the Motion and transferring the case to the Richland County Public Defender's Office. Therefore, if the Court only has jurisdiction to hold the Application in abeyance or dismiss it without prejudice, the Applicant, through counsel, respectfully asks that the Court take some measure to ensure that the Applicant's case is properly transferred by to the Richland County Public Defender's Office for the resolution of the matter of newly discovered evidence.

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Nathaniel Mitchell, #284407,)	2007-CP-40-6693
Applicant,)	
v.)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
Respondent.)	

JEANETTE W. McBRIDE
C.C.P. & S.S.
2012 JAN 23 PM 4:21
FILED

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail on this 17th day of January 2012, a copy of Motion for Abeyance and/or Dismissal Without Prejudice, with postage prepaid and the return address clearly shown on said envelope to the Office of the Attorney General at:

Office of the Attorney General
ATT: Brian Petrano, Ast. AG
P.O. Box 11549
Columbia, SC 29211

Tricia A. Blanchette
Attorney for Applicant
PO Box 12725
Columbia, SC 29211

January 17, 2012

The New York Times Reprints

This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers here or use the "Reprints" tool that appears next to any article. Visit www.nytreprints.com for samples and additional information. Order a reprint of this article now.



February 2, 2011

Shaken-Baby Syndrome Faces New Questions in Court

By EMILY BAZELON

At 4 months, Noah Whitmer was an easy baby. *Super tranquilo,* remembers Trudy Eliana Muñoz Rueda, who took care of Noah at her home day care center in Fairfax County, Va. Rueda and Noah's mother, Erin Whitmer, both noticed when he stopped taking his bottle well and napping as usual in the middle of his fifth month, in April 2009. Whitmer thought this was because Noah had just started eating solid food. She and Rueda talked about it early on April 20, both of them hunched over Noah in his car seat when Whitmer dropped him off.

That afternoon, after a morning in which Noah didn't nap and drank only a couple of ounces of formula, Rueda says she prepared a bottle for him while he lay on a mat. In her native Peru, Rueda, who is 46, ran a travel agency and taught college courses for prospective tour guides. Her husband was trained as a lawyer. After they moved to the United States in 2001, the couple had a second child, and three years later Rueda converted her basement into a home day care center so she could work while spending time with her two kids. When Rueda sat down to feed Noah, her 13-year-old daughter was at school, her 5-year-old was upstairs watching TV and the four other children in her care were taking naps. Rueda's sister-in-law, who spent the morning with the children while Rueda was at a doctor's appointment, had just left the house. "Everything was calm and quiet," Rueda, who has soft features and dark hair, told me in Spanish while her lawyer translated.

There are two irreconcilable versions of how that calm shattered. Rueda says that Noah was crying, and she picked him up, sat on the couch and gave him the bottle to help put him to sleep. While she was feeding him, she felt Noah's arm go limp, and when she moved to take the bottle out of his mouth, he made a sound that she didn't recognize. "I could tell something was happening," she says. She stood up and put Noah on her shoulder, patting him on the back. "As I did this, his body tensed up in a ball. It was as if he was looking for air, and he couldn't breathe." Rueda put Noah on the floor and started C.P.R., at the same time reaching for her phone to call 911. She put the dispatcher on speakerphone so she could keep tending to Noah. "I said, 'Please, please get someone here,' " she said. "I knew it could hurt him if there wasn't enough oxygen going to his brain."

Erin Whitmer's account of the moments before Noah lost consciousness is entirely different. "Around 2:30 on April 20, 2009, Noah was shaken," she wrote on her blog Noah's Road, on the one-year anniversary of the incident. "He'd been crying. He needed something that his day care provider wasn't providing him. Maybe he was tired of lying on the mat where she'd had him. Maybe he needed a hug, a laugh, a kind touch. Instead, she picked him up, her fingers gripping him tightly, feeling the softness of his velour pants and his cotton onesie under her fingers, and she shook him."

Whitmer's account of what Rueda must have done to Noah was based on evidence presented at Rueda's trial and information from the doctors who treated him after he was rushed to Inova Fairfax Hospital. The doctors gave Noah a CT scan, which showed subdural hemorrhaging (bleeding in a space between the skull and the brain) and an ophthalmological exam revealed retinal hemorrhaging (bleeding at the back of the eyes). Also, his brain was swelling. For decades, these have been the three telltale signs linked to the kind of child abuse commonly called shaken-baby syndrome.

Noah had no external marks on his body — no bruises or cuts or fractures, no sign that he was forcefully gripped and no evident neck injury that would seem to result from vigorous shaking. But an M.R.I. confirmed the CT scan findings and showed that the subdural bleeding was extensive. The doctors at Inova Fairfax tested Noah for clotting disorders that can cause these kinds of hemorrhages. The tests came back negative. The doctors told Erin and Michael Whitmer, who are both 32, that they strongly suspected Noah was violently shaken in the moments before he stopped breathing. While Noah lapsed into a coma, police went to question Trudy Rueda. A day later, Rueda was arrested. She was charged with two felony counts: abuse of a child causing serious injury and cruelty to a child.

Before April 20, 2009, Noah was a healthy baby. Trudy Rueda also had nothing suspect in her past. In five years as a day care provider, she had a pristine record with state regulators — she had taken the classes required for her license and extra ones as well. She cared for a boy with autism and a girl with one arm, reportedly with calm and assurance. "She was more patient than all of us," one mother testified at Rueda's trial. A second said, "What she's accused of now I could not begin to imagine Trudy doing." And yet Noah emerged from her home with terrible and permanent injuries.

Between 1,200 and 1,400 children in the United States sustain head injuries attributed to abuse each year. Most of them are less than a year old. Usually, there's not much dispute that these children were abused, because doctors discover other signs of mistreatment — cuts, bruises, burns, fractures — or a history of such injuries. There is no exact count of shaken-baby prosecutions, but law-enforcement authorities think that there are about 200 a

year. In an estimated 50 percent to 75 percent of them, the only medical evidence of shaken-baby syndrome is the triad of internal symptoms: subdural and retinal hemorrhage and brain swelling.

For a year after Noah came out of his coma, he had as many as 32 seizures a day. Now he is 2, and his parents watch as his 1-year-old brother surpasses him developmentally. Noah sometimes nods his head "yes" and gives high fives, but he is not yet talking; doctors are not sure of his cognitive prognosis. Erin Whitmer, a slender woman with large brown eyes who chose Rueda for part-time day care after a careful search, cried when she found out that Rueda had been arrested. Now she says, "It will never completely leave me, the horror that I trusted my son with someone and she did this to him."

At Rueda's trial in January 2010, the prosecutor presented six doctors who testified that Noah's brain scans showed he had been abused. The doctors' reading of the scans were the main evidence that a crime had taken place, of its timing and even of Rueda's state of mind, since they agreed that only an act of great violence could inflict such injuries. Two doctors who treated Noah in the hospital said that the baby's scans showed that he had an acute subdural hemorrhage — the bleeding had begun suddenly — which was, as one doctor stated, "inconsistent with accidental trauma." Another witness, Craig Futterman, a doctor at Inova Fairfax and president of the board of the Shaken Baby Alliance, put it more bluntly, "This child was shaken, or shaken and slammed against something."

The usual explanation for how a caregiver can become an abuser is that in a moment of intense frustration, she snaps. The prosecutor, Gregory Holt, imagined for the jury a scenario in which Rueda was aggravated that she could not get Noah to stop crying: "Put him on the mat, put him on the chair, he's not drinking his milk. Getting a little bit frustrated?" And he claimed that Rueda confessed to shaking Noah.

On the day of Noah's injuries, Rueda spoke to the police without a lawyer and denied hurting him. The next day, Joslyn Waldron, a social worker for Virginia's Child Protective Services, visited Rueda at home. Waldron knew that Noah's doctors at Inova Fairfax suspected that he had been abused because of his symptoms. She and Rueda spoke together in Spanish while a detective, who did not speak Spanish, was present. At the trial, Waldron testified that Rueda confessed to shaking Noah when he was crying and before she gave him a bottle. The social worker said she wrote in her notes, "Might have shaken him about three times, but not sure" (using a standard Spanish word, *sacudir*, for shake).

As is protocol in her department, Waldron offered to tape the interview; Waldron says Rueda declined. Rueda has denied telling Waldron that she shook Noah. At the trial, she

testified in heavily accented, halting English, frequently interrupting herself because she didn't understand the questions. Rueda said that she told Waldron, "I probably moved kind of rough with Noah," at the moment that she lifted him to give him the bottle, but that she had not gotten frustrated with the baby or harmed him.

When her lawyer asked her what she thought happened to Noah, Rueda answered: "I imagine the parents, we all want to know what happened. But I cannot give you an explanation about what I don't know."

The Whitmers dismissed Rueda's denials of guilt. "It's a complicated thing to look at someone who always smiled at you, to know that your baby loved her, and to know that because of her, you struggle each day to adapt to a new sense of reality," Erin Whitmer wrote on her blog, which has had more than a million visits, after Rueda's first criminal hearing. Michael Whitmer expressed his rage at Rueda's next hearing by wearing a T-shirt he made. On the back is a picture of Noah taken in the hospital, with tubes coming out of his mouth and the words: "Ask me what happens when you shake a baby."

At the trial, the prosecution presented one more piece of testimony against Rueda. The pediatrician who saw Noah in the I.C.U. told the jury that given the severity of the baby's injuries, their "onset would have been very rapid, so it would have been within minutes of when the injury occurred." This meant that the person with the baby right before he stopped breathing — Rueda — was necessarily the guilty party.

Rueda's lawyer didn't challenge this assumption directly. Medical experts, however, have begun to point out that clinical observations show that it's possible for a child to have a brain injury and still remain conscious. The child may be lethargic or fussy or may not eat or sleep normally for hours or days, while the subdural hemorrhage and other injuries become more serious, ending in acute crisis. This has made some doctors wary of pinpointing the timing of a child's injury — even when they are sure that abuse occurred — lest the wrong adult take the blame. "The police want us to time it within one to three hours," says John Leventhal, a Yale pediatrics professor and medical director of the child-abuse programs at Yale-New Haven Children's Hospital. "But sometimes we can only time it to within days."

In this case, because Rueda had been at the doctor that morning and her sister-in-law stayed to help with lunch, she spent only about an hour alone with the children in the day care center before calling 911. Arguing that another adult had harmed Noah would have meant implicating Rueda's sister-in-law, whom Rueda says she has never suspected, or the Whitmers, whom no one has accused. Rueda, her husband and their lawyers decided not to take this tack. The defense relied primarily on Ronald Uscinski, a neurosurgeon on the

1122

faculty of the medical schools of George Washington University and Georgetown. When he took the stand, Uscinski refuted all the prosecution experts who said that Noah's hemorrhaging was acute — the sudden result of a new injury. Uscinski testified that he saw chronic subdural bleeding on the scans, which he said was the result of trauma at birth. "Rebleeds" like Noah's, he testified, "can occur with minimal or no trauma. They can occur spontaneously." On cross-examination, Uscinski said that he earned approximately $200,000, which was about 30 percent of his income, as an expert witness in 2009.

For the prosecution, Cindy Christian, a pediatrics professor at the University of Pennsylvania, who has published extensively about shaken-baby syndrome, rejected Uscinski's reading of Noah's brain scans. "That's false, he did not have a rebleed from a chronic hematoma from birth," she said. "There was no evidence of that."

After five days of testimony, the jury deliberated for five hours and voted to convict. Virginia's sentencing guidelines called for a minimum sentence of 3 years and a maximum of 15. The jury recommended 10½ years and Erin and Michael Whitmer took the stand in support of that punishment. "This is a life sentence for my son, for my wife, for me, and for our family," Michael Whitmer told the jury.

"Really still, now, I can't comprehend it," Rueda told me, looking wan and bereft when I visited her at the Fluvanna Correctional Center for Women in Virginia. Rueda's daughters have gone to live with her older sister in Peru while her husband works extra hours to support the family and pay for her appeal. Rueda can rarely speak to her children."It is so hard to talk about this separation," she said, and started to cry.

A dozen years ago, the medical profession held that if the triad of subdural and retinal bleeding and brain swelling was present without a fracture or bruise that would indicate, for example, that a baby had accidently fallen, abuse must have occurred through shaking. In the past decade, that consensus has begun to come undone. In 2008, the Wisconsin Court of Appeals, after reviewing a shaken-baby case, wrote that there is "fierce disagreement" among doctors about the shaken-baby diagnosis, signaling "a shift in mainstream medical opinion." In the same year, at the urging of the province's chief forensic pathologist, the Ontario government began a review of 142 shaken-baby cases, because of "the scientific uncertainty that has come to characterize that diagnosis." In Britain, after one mother's shaken-baby conviction was overturned, Peter Goldsmith, then attorney general, reviewed 88 more cases. In 2006, he announced doubts about three of the convictions because they were based solely on the triad; in the other cases, Goldsmith said, there was additional evidence pointing to the defendant's guilt.

A small but growing number of doctors warn that there can be alternate explanations — infections or bleeding disorders, for example — for the triad of symptoms associated with shaken-baby syndrome. Across the country, the group of lawyers that has succeeded in exonerating hundreds of people based on DNA evidence is now mounting 20 to 25 appeals of shaken-baby convictions. "No one wants child abuse," says Keith Findley, a lawyer for the Wisconsin Innocence Project. "But we should not be prosecuting and convicting people in shaken-baby cases right now, based on the triad of symptoms, without other evidence of abuse. If the medical community can't agree about all the conflicting data and research, how is a jury supposed to reach a conclusion that's beyond a reasonable doubt?"

Much of the science of shaken-baby syndrome dates from the late 1960s, when a neurosurgeon named Ayub Ommaya conducted a brutal animal experiment to figure out how much acceleration it took to cause a head injury. Ommaya took more than 50 rhesus monkeys and strapped each one into a chair mounted on wheels, leaving their heads unsupported. He placed the chair on a 20-foot-long track, and an air-powered piston sent the monkeys zooming into a wall. Fifteen emerged with some kind of cerebral hemorrhage. Eight of those also had injuries to the brain stem or cervical cord.

Ommaya's experiment involved neither shaking nor infants. Still, two pediatric specialists, John Caffey and A. Norman Guthkelch, each wrote a paper that pointed to the work as evidence that unexplained subdural bleeding in babies could occur without direct impact to the head and with or without a visible neck injury. In the 1980s, the term "shaken-baby syndrome" came into broad use, and a national prevention and awareness campaign was set in motion.

As the diagnosis of shaken-baby syndrome took hold in medicine, and prosecutors began to bring charges based on it, doctors testified that shaking could generate the same terrible force as throwing a child from a second-story window. It turned out they were wrong. In 1987, a neurosurgeon named Ann-Christine Duhaime published a paper that included the autopsy results of 13 babies with symptoms associated with shaken-baby syndrome. In all of them she found evidence of trauma that was actually caused by impact. She teamed up with biomechanical engineers to create infant-sized dummies equipped with sensors to measure acceleration. "We shook them as hard as we could, and we thought something was wrong, because the accelerations we measured were unexpectedly low," Duhaime says. Instead, the force level shot up when the testers released the dummies after shaking them, even if they hit a soft surface like a bed or a couch.

Later experiments confirmed this finding and have made some doctors and biomechanical engineers skeptical that shaking alone can cause severe brain damage or death. At the same

time, the experiments have not ruled this out, Duhaime says. Among other things, the dummies are not live children, and while their heads and necks can exhibit the effects of acceleration, impact on brain tissue is still hard to model.

Many doctors who treat child abuse say that decades of clinical observation, as well as confessions, show that it's possible for shaking alone to cause the triad of subdural and retinal bleeding and brain swelling. A 2009 position paper from the American Academy of Pediatrics, written by Cindy Christian, recommends that doctors use the more general term "abusive head trauma" but also calls shaking an "important mechanism" of such trauma. Many doctors who testify for the defense agree that shaking could in theory cause the triad of symptoms but only if there is an injury to the neck or spinal cord, "where the breathing center is," as one doctor puts it. It's the absence of signs of this kind of an injury that makes some shaken-baby cases particularly fraught.

In 1993, Audrey Edmunds left her job as a secretary and started caring for children in her home near Madison, Wis. Like Trudy Rueda, Edmunds says that a baby she was taking care of, 7-month-old Natalie Beard, suddenly collapsed while drinking a bottle of milk; Natalie was propped up with the bottle in a car seat while Edmunds was out of the room getting her two daughters and another child ready for preschool. In the hospital, a CT scan showed that Natalie had the triad of shaken-baby symptoms but no spinal-cord injury. The baby died, and the doctors agreed that Edmunds, who was pregnant with her third child, had to be responsible. She was charged with first-degree reckless homicide.

At Edmunds's trial, a librarian testified that she once heard a thump and then the cries of a child who was with Edmunds, but she didn't see what had happened. Edmunds denied ever harming a child in her care. Her neighbors testified to her calm around children. Natalie "was a real fussy baby," one said, "but Audrey was very patient with her." Another day care provider in the neighborhood said, "I looked up to Audrey . . . when I started doing my day care."

Still, the prosecution's medical experts said that only Edmunds's violence could explain Natalie's injuries. A forensic pathologist, Robert Huntington, testified that the baby most likely had been abused at some point during the two hours before her collapse — which was when she was with Edmunds. The jury convicted Edmunds, and she was sentenced to 18 years; she went to prison two days after her youngest daughter's first birthday.

A decade later, Edmunds had a hearing to determine whether she should have a new trial. Huntington this time took the stand on her behalf. When Keith Findley, her lawyer, asked whether Huntington was comfortable with his 1996 testimony, the pathologist said, "No, sir,

no I am not." He explained that in the years since her trial, he observed a child with subdural and retinal bleeding who was lucid for a period between her brain injury and her collapse. After that, he returned to the medical literature and found research to support this possibility. Huntington now believed that a "lucid interval is a distinct, discomforting but real possibility." He said he could no longer precisely time the injury that caused Natalie's death. For how long could Natalie have appeared relatively normal — fussy, but not obviously in crisis? "I'm sorry, I just don't know," Huntington said.

Huntington's change of heart reflects a new explanation for the manifestation of brain injury in babies. In a 2001 study, the British neuropathologist Jennian Geddes found that most babies with the triad of shaken-baby symptoms suffered not from a rupture of the nerve fibers of the brain but rather from a lack of blood caused by oxygen deprivation to the brain's cells.

The rupture of the brain's nerve fibers is immediate and produces instant coma; the effects of oxygen deprivation can be slower and more subtle. This can explain how a child with the triad of shaken-baby symptoms could, for some period of time, seem fussy or lethargic or stop eating or sleeping well. In 2005, Christian co-wrote a study that concluded, "Although infrequent, young victims of fatal head trauma may present as lucid before death."

This possibility introduces questions about whether the last person to care for a child before he or she stops breathing is necessarily guilty of abuse. In most cases of assault or murder, jurors could weigh this doubt in light of other evidence — witness testimony, perhaps, or the motive the defendant would have had to commit the crime. In shaken-baby cases, however, this kind of additional evidence is often absent. Doubts raised about the medical testimony loom large because it's so central to the prosecution.

At Edmunds's hearing for a new trial, five doctors joined Huntington on the side of the defense. Opposing them were four doctors for the prosecution. The Wisconsin Court of Appeals ruled in January 2008 that the disagreement among the physicians represented a shift in medical opinion and warranted a new trial: a jury would have to hear both sides. Edmunds called her daughters to tell them she was coming home. Six months later, prosecutors dropped the charges against her.

Audrey Edmunds's successful appeal was built on a foundation laid by defense lawyers a decade earlier in the first big courtroom fight over shaken-baby syndrome. In that case, prosecutors in Massachusetts charged an English au pair, Louise Woodward, with the murder of 8-month-old Matthew Eappen, who stopped breathing in her care. Matthew had the triad of shaken-baby symptoms, along with a skull fracture. Woodward, who was 19, told

the police that she shook Matthew lightly when she couldn't wake him from a nap. Prosecutors decided that the shaking must have been violent. They also said that to cause the skull fracture, Woodward must have smashed Matthew's head on a hard surface at a velocity of more than 25 miles per hour.

Woodward's lead counsel was Barry Scheck, who went on to found the Innocence Project at Cardozo law school with Peter Neufeld. He enlisted seven medical experts, including Ommaya, the neurosurgeon who experimented with the rhesus monkeys, and Ronald Uscinski, a colleague. The defense's theory was that Matthew's skull fracture was three weeks old when he died, and that because of it, a slight jarring could have caused his fatal bleeding. Scheck didn't try to explain how the fracture happened. "We didn't know, so we didn't claim anything," he told me. But the defense experts testified that because tests showed no swelling at the site of the fracture, it had to be old.

The prosecution, for its part, lined up the doctors who treated Matthew at Children's Hospital in Boston. Among them was Patrick Barnes, then a pediatric radiologist at Children's. He had written, with another doctor, a chapter in a textbook that embraced the traditional theory of shaken-baby syndrome and shared the assumptions that pointed to Woodward's guilt.

Barnes testified for the prosecution at the trial, saying Matthew's brain scans showed his injuries were a result of shaking as well as a skull fracture. The prosecutors also asked Barnes to help them prepare for their cross-examination by briefing them on what to expect from the defense's doctors. He spent evenings watching Court TV tapes of their testimony. He heard doctors from fields other than pediatrics — biomechanics, neurosurgery and neuropathology — discuss scientific findings about traumatic brain injury that contradicted his belief in the traditional method for diagnosing shaken-baby syndrome. He started to question his assumptions. "I'd been in lockstep with the child-abuse establishment for 20 years," he told me. "For the first time, I saw that there were well-qualified experts on the other side giving opinions I'd never heard, that I knew nothing about."

Woodward's case ended in a stalemate. After the jury found her guilty of second-degree murder, the judge reduced the conviction to involuntary manslaughter and released her for time served. But a lasting legacy of that case was the eventual conversion of Patrick Barnes from an upholder of the medical orthodoxy surrounding shaken-baby cases to one of its strongest critics.

After Woodward's trial, Barnes continued to think about his newfound doubts. He read widely in the medical literature. He started to look at brain scans brought to him by defense

lawyers. In a New York case in which a father was being prosecuted, Barnes says, he found strong support in the medical literature for a diagnosis of infant stroke, which he thought was likely related to an infection like meningitis. Now he says that he sometimes sees other explanations for the triad of symptoms. "There are a number of things you have to look for in these children — infections, bleeding and clotting problems," Barnes says. "Even now, I am most concerned about looking very carefully for predisposing or complicating medical conditions, in particular for infants younger than 6 months."

Trudy Rueda's lawyer asked Barnes to review Noah Whitmer's brain scans before her trial. Barnes wasn't able to testify because of a scheduling conflict, but he says the scans indicate that the baby had a thrombosis — a blood clot within a blood vessel. The prosecution's doctors saw the thrombosis, too, but they claimed it was a result of abuse. To Barnes, the clotting suggested infant stroke, which can be triggered by an infection. He says the fact that Noah was not taking a bottle or napping normally in the days before he was hospitalized suggests that his condition could have been subtly deteriorating during that time. "It's a very striking pattern," Barnes says of the thrombosis. "The baby not eating well may reflect the process which starts this. Usually, it's not a process that happens acutely and the baby crashes. It can start relatively slowly."

Barnes also testified at Audrey Edmunds's hearing challenging her conviction. He said that it was difficult to know for sure what had happened to Natalie Beard based on her scans; at the time of her death, hospitals were using CT scans, rather than also using M.R.I.'s, which provide more detail. But he did say that he saw the possibility of a thrombosis.

To a degree, some of the alternative explanations from defense-side doctors are accepted in the child-abuse field. A 2009 textbook that Cindy Christian co-edited includes a discussion of diseases and accidental injuries that can mimic the effects of abusive head trauma. Leventhal, the Yale pediatrician, told me about an unusual case involving an accidental fall. "A child who was sitting in a highchair and put his feet up on the table in front of him and rocked himself backward," Leventhal said. "When the child was taken to the hospital, the ophthalmologist said, 'This is shaken baby,' because of the massive retinal bleeding. Luckily, there were seven people playing cards in the room when the baby fell." Leventhal continued, "The subdural hematoma continued to bleed, and it turned out he had a previous bleeding disorder, a clotting problem."

Leventhal and others in the child-abuse field emphasize that such hemorrhaging as a result of a fall is very rare. In order for doctors to determine what caused an injury, they begin with a list of alternatives, ruling out the ones that don't match a patient's symptoms until they arrive at a diagnosis, with a reasonable degree of medical certainty. But defense-side doctors

like Barnes say that in a criminal case, physicians should be more careful about testing their assumptions, and they should give the possibility of an alternative explanation — a stroke, say, caused by an infection — more weight.

It's on this question of probable causes that the doctors who testify in these cases split. Prosecution-side experts rely on a set of studies that indicate that when children have subdural bleeding and extensive retinal hemorrhaging, they are far more likely to have been abused than injured in any other way. In a 2010 paper in Pediatrics, Christian and the pediatric ophthalmologist Alex Levin concluded that the evidence supporting the "diagnostic specificity" of "severe" retinal hemorrhaging has significantly increased. "Some children have such severe retinal hemorrhaging that it is much more likely to be from abusive head trauma," Christian told me. She testified to this at Rueda's trial, because Noah Whitmer had severe retinal hemorrhaging. Levin similarly called Natalie Beard's retinal bleeding "textbook severe" when he testified for the prosecution at Audrey Edmunds's 2007 hearing. When the prosecutor asked him how significant these findings were for diagnosing shaken-baby syndrome, Levin answered: "Very important. We really don't have any other cause for this particular kind of hemorrhaging and retinal findings."

Defense experts, however, criticize the methodology of these studies. And even taken at face value, they say, the studies show that severe retinal hemorrhaging is far more common in abuse cases, not that it's never found in any other circumstance. At the 2010 meeting of the American Academy of Forensic Sciences, the Canadian forensic pathologist Evan Matshes presented the results of a study, under peer review, of 123 autopsies performed on infants in Miami-Dade County who died under natural or accidental circumstances, or from homicides. Of the children with retinal hemorrhages, 53 percent died from accidental or natural causes, and 47 percent died as a result of homicide. Severe retinal hemorrhages were identified in some of the children in the accident group. Although the children in the homicide group were more likely to have severe retinal hemorrhages than the other groups, this finding could be explained by factors other than abuse, according to Matshes. The children in the homicide group had isolated head injuries and were more likely to be resuscitated for a period of time, he says. In the aftermath, they were more likely to develop brain swelling and bleeding disorders that may explain the severe retinal hemorrhaging. Matshes puts his conclusions like this, "It is simply incorrect to state that severe retinal hemorrhaging is diagnostic of abuse or shaking." He is now working on a study that looks at whether infants with subdural and retinal hemorrhaging might in fact have neck injuries, which could indicate shaking, that go undetected, because doctors haven't looked in the right place for them. Matshes and his team are conducting autopsies of the entire cervical spinal column, which is not usually dissected in shaken-baby cases. The goal is to determine

whether injuries there could explain how shaking can cause brain damage or death — and whether this additional diagnostic tool might one day help distinguish which babies have in fact been abused, and which have subdural and retinal bleeding from other causes.

Underlying the clash over the medical research on shaken-baby syndrome is another one about human nature. How likely is an adult with no history of wrongdoing to do terrible harm to a child by violently shaking it? To pediatricians like Leventhal and Christian, the sad answer, born of experience, is that such a lapse is all too possible. When I described Trudy Rueda's case to Leventhal, he told me about cases in which he had met and liked a parent or caregiver who ended up confessing to harming a child. Was there truly *no* indication that the adult in question was capable of such an act? The doctors who treat abused children insisted that sometimes, there isn't. They described disturbing confessions, like one that made headlines in Florida last year after a 22-year-old mother told the police that she had shaken her 3-month-old baby and perhaps caused him to hit his head, because he wouldn't stop crying while she was playing FarmVille. Leventhal cites a 2010 study that included 29 people who confessed in the French courts to shaking infants and who described the abuse as extremely violent.

Doctors like Barnes, on the other hand, emphasize that confessions are not always reliable. The exonerations of recent years have shown that people sometimes falsely admit to crimes because of police pressure or the promise of a plea bargain. In the first case from Canada's shaken-baby inquiry to reach the Ontario Court of Appeal, the judges overturned the conviction of Dinesh Kumar, a 44-year-old father who pleaded guilty to shaking his 5-week-old son to death. Kumar says now that at the time of his guilty plea, he believed he had no hope of prevailing against the damning testimony of the state's pathologist, who has since been discredited for giving error-riddled testimony based on botched autopsies.

In response to the critics who question the basis for some shaken-baby convictions, many in the child-abuse-treatment field have fired back with a critique of their own. Christian and Leventhal dismiss defense-side experts' alternate explanations, like Uscinski's theory that children suffer spontaneous rebleeds from birth injuries. "Every year they come up with a new alternate theory that we have to refute," Christian says.

Normally, of course, this is how science progresses: One researcher comes up with a hypothesis, which others question and test. But shaken-baby cases are haunted by the enormous repercussions of getting it wrong — the conviction of innocent adults, on the one hand, and on the other, the danger to children of missing serious abuse. In one study, researchers looked into the deaths of five children who had head injuries that initially were misjudged to be accidents and found that four of them could have been prevented if an

earlier pattern of abuse had been detected. If parents are the focus of a shaken-baby investigation, doctors must weigh this risk in helping the state determine whether a child should be removed from the home. "When babies are sent home with an injury that's misattributed to an accident, we know that one-quarter to one-third of them will come back with another serious injury or, in some cases, death," Leventhal says.

Barnes, who is now part of a child-abuse-protection team at Stanford, doesn't dispute the need to investigate shaken-baby symptoms. But he says that most of his colleagues don't present the science dispassionately. "They have built their careers, their entire standing on this issue." His opponents, for their part, dismiss the defense experts as hired guns. "They're aggrandizing themselves and making a lot of money testifying," says Robert Block, the president-elect of the American Academy of Pediatrics. While it's true that experts like Uscinski can make six figures a year testifying (he says he testifies free when a defendant cannot afford to pay him), it's also the case that some witnesses for the prosecution are paid. Barnes no longer takes fees to testify in either criminal or custody cases. Neither did four of the other five defense experts who testified for Audrey Edmunds.

Last September, the fight among the doctors broke out in public on the Web, after Deborah Tuerkheimer, a former prosecutor and a law professor at DePaul, wrote a New York Times Op-Ed warning of wrongful convictions and calling on the National Academy of Sciences to referee the shaken-baby-syndrome dispute. On the Web site CommonHealth, about 20 doctors commented, mostly to express outrage. One of them was Block. He wrote that Tuerkheimer had "been beguiled by a group of physicians who are using the courtroom to distort science, facts and reality." And he denounced her for "furthering the cause of the so-called innocence project."

Philipp Baumer was born after a difficult delivery and spent his first week in the newborn -intensive-care unit. His mother, Victoria, who had given up her last baby for adoption, struggled with drug addiction. Her sister Julie, who was 27 and a loan officer for a mortgage company, was helping take care of Victoria's oldest child. She volunteered to adopt Philipp. "I didn't want to see anyone else leave the family," she told me in November when I met her in Ann Arbor, Mich.

When Philipp came home, neither Julie Baumer nor her parents could get him to take a bottle regularly. On Oct. 3, 2003, when he was 6 weeks old, Philipp was not able to keep down food for 12 hours, Baumer says. She called his pediatrician, who sent her to the emergency room at Mount Clemens Regional Medical Center outside of Detroit.

The E.R. doctor who saw Philipp found he was dehydrated and septic, gave him fluids and antibiotics and ordered a CT scan. But the test was canceled when Philipp was scheduled for transfer to the region's specialty facility for pediatrics, Children's Hospital of Michigan in Detroit. At Children's, Philipp went straight to intensive care. But he waited 28 hours for the CT scan. By then, Philipp had been in the hospital for a total of 33 hours. The scan showed subdural bleeding, which was so extensive that his fontanelle (the soft spot on a baby's head) was bulging. An ophthalmologist saw retinal bleeding. Philipp also had a skull fracture, although it was not near the site of the hemorrhage. In an emergency operation, a shunt was placed to relieve the pressure on Philipp's brain, but it was too late to prevent severe damage. Philipp, who is now 7, has cerebral palsy; he cannot walk on his own, talk or see.

Four months after Philipp's injuries occurred, Julie Baumer was charged with child abuse in the first degree. The prosecutor didn't present a theory about why Baumer would have harmed Philipp, saying that it was the state's job to show that Baumer intended to shake the baby, not what motivated her. Two doctors from Children's Hospital testified for the prosecution: Steven Ham, the neurosurgeon who put in the shunt; and Cristie Becker, a radiologist who treated Philipp later. Becker said Philipp's injuries were inflicted by shaking and timed them to "likely within 24 hours" of the CT scan. She said the skull fracture may have been an old birth-related injury. Looking at the scan, Ham said the fracture was new and that Philipp's injuries were the result of blunt-force trauma that occurred "within the previous 12 to 24 hours." He said he could pinpoint the timing based on "how sick the child was, and then the fact that in looking at the scan we could see fresh blood in the scan."

Becker and Ham didn't note in court that their 24-hour time frame meant that Philipp would have started hemorrhaging while he was at Children's — and no longer in Baumer's care. (When I called Becker, she said, "I don't care to revisit that issue, and best of luck trying to find the truth in the midst of that trial." Ham did not return my calls.) Baumer's trial lawyer failed to point out this flaw in the prosecution's case. The lawyer also did not find a defense expert who could read Philipp's brain scans. Baumer had no money to hire one, and her lawyer didn't know that he could have asked for court funds to cover the expense. In 2005, Baumer was convicted and sentenced to 10 to 15 years.

Baumer was raised Catholic, and in 2007, a nun saw her name on a prayer list and came to visit her in prison. When she heard her story, the nun asked Baumer if she needed a new lawyer and wrote on her behalf to Charles Lugosi, then a professor at the Catholic law school Ave Maria. Lugosi agreed to take Baumer's case and enlisted the help of a former prosecutor, Carl Marlinga, who had opened a defense practice. Later, the University of Michigan Innocence Clinic joined the defense.

The defense team sent Philipp's brain scans to Patrick Barnes. At the bottom of the images, Barnes saw a distinctive bright triangle surrounding the major vein that brings blood in and out of the brain. To Barnes, the triangle clearly pointed to a diagnosis unrelated to abuse: Venous sinus thrombosis, or stroke, probably from an infection — an explanation similar to the one Barnes gave for Noah Whitmer's injuries. Another radiologist and a forensic pathologist concurred with Barnes's reading of Philipp's scans. The defense experts also saw suggestions of an earlier smaller stroke, which could have triggered the feeding problems that led Julie to call Philipp's pediatrician. This reading of the scans matched the time frame Becker and Ham had given at trial: Philipp could have started to show some symptoms, and then had a major stroke after he was admitted to the hospital. The defense experts agreed with Becker that the skull fracture was old. They said it was likely the result of Philipp's difficult birth.

This testimony won Baumer a new trial. It also gave the defense team an answer to the question that hovers over every shaken-baby prosecution: What happened to hurt the child? During a trial, solving that mystery isn't supposed to be the defense's responsibility — the burden of proof rests with the prosecution. But a credible response makes it easier to lift the weight of the medical evidence from the shoulders of the defendant.

At Baumer's second trial, which took place in October, the defense called neighbors and friends who testified that she was gentle and loving with children. The prosecution introduced no evidence to the contrary. Baumer has two drunken driving offenses on her record from the late 1990s, but they weren't introduced at the trial.

Back on the stand, Ham and Becker now said they had misspoken about the time frame, and came up with new estimates: Becker said that Philipp's internal bleeding could have begun five days before the CT scan, and Ham said one or two days. They both remained convinced that Philipp's hemorrhages were inflicted. "Before they testified, they both said that it was their opinion from the beginning that the injuries occurred before Philipp came to the E.R.," Richard Goodman, the prosecutor at the second trial, says. And the prosecution's doctors disagreed with Barnes and the other defense-side experts that Philipp's scans showed a thrombosis. On cross-examination, Baumer's lawyer, Marlinga, asked Ham and Becker if they were trying to deflect criticism of the hospital for failing to give Philipp the care he needed because of the delay of his CT scan. The doctors denied that their revised testimony had anything to do with protecting the hospital.

The jurors began their deliberations by taking a poll. Nine out of 12 thought Baumer should be found not guilty. "For me, it came down to this: For the prosecution to be right, I was required to believe that a woman with no history or indication of violent tendencies or

instability hit this baby's head so hard that she fractured his skull, and shook him so hard that she caused extensive brain damage, while leaving no marks on him," says Carman Minarik, a juror who is a minister at First United Methodist Church in Mount Clemens. "That just didn't make a lot of sense to me."

Sera Miller, a claims representative for the Social Security Administration, was one of the three jurors who thought at first that Baumer was guilty. She found the medical testimony dense and confusing. "I think we needed 12 doctors on that jury," she said. After an afternoon of deliberations, she went home and couldn't sleep. In the morning she decided that the defense had done enough to introduce reasonable doubt. The jury found Baumer not guilty.

When Philipp was 3 months old and ready to leave the hospital, he was put into foster care with Debi and Phil Zentz, who later adopted him and changed his name to Ben. When the second jury announced that it found Baumer not guilty, the Zentzes were in court. Baumer looked at Debi. "I was hoping for a bridge between the families," Baumer says. Instead, Debi Zentz gave this statement to the press: "The verdict does not change our belief. Reasonable doubt does not equate to innocence." When I called her in January, she said, "I have absolutely no doubt that Julie Baumer shook and horribly injured my son."

The Whitmers also feel certain that Trudy Rueda harmed their son and that she wronged them by putting them through a trial. "We got to a point where we said that if she stands up and admits what she did, we might be able to put this behind us," Michael Whitmer said. "But now, how do you forgive?"

He and his wife were sitting on a couch in their living room, in the Cape Cod-style house in Alexandria, Va., that Michael renovated by hand. Noah, his blue eyes sometimes focused and sometimes vacant, walked a bit unsteadily on the floor in front of us, picking up books and toys and putting them in his mouth. Noah can see now because a few months after his injury, he slept standing up for weeks to drain the blood from behind his eyes. His seizures have stopped, but only thanks to a strict and labor-intensive ketogenic diet. How *could* the Whitmers forgive, given the medical testimony from doctors they trust? Rueda's conviction is now on appeal, with a hearing scheduled for mid-February.

As for Audrey Edmunds, she has been out of prison for about three years. Now 49, she is blond and slim, and when I met her at a mall near her home outside Minneapolis, she talked to me about her three daughters. She wore jeans and open-toed sandals and showed me pictures of her children at a Twins game and talked about the delight she takes in taking

snacks to her youngest girl's soccer practice. For a few minutes, her 11 years in prison seemed like a balloon she has let go.

But Edmunds does not live with her children. Her husband divorced her four years into her sentence; she says the separation was just too much for him. He stopped taking the girls to see her every week. When she got out of prison, she moved in with a friend and took a job at a Kwik Trip convenience store. Better work is hard to come by because of the time Edmunds served in prison. She also wants the early shift so she can see her kids in the afternoons. Sometimes, though, they go on a trip with their father and forget to call. "I was gone for so long," she says.

Edmunds said, however, that she had to come to terms with the drive to prosecute her. As we walked through the mall, she pointed out a Dora the Explorer display she thought young kids would like. Then she turned away from it. "A baby has died," she said simply. "They want to blame somebody."

Emily Bazelon, a contributing writer, is a senior editor at Slate and the Truman Capote law-and -media fellow at Yale Law School.

This article has been revised to reflect the following correction:

Correction: February 20, 2011

An article on Feb. 6 about shaken-baby syndrome misspelled the middle name of a doctor who offered a definition of it. He is A. Norman Guthkelch, not Norma.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Nathaniel Mitchell, #284407, Applicant, v. State of South Carolina, Respondent.	2007-CP-40-06693 **RESPONSE TO APPLICANT'S MOTION TO HOLD PCR IN ABEYANCE AND/OR DISMISS WITHOUT PREJUDICE**

RICHLAND COUNTY FILED
2012 FEB 29 PM 4:14
JEAN H. McBRIDE C.C.P. & G.S.

The Respondent, making its Return to the Applicant's "Motion for Abeyance and/or Dismissal Without Prejudice" dated January 16, 2012, would respectfully submit:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment by the Richland Clerk of Court. He was indicted at the June 2000 term of the Richland County Grand Jury for Homicide by Child Abuse (2000-GS-40-50660). He was represented by Doug Strickler, Esquire, on the charge. On May 13, 2002, Applicant proceeded to jury trial before The Honorable Henry F. Floyd. On May 17, 2002, he was convicted of the charge as indicted and sentenced to twenty-five (25) year imprisonment.

A Notice of Appeal was filed and an appeal was perfected. By order filed Janauary 10, 2005, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Mitchell, Op. No. 3918 (S.C. Ct. App. filed January 10, 2005), cert. denied S.C. Sup. Ct., October 19, 2006. The Remittitur was issued October 24, 2006.

The Applicant subsequently filed an Application for PCR on October 8, 2007. The Respondent made its Return and Motion to Dismiss March 5, 2008, requesting the case be summarily dismissed based on Applicant's failure to allege any genuine issue of material fact or

otherwise state a claim upon which relief could be granted as the issues presented in the application pertain to matters that could or should have been raised at trial or on direct appeal. No subsequent amendment of the application has since been made. A proposed Conditional Order of Dismissal was submitted with the Return and Motion to Dismiss, but appears to never have been signed or filed. On September 11, 2008, The Honorable J. Michelle Childs entered an order granting Applicant's motion for disclosure of discovery and appointment of counsel. This motion follows.

II.

Respondent respectfully requests this Court deny Applicant's motion to hold his PCR application in abeyance or otherwise dismiss it without prejudice to allow Applicant time to re-file, as it would be contrary to and circumvent the purposes of S.C. Code § 17-27-45 (2003), and would be unduly prejudicial to Respondent. The Applicant has moved this Court to hold his PCR application in abeyance over four (4) years after its original filing asking the Court to delay the pursuit of this action some unknown amount of time into the future. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283 The continued delay in the pursuit of post-conviction relief for time to file a motion in General Sessions Court would be unduly prejudicial to Respondent's ability to defend the allegations set forth in the PCR application and any possible re-trial (if relief is thereafter granted). Applicant's pursuit of a Rule 29 motion in General Sessions Court has the potential of taking several years to reach full resolution after exhaustion of the appellate process. In that period of time, it is likely that the attorneys' original

files or documents from Applicant's trial will be difficult to locate and those involved in the initial General Session proceeding will have little memory of the case due to the extensive lapse of time since trial. Records of the proceeding (i.e. transcripts), witnesses and other crucial evidence may end up being unavailable for post-conviction relief or any re-trial that could follow. Applicant has had nearly ten (10) full years since his conviction in General Sessions court to pursue any avenues of relief he deemed appropriate. At this late juncture, Applicant's request as set forth in this motion would cause unreasonable delay and potentially irreparable prejudice to Respondent, and would be contrary to and circumvent the purposes of the statutorily imposed time limit placed on PCR actions.

Further, Applicant has failed to set forth any valid reason why an additional delay in the disposition of this case is necessary at this time. Applicant requests the PCR application be held in abeyance pending the resolution of a future motion in General Sessions court so Applicant may bring forth his allegations of trial counsel's ineffectiveness through a PCR action at a later date. Applicant fails to recognize that, should he bring this newly-discovered evidence claim through a motion in General Sessions Court, there are no claims set forth in the current PCR application that would necessitate an evidentiary hearing into the matter, nor would Applicant would be entitled to new allegations of ineffectiveness arising out of the Rule 29(b) motion in General Sessions court. *See* State v. Clinkscales, 318 S.C. 513, 458 S.E.2d 548 (1995)(*Defendant is not entitled to assistance of counsel on motion for new trial based on after-discovered evidence).* If Applicant opts to pursue the newly-discovered evidence claim through a General Sessions court motion, there is no reason this Court should delay the disposition of his meritless PCR application. Accordingly, Respondent requests the Court deny the current motion to allow a

hearing to be scheduled into Respondent's pending Motion to Dismiss the PCR application with prejudice.

III.

WHEREFORE, Respondent respectfully requests this Court deny Applicant's "Motion to Hold PCR in Abeyance and/or Dismissal Without Prejudice" so the matter may be set for hearing on Respondent's Motion to Dismiss the application with prejudice.

Respectfully Submitted,

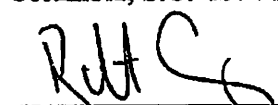
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: 

Attorneys for the Respondents

February 29, 2012

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Nathaniel Mitchell, #284407, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 2007-CP-40-6693 ORDER OF APPOINTMENT

RICHLAND COUNTY FILED
2012 AUG 17 AM 9:50
JEANETTE W. McBRIDE C.C.P. & G.S.

This matter initially came before the Honorable James R. Barber by way of an Application for Post Conviction Relief filed in Common Pleas on October 8, 2007. The State submitted a Return and Motion to Dismiss on or about March 4, 2008. On April 15, 2008, a hearing was held at Broad River Correctional Institution in front of the Honorable J. Michelle Childs on the Applicant's Motion to Appoint Counsel and Motion for Discovery. On September 11, 2008, the Honorable J. Michelle Childs issued an Order Granting Applicant's Motion to Appoint Counsel and Applicant's Motion for Disclosure of Discovery. By way of said Order, Tricia A. Blanchette, Esquire, was appointed to represent Applicant.

On January 23, 2012, Applicant, through counsel (Ms. Blanchette), filed a Motion for Abeyance and/or Dismissal Without Prejudice. Based upon the information set forth in the Motion this Court finds that the Richland County Public Defender's Office should be appointed for the limited purpose of filing a Motion for a New Trial Based on After Discovered Evidence pursuant to Rule 29(b) SCRimP.

SCANNED

IT IS THEREFORE ORDERED:

That the Richland County Public Defender's Office is appointed by this Court and instructed to reopen Applicant's case (Docket No.: 2000-GS-40-50660) for the purpose of filing a Motion pursuant to Rule 29(b).

AND IT IS SO ORDRED this 16 day of August, 2012

The Honorable James R. Barber, III
Administrative Judge, Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Nathaniel Mitchell, #284407, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 2007-CP-40-6693 ORDER TO HOLD POST CONVICTION RELIEF APPLICATION IN ABEYANCE

2015 SEP 14 P 1:42

This matter comes before the Court by way of an Application for Post Conviction Relief filed on October 8, 2007. The State submitted a Return and Motion to Dismiss on or about March 4, 2008. On April 15, 2008, a hearing was held at Broad River Correctional Institution in front of the Honorable J. Michelle Childs on the Applicant's Motion to Appoint Counsel and Motion for Discovery. On September 11, 2008, the Honorable J. Michelle Childs issued an Order Granting Applicant's Motion to Appoint Counsel and Applicant's Motion for Disclosure of Discovery. By way of said Order, Tricia A. Blanchette, Esquire, was appointed to represent Applicant.

On January 23, 2012, Applicant, through counsel, filed a Motion for Abeyance and/or Dismissal Without Prejudice. Respondent filed a Response to Applicant's Motion to Hold PCR in Abeyance and/or Dismiss without Prejudice on February 29, 2012. Also, on April 29, 2012, a meeting was held in the chambers of the Honorable James R. Barber, III. In attendance at the chambers meeting were Tricia A. Blanchette, Esquire, on behalf of Applicant, and Robert Corney, Esquire, and Brian Petrano, Esquire, on behalf of the State. The Honorable James R. Barber, III, also had Doug Strickler, Fifth Circuit Public Defender, attend the meeting. As a result of the meeting, the Fifth Circuit Public Defender's Office was appointed to represent Applicant on a motion pursuant to Rule 29(b), SCRCrimP, which was filed on April 4, 2012.

On April 3, 2015, a hearing was conducted at the Richland County Courthouse in front of the Honorable Brooks P. Goldsmith. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Clayton Mitchell, Assistant Attorney General.

At the hearing, Applicant's counsel explained the procedural history, the current status of Applicant's Rule 29(b), SCRCrimP, in the Court of General Sessions, and requested that the PCR Application be held in abeyance until the final resolution of the motion pending in the Court of General Sessions.[1] Based upon the filed motion and counsel's explanation before this Court, this Court finds that the PCR Application shall be held in abeyance until a final resolution has been reached on the Rule 29(b), SCRCrimP, Motio, which is currently pending in the Court of General Sessions in Richland County.

IT IS THEREFORE ORDERED:

1. That the Application for Post Conviction Relief is held in abeyance until a final resolution has been reached on the Rule 29(b), SCRCrimP, Motion.

2. That Applicant's counsel shall notify the Attorney General's Office upon receipt of notice of a final resolution and the abeyance shall be lifted, without further order of this Court, and counsel given adequate time to properly prepare before an evidentiary hearing is set.

AND IT IS SO ORDRED this 11 day of September, 2015

~~The Honorable~~ Brooks P. Goldsmith
Presiding Judge, Fifth Judicial Circuit

Eastover, South Carolina

[1] On April 16, 2015 at the Richland County Courthouse, the Honorable Robert E. Hood conducted a final hearing on the Rule 29(b), SCRCrimP Motion, and instructed both parties to submit a proposed final order within 60 days.

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Nathaniel Mitchell, #284407,)	2007-CP-40-6693
Applicant,)	
v.)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
Respondent.)	

2015 SEP 14 PM 1:42

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I that placed in the mail this 9th day of September, 2015, a copy of a Proposed Order to Hold Post Conviction Relief Application in Abeyance to Clay Mitchell of the Attorney General's Office, at:

Office of the Attorney General
Att: Clay Mitchell, Ast. AG
PO Box 11549
Columbia, SC 29211

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Applicant

September 9, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND The State of South Carolina, vs. Nathaniel Mitchell, Defendant.	IN THE COURT OF GENERAL SESSIONS Warrant No: G419357 Indictment No: 2000GS4050660 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR NEW TRIAL

RICHLAND COUNTY FILED
2015 JAN 14 PM 3:55
JEANETTE W. WALKER C.C.P. & G.S.

INTRODUCTION

This Memorandum of Law is divided into three sections. The first reviews the evolution of the medical and scientific research concerning what was once known as "Shaken Baby Syndrome" ("SBS") from its inception in the early 1960's, up to Nathaniel Mitchell's trial date in 2002, and from 2002 until the present. The second considers how that evolution undermines the premises that supported the specific theories and facts in the State's case against Nathaniel Mitchell. The third section argues that the revolution in the medical and scientific thinking about "SBS," both generally and as applied to this case, meets the standard for after discovered evidence laid out in South Carolina Rule of Criminal Procedure 29(b) and requires that Nathaniel Mitchell be granted a new trial.

I. THE HISTORY OF MEDICAL AND SCIENTIFIC BELIEFS ABOUT "SHAKEN BABY SYNDROME."

Nathaniel Mitchell was prosecuted and convicted in the death ofMINOR on the theory that he had violently shaken the child to death, and that the child had died of "Shaken Baby Syndrome." The evidence against Mr. Mitchell consisted of expert medical opinion regarding the significance of what were considered telltale medical signs of "SBS" visualized in MINOR's brain and eyes.

When Nathaniel Mitchell was prosecuted for homicide, few medical practitioners openly questioned the hypothesis that infants could suffer severe brain injury through shaking. Today, such questioning is main stream. See, *e.g., Cavazos v. Smith,* 132 S. Ct. 2, (2011) (Ginsburg, J.) ("Doubt has increased in the medical community 'over whether infants can be fatally injured through shaking alone."); *State v. Edmunds,* 746 N.W.2d. 590 (Wis. Ct. App. 2008) ("{A} significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome."); Maia Szalavitz, *The Shaky Science of Shaken Baby Syndrome,* TIME.com (Jan. 17, 2012); Keith A. Findley, *Examining Shaken Baby Syndrome Convictions in the Light of New Medical Scientific Research,* 37 Okla. City U. L. Rev. 219 (2012); Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court,* N.Y. TIMES (Feb. 2, 2011); Mark Hansen, *Unsettling Science,* ABA. Journal (Dec. 1, 2011); Steven C. Gabaeff, *Challenging the Pathophysiologic Connection Between Subdural Hematoma, Retinal Hemorrhage and Shaken Baby Syndrome,* 12 W. J. EMER. MED. 144, (2011); Camilla Cavendish, *Is shaken baby syndrome a myth?,* LONDON TIMES (April 13, 2011); Miller, et al. *Overrepresentation of Males in Traumatic Brian Injury of Infancy and in Infants with Macrocephaly: Further Evidence that Questions the Existence of the Shaken Baby Syndrome*, 31 Am. J. Forensic Med. Path. 165, 169 (2010) ("Several recent observations have converged to raise serious questions about "SBS" and whether shaking alone can cause the triad....How could such a diagnosis based on such flimsy evidence and with such far-reaching implications become so entrenched in pediatric and legal medicine?); Edward J. Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the*

Scientific (And Non-Scientific) Experts, 46 Crim. L. Bull. 156 (2010); Editorial, *Shaky Diagnosis*, New Scientist, Vol. 207 Issue 2771, p. 3 (July 29, 2010) (App. Tab 2); Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts,* 87 Wash. U.L.R. 1 (2009) (App. Tab 3); Mark Anderson, *Does Shaken Baby Syndrome Really Exist?,* DISCOVER (Dec. 2, 2008); Radley Balko, *A Shake to the System: New research into "shaken baby syndrome" could put hundreds of convictions in peril,* Reason-Online; Molly Gena, *Shaken Baby Syndrome: Medical Uncertainty Casts Doubt on Convictions,* 2007 Wis. L. Rev. 701 (2007).

Now doctors and scientists understand that many other conditions and events can cause the symptoms once thought to exclusively signify "SBS," and there is significant debate about whether those symptoms can even be caused by shaking.

A. The Original Hypothesis of "Shaken Baby Syndrome."

The roots of the belief in "SBS" begin a half a century ago as doctors sought to understand and eradicate child abuse. In 1962, Dr. Henry Kempe wrote an article identifying characteristics of "battered" children. *The Battered-Child Syndrome,* 181 J. Am. Med. Ass'n 17 (1962) (App. Tab 4). He identified several kinds of physical injuries that, particularly when more than one was present, suggested abuse. Most were fairly common sense: broken bones in babies, soft tissue swelling, and bruises. Dr. Kempe also hypothesized that subdural hematoma (a pooling of blood between the brain and the protective dura) could be a trauma-induced injury, indicative of child abuse.

In 1971, Dr. A. Norman Guthkelch, the first pediatric neurosurgeon in England, explored why infants with subdural hematoma who he suspected had suffered unrecognized trauma, might not present with obvious sign of trauma to their heads. A.N. Guthkelch, *Infantile Subdural*

Hematoma and its Relationship to Whiplash Injuries, 2 Brit. Med. J. 430 (1971). He cited a biomechanical study of Dr. Ommaya that described "two well-documented cases of subdural hematoma, in both of which the subject sustained a whiplash injury to the neck as a result of an automobile accident, the head itself not being [impacted] at all." *Id.* at 430. Guthkelch also discussed two of his own patients with subdural hematomas and no obvious sign of head trauma – in one the mother said she had shaken her infant when he was having a coughing fit and she feared he was choking; in the other, the infant had grip marks and the mother said she "might have" shaken him when he cried at night. (*Id.* at 431). From the Ommaya study and his own two case reports, Dr. Guthkelch hypothesized that infants could sustain whiplash-type injuries, including subdural hematoma, from being vigorously shaken. When the article was published, doctors seized upon it to explain the cause of otherwise confusing head injury in infants.

Now, Dr. Guthkelch has revisited his influential article, which he wrote to inform parents about the dangers of shaking. In a recently published article addressing the debates about the "SBS" hypothesis, he queries, "If shaking is responsible for significant damage to the central nervous system and its coverings, one must ask why the forces generated by humans or laboratory machines shaking a dummy have so often proved insufficient to cause the disruption of these tissues." A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 Hous. J. Health L. & Policy (2012). He adds that "[it] does not follow...that one can infer shaking (or any other form of abuse) from a finding of retino-dural hemorrhage and encephalopathy is present and no one can think of any other explanation." *Supra* at 3. Commentators have observed that "[Dr. Guthkelch] worries that [the SBS hypothesis] is too often applied by medical examiners and doctors without considering other possible causes for a

child's death or injury." Joseph Shapiro, *Rethinking Shaken Baby Syndrome*, NPR, June 29, 2011.

In the early 1970's, John Caffey, a prominent American pediatric radiologist and textbook author, published two articles: *On the Theory and Practice of Shaking Infants: Its Potential Residual Effects of Permanent Brain Damage and Mental Retardation,* 124 Amer. J. Dis. Child. 161 (1972) (on file with the Pace Post-Conviction Project), and *The Whiplash Shaken Infant Syndrome: Manual Shaking by the Extremities With Whiplash-Induced Intracranial and Intraocular Bleedings, Linked With Permanent Brain Damage and Mental Retardation,* 54 PEDIATRICS 396 (1974) (App. Tab 5). In the first article, Dr. Caffey collected 27 instances of what he deemed "convincing" examples of children who had suffered brain injury as a result of shaking. In the second article, Dr. Caffey cited his previous data and the same Ommaya study that Guthkelch cited for the proposition that shaking infants could cause subdural hemorrhage. In addition to causing subdural hemorrhage, Dr. Caffey speculated that shaking damaged capillaries within the retina, which explained why retinal hemorrhages often were seen in children he thought to have been shaken. He broadly concluded that evidence "indicates that manual whiplash shaking of infants is a common primary type of trauma in the so-called battered infant syndromes. It appears to be a major cause in the infants who suffer from subdural hematomas and intraocular bleedings." *Id.* at PEDIATRICS 402.[1]

Although no large-scale studies or reports supported the theory that shaking could cause the triad of injuries, the theory quickly became widely accepted. It provided a simple and easy-

[1] In a passage that perhaps should have caused Dr. Caffey pause, but which only later would be recognized as somewhat chilling, Dr. Caffey noted that children who presented with subdural hematoma and no external evidence of trauma – children that he assumed had been shaken – often had histories of vomiting, hyperirritability, infection, stupor, birth trauma, fever, bulging fontanel, anemia, enlarged head, and abnormal ocular fundi. Caffey, 54 PEDIATRICS at 400. These symptoms turn out to be associated with several neurological conditions that are now acknowledged to mimic the intracranial conditions supposedly caused by SBS."

to-understand explanation for the otherwise unexplained cause of brain injury in infants. *See* Ronald H. Uscinski, *Shaken Baby Syndrome: An Odyssey,* 46 Neurol. Med. Chir. 57 (2006) ("Nonetheless, the mechanism of shaking and the so named syndrome gained immediate acceptance and enormously widespread popularity, with no real investigation or even question as to its scientific validity."); Edward J. Immwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (and Non-Scientific) Experts*, 46 Crim. Bull. 1 (Jan. – Feb. 2010) ("In a relatively short time after Caffey's enunciation of the theory, the theory became widely accepted in both medical and legal circles.").

By the early 1990s, "SBS" – a diagnosis that an infant who had subdural hemorrhage, brain swelling and retinal hemorrhages with no "adequate" explanation for such allegedly traumatic injuries presumptively had been violently shaken – was an entrenched diagnosis within the medical community. *See* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts, supra* at 87 Wash. U. L. Rev. 1, 3-4.

B. The Medical Beliefs Concerning "Shaken Baby Syndrome" in 2001 when Nathaniel Mitchell was Convicted of Homicide.

In 2001, the diagnosis of "SBS" was well accepted by the relevant medical community and formed the basis for prosecutions across the country. The American Academy of Pediatrics endorsed the diagnosis of "SBS" and suggested that child abuse be presumed whenever a child presented younger than 1 year with intracranial injury and retinal hemorrhages. The National Association of Medical Examiners (NAME) also endorsed "SBS" as a reliable diagnosis. *See,* John Lloyd, et. al., *Biomechanical Evaluation of Head Kinematics During Infant Shaking Versus Pediatric Activities of Daily Living*, 2 J. Forensic Biomechanics 1 (2011).

Few doctors were willing to challenge the well-accepted dogma. Those who did were considered to be outliers and eccentrics. For example, in 2001, Dr. Jennian Geddes, a British

neuro-pathologist, published two papers after studying the brains and eyes of infants who were allegedly victims of non-accidental head injury, including shaking. In one of the papers, she observed that the subdural hemorrhage and brain findings in infants who died of natural causes appeared to be virtually indistinguishable from the findings in cases of allegedly abused children. J. F. Gedes, et. al., *Neuropathology of Inflicted Head Injury in Children I,* 124 Brain 1290 (2001). In the other, Geddes concluded that hypothesis that shaking directly caused the triad (subdural hemorrhage, retinal hemorrhage and edema) "require(s) fresh examination." *Neuropathology of Inflicted Head Injury in Children II,* 124 BRAIN 1299 (2001). Geddes' work was vilified as unreliable (or worse) by the child abuse protection community. *See* Robert Block, Letter to the Editor, 113 Pediatrics 432 (Feb. 1, 2004) (referring to Geddes' related articles as "junk science") (App. Tab 7).

Also in 2001, John Plunkett, a forensic pathologist, published *Fatal Pediatric Head Injuries Caused By Short-Distance Falls, 22 Am. J. Forensic Med. Path. 1* (2001). Based on case data from the Consumer Product Safety Commission, Dr. Plunkett described multiple witnessed short falls that resulted in some or all of the triad injuries, including a *videotaped* fatal fall of a 23 month-old toddler from a plastic gym set (28 inches high) in the carpet-covered garage of her home. At the time, Dr. Plunkett's study was met with near ridicule by doctors who were trained to diagnose "SBS." *See* Dee J. Hall, *Shaken Baby Case Back After 10 Years,* WISCONSIN BAR JOURNAL (Jan. 26, 2007).

C. The Landscape Changed after Nathaniel Mitchell's Conviction: Medical Opinion between 2002 and 2005.

After Nathaniel Mitchell was convicted, significant doubts about "SBS" theory started to emerge. Two publications were particularly important. First, in 2002, Dr. Ayub Ommaya, with biomechanical expert co-authors, published *Biomechanics and Neuropathology of Adult and*

Pediatric Head Injury, 16 Brit. J./Neurosurg. 220 (2002). Biomechanical engineers study the exertion of forces on the human body and the body's tolerances to such forces. Dr. Ommaya and his co-authors pointed out that Dr. Ommaya's earlier whiplash study, the one cited by Guthkelch and Caffey in their seminal papers on "SBS" had not involved infants, but instead adult rhesus monkeys. And, they noted, the monkeys had not been shaken. They were strapped in collision carts and impacted at various speeds from the rear in an effort to gauge human threshold to whiplash injury in car accidents. *Id.* at 221-22. They further explained that the Ommaya study actually showed that subdural hemorrhage was caused far more easily by impact to the head than by whiplash. They suggested that the study had been misinterpreted by Guthkelch and Caffey who cited to it as scientific support for "SBS." *Id.* These significant distinguishing details were overlooked for years. Moreover, they reasoned that shaking sufficient to cause subdural and retinal hemorrhage would have to cause soft tissue injury to the neck as well as spinal injury. *Id.* at 222. On the subject of retinal hemorrhages, they were directly critical of prevailing "SBS" theory, stating that the "hypothesis" of "retinal hemorrhage caused by orbital shaking has not been tested experimentally" and the "levels of force required for retinal bleeding by shaking to damage the eye directly is biomechanically improbable." *Id.* at 233.

Second, in 2003, Dr. Mark Donohoe conducted a literature review through the lens of Evidence-Based Medicine (EBM), using reputable criteria to gauge the evidentiary basis for medical practices and opinions. Mark Donohoe, M.D., *Evidence- Based Medicine and Shaken Baby Syndrome Part I: Literature Review*, 1966-1998, 24 Am. J. Forensic Med. Path. 239 (2003). Dr. Donohoe concluded that the then commonly held opinion that the finding of subdural hemorrhage and retinal hemorrhage in an infant was strong evidence of "SBS was unsustainable, at least from the medical literature.

At the same time, a large body of medical literature took note of the many alternative causes of the medical markers that had previously been attributed exclusively to shaking. The medical community, including doctors who once had opined that the "triad" – subdural hematoma, retinal hemorrhage, and encephalopathy (brain injury) – could only be caused by shaking, began to recognize the existence of multiple "mimics" of abuse, including, for example, accidental trauma (e.g., short falls), congenital malformations, metabolic disorders, hematological diseases, infectious diseases, autoimmune conditions, birth defects, re-bleeds of pre-existing subdural hematomas, hypoxia, childhood stroke, and genetic conditions. Patrick Barnes & Michael Krasnokutsky, *Imaging of the Central Nervous System in Suspected or Alleged Nonaccidental Injury, Including the Mimics,* 18 Top. Magn. Reson. Imaging 53, 65-70 (2007); Andrew Sirotnak, *Medical Disorders that Mimic Abusive Head Trauma, in Abusive Head Trauma in Infants and Children: A Medical, Legal, and Forensic Reference 191* (Frasier et. al. eds., 2006).[2]

D. New Medical Research: 2005 – Present.

Doubts about "SBS" theory were slowly acknowledged by respected medical organizations and integrated into mainstream beliefs. In 2005, Dr. Faris Bandak, another biomechanical engineer, concluded that shaking a healthy infant hard enough to produce subdural hemorrhage would exceed the tolerance of the infant neck, causing near or total neck failure. *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms,* 151

[2] Likewise, new research began to undermine other fundamentals of the "SBS" hypothesis that had been relied upon in child abuse and homicide prosecutions. For years, doctors had testified that the brain injuries in fatal "SBS" cases would have been so massive that the trauma inflicted on the child would have rendered the child immediately comatose and unresponsive. Applying this hypothesis, doctors confidently opined that the last person with the child before she collapsed had to be the one who inflicted the fatal trauma. Beginning with a seminal article in 1998, however, researchers began to learn that children with such brain injuries frequently experienced periods of hours or even up to days of lucidity after injury before collapse. *See* M.G.F. Gilliland, *Interval Duration Between Injury and Severe Symptoms in Non-accidental Head Trauma in Infants and Young Children,* 43 J. Forensic Sci. 723 (1998), *available at http://www.wisspd.org/htm/ATPracGuides/Training/ProgMaterials/Conf2011/ShakenBabyCases/11.pdf.*

FORENSIC SCI. INT. (2005) (App. Tab 8) ("Head acceleration and velocity levels commonly reported for "SBS" generate forces that are far too great for the infant neck to withstand without injury"). His article challenged the assumption that shaking alone could cause the triad of injuries associated with "SBS" without significant neck or spinal injury.

In 2006, the National Association of Medical Examiners officially withdrew its 2001 position paper on "SBS". In 2009, the Committee on Child Abuse and Neglect of the American Academy of Pediatrics updated its 2001 policy statement reasoning that "advances in the understanding of the mechanisms and clinical spectrum of injury associated with the abusive head trauma compel us to modify our terminology to keep pace with our understanding of pathologic mechanisms". Cindy W. Christian, et al. Abusive Head Trauma in Infants and Children, Committee on Child Abuse and Neglect, News from the Field (June 2009). The Committee recommended that physicians use the term "abusive head trauma" ("AHT") rather than Shaken Baby syndrome, an admission that the "SBS" diagnosis and mechanism of shaken had become highly controversial.

II. THE NEW MEDICAL AND SCIENTIFIC INFORMATION ABOUT "SBS" UNDERMINES THE RELIABILITY OF NATHANIEL MITCHELL'S CONVICTION.

New medical and scientific research, developed since Mr. Mitchell's trial, undermines the hypotheses that supported the State's case. Based on the mistaken literature of 2001, the state's experts testified that MINOR 's injuries could not have been caused by a short household fall and that her injuries could only have been caused by shaking. That testimony was wrong.

A. Falls Can Kill.

At trial, the State's experts testified that MINOR 's injuries were inconsistent with the injuries she would have been expected to sustain if she had fallen from a short distance. The prosecution experts testified that falls simply do not cause serious injuries in children.

Dr. Robert Hubbird testified for the State at trial. Dr. Hubbird was the attending physician at the Pediatric Intensive Care Unit where MINOR was admitted for treatment. Dr. Hubbird was asked on direct if MINOR's injuries could have been caused by a fall. He replied "No. The only trauma that I know of, and I've never seen this, but from what's reported, that can cause anything even similar is a big time automobile accident. Either head on or side impact where the child is ejected from the car. And I guess it's a potential from a several story fall, but then you'd see other injuries as well. When you have these three things, the swelling of the brain, the subdural hematoma, and the retinal hemorrhages, a light goes on, that's shaken baby syndrome." Tr. 176. On cross examination he reiterated his position stating that "It would take a fall from a several story building" to cause the type of subdural hematoma present in this case. Tr. 210. When asked whether he believed that shaken baby syndrome could occur absent any impact he testified that "You do not have to have impact. It's just shaking without impact." Tr. 213. When asked about any debate within the scientific community about whether shaking alone could cause these injuries or whether impact would be required, Dr. Hubbird testified that while that has been "brought forth" the "majority of people" believe that you can shake a baby really hard without impact and cause these injuries. Tr. 213.

Dr. Linda Christman, a pediatric opthamologist who saw MINOR in the Intensive Care Unit testified that the retinal hemorrhages that she saw could not have been caused by a fall

unless it was a "very severe fall from several stories" and that these were caused instead by shaking. Tr. 245-246. Dr. Anne Abel testified for the state as a forensic pediatrician. Dr. Abel testified that there was "no doubt" in her mind that MINOR had shaken baby syndrome. Tr. 298. She further testified that her injuries could not have been caused by a fall and could not be accidental. Tr. 239. Dr. Timothy Close testified for the state as a treating radiologist who reviewed MINOR's CT scans in the hospital. Dr. Close testified that these injuries could not have been caused by a fall unless it was a fall from a third story window. Tr. 361.

Thus, four medical experts offered by the state testified unequivocally that MINOR's injuries could not have been caused accidentally or specifically by a fall. It is now universally agreed, however, that numerous factors other than shaking could indeed have caused MINOR r's brain injuries. Specifically, it is now beyond dispute that short distance falls can kill. It is now apparent that the experts at Nathaniel Mitchell's trial provided opinions that were not based on settled fact, and claimed a certainty for which they had no basis; indeed their assertions are now nearly universally recognized as inaccurate. Studies conducted after Nathaniel Mitchell's conviction show that, despite earlier beliefs to the contrary, head injuries sustained as a result of low-level falls can be fatal.

For example, 2003 Dr. Michael Prange, a biomedical engineer at the University of Pennsylvania, along with colleagues, published Anthropomorphic Simulations of Falls, Shakes, and Inflicted Impacts in Infants, 99 J. NEUROSURG. 143 (July 2003) (App. Tab 9). Dr. Prange constructed an anthropomorphic surrogate of a 1.5 year old infant. He subjected the surrogate to falls from one foot three feet, and five feet, violent shaking and to inflicted impact. The falls and impacts were onto 3 surfaces; concrete, quarter inch carpet created maximum changes in angular velocity similar to what is thought to occur in violent shaking and peak angular accelerations

significantly higher than what could possibly be produced through violent shaking. His findings debunk the claim that only violent shaking can cause the rotational forces.neccessary for injuries formerly associated with "SBS". In fact, short falls are at least as likely to cause such injuries.

Also in 2003, doctors Scott Denton and Darinka Mileusnic published a case report concerning a short fall resulting in an infant's death, *Delayed Sudden Death in an Infant Following an Accidental Fall*, 24 AM. J. FORENSIC MED. PATHOL. 371 (December 2003). The victim, a nine month old 22 pound child fell backwards off of a bed onto vinyl-covered concrete. Although the fall was from only 30 inches, the child's injuries included subdural hematoma and cerebral edema. Like the 2001 case study reported by Dr. Plunkett, supra at 8, Denton and Mileusnic's case study demonstrated that the symptoms the Mitchell experts swore could only be caused by shaking could be caused by a short fall.

In 2004, Warner Goldsmith, a bioengineering professor at UC Berkeley, and Dr. Plunkett published *A Biomechanical Analysis of the Causes of Traumatic Brain Injury in Infants and Children*, 25 AM. J. FORENSIC MED. PATHOL., 89 (June 2004) (App. Tab 10). Using Newton's second law of motion advanced biomechanical engineering models and simulated events, Goldsmith and Plunkett calculated that the force generated by a three-foot child falling backwards onto his head causes a peak acceleration nearly 16 times greater than acceleration caused by violent shaking. This new study again confirmed that, not only can a short fall cause severe brain trauma, it is actually a more likely mechanism to cause severe injuries than shaking.

In 2009, Dr. Plunkett now working with Chris Van Ee, David Raymond, Kirk Thaibault, and Warren Hardy--- biometrical engineers who specialize in impact biomechanics, accident reconstruction, head trauma, surrogate and biomechanical instrument design, and forensic

research--- reconstructed the fatal short fall that Dr. Plunkett discussed in his earlier article. Chris Van Ee, et. al, Child ATD Reconstruction of a Fatal Pediatric Fall, Proceedings of the ASME 2009 International Mechanical Engineering Congress & Exposition (November 2009). Their reconstruction used the CRABI-18 Anthropomorphic Test Device, A realistic doll used in automobile and playground safety testing, which closely matched the 23- month-old in Dr. Plunkett's report. Using multiple drops from a similar play structure onto similar carpet as that in the video of the child, the scientist calculated that the 28-inch fall onto carpet which killed the child produced velocities sufficient to cause brain trauma. Significantly, the average peak angular velocities generated by the 28-inch fall were more than twice those produced by shaking as measured by Dr. Prange. The average peak angular accelerations of the 28 –inch fall were more than twelve times those produced by shaking.[3]

In 2011, doctors Patrick E. Lantz and Daniel E. Couture published a case study of an infant who sustained traumatic brain injury after a stairway fall, Fatal Acute Intracranial Injury, Subdural Hematoma, and Retinal Hemmorages Caused by Stairway Fall, 56 J. FORENSIC SCI. 168 (2011) (App. Tab 11). The child, a 7 ¾ month- old boy, fell down 6 carpeted oak steps. The fall was confirmed by multiple witnesses. Examing doctors discovered that the child had subdural hematoma, retinal hemorrhages, and brain injury; symptoms which are generally considered the "triad" or classic discriminative systems of "SBS".

In September 2011, news accounts reported that a 3 month old infant died of brain injuries when he fell from the toddler compartment of a grocery cart that hit a speed bump in the parking lot. Jessica King, *Infant Boy Falls from Kroger Shopping Cart-Dies, Imperfect Parent*

[3] Note: The 2009 surrogate simulated a 29 lb. 23 months- old child. The 2003 surrogate was modeled on a 10.6 lb. 18 months- old infant. Most likely such shaking would produce even lower rotational forces in a much heavier 23 month- old child.

(September 22, 2011). The accident was confirmed by surveillance video of the parking lot. John Stevens, Three-Month-Old Boy Dies After Falling Out of Shopping Cart as Mother Walked Back to Car, Mail Online (Sept. 22, 2011)[4]

Dr. Prang's 2003 biometrical study and Professor Warner Goldsmith's 2004 biomechanical study showed that short falls can actually cause far greater rotational forces than violent shaking. However, these studies did not determine whether short falls can cause severe brain injury and death. This question was definitively answered by Chris Van Ee's 2009 study, as well as by case studies- which prove that short falls can and do cause death. The new research establishes that the experts who testified at Nathaniel Mitchell's trial that MINOR could not have been injured in a fall were wrong.

B. The New Consensus of the Medical Community: Medical Experts Now Agree The Triad of Injuries Formerly Considered Diagnostic of "SBS" Occur Through Accidental Injury.

Not only can short falls kill, but the diagnostic signs previously ascribed exclusively to "SBS" cannot reliably distinguish inflicted from accidental trauma. The prosecution experts based their dramatic and incorrect conclusion that MINOR had been shaken to death on the presence of three physical indicators: massive intracranial injury, retinal hemorrhages, and the minimal amount of external injury- the classic "triad." None of those indicators, however, can distinguish accident from abuse.

[4] Other news stories report skull fractures resulting from new products such as a baby bath seat. See Associated Press, 2 Million Baby Bath Seats Recalled Due to Skull Fractures, Fox News, available at http://www.foxnews.com/health/2012/08/30/2-million-baby-bath-seats-recalled-due-to-skull-fractures/(last visited February 17, 2013).

1) Non-Medical Evidence Should have been considered in evaluating and diagnosingMINOR **'s injury.**

Just as the existence of a broken leg in a patient does not provide information about how the leg fractured, the existence of intracranial injuries does not establish how a child suffered a brain injury. To determine the cause of injuries, doctors generally search for other information- apart from the brain injury –to assist in making a differential diagnosis. That information, however, was not known and was not considered by the medical experts in this case.

Here, the non-medical evidence corroborated a diagnosis of accident- rather than intentional violent shaking. Mary Tate, a family friend since the 1990's, testified that Nate was "a normal father" who was "protective" and who "spent a lot of time with the children". Tr. 698. Carl Brown, a family friend of the Mitchell family since the 1970's testified that he knew Nate his entire life. He testified that Nate "acted just as any normal father would" and that the children were always "hanging on Nate wherever he was whether he was outside changing a tire or sitting down eating". Tr. 708. Mr. Brown was a therapeutic foster parent who had experience of his own with foster children. He described Nate as a "very loving, very caring, compassionate father with his children, and very very proud to have children". Tr. 715-716.

Nate's sister-in- law testified that she knew Nate since her sister and he had started dating in high school. Nate would often baby sit for her before he and his wife adopted MINOR and her siblings. She said that Nate loved MINOR and that he was a loving father who would "always cuddle up". Tr. 725. Nate's sister Patricia Smith testified that Nate and Sonya had a stillborn baby in 1994 that left them crushed. For some reason they were unable to conceive after that and decided to become foster parents. Patricia said Nate was a normal loving father and that they would have to "bribe" MINOR in order for them to hold her just to make her even leave Nate. Tr.

735. The defense also called Kimberly Kennedy who was the adoption specialist that was tasked with assessing the fitness of Nate and Sonya to adopt MINOR and her two siblings. She testified that from September 1999 to March 2000 she would visit the Mitchells and observe the children in the home. She further testified that the children were well adjusted to the home and that she was in the process of finalizing their adoption of all three children. She said that there was never anything about the Mitchells or the home that caused her concern. Tr. 740-743. Hope Deambrosio, a foster care licensing worker with DSS testified about interacting with the Mitchells to establish them as foster parents. She testified that in the course of her review of the Mitchells, her visits, and her considerations of licensing and re-licensing them that she never had any concerns about their parenting whatsoever. Tr. 767.

Mr. Mitchell had no prior record and had never been in trouble in his life. He and his wife were high school sweethearts who tragically lost their first baby at birth. By all accounts, they both desperately wanted children after the stillbirth of their baby. They were eager and enthusiastic about adopting not just MINOR, who was a developmentally delayed child with special needs, but her two siblings as well. There was no evidence that Mr. Mitchell was some out of control brute who would have violently shaken this child, or any child, in the manner described repeatedly by the State's doctors. Thus, the non-medical evidence available to the doctors suggested a finding other than Shaken Baby Syndrome.

2) The significance of retinal hemorrhages and the "triad" of symptoms as diagnostic is very much in dispute today.

All of the state's experts relied heavily on the presence of retinal hemorrhages found in the eyes of MINOR at the time of autopsy. This was significant to them because such finding in 2001 was dispositive of a diagnosis of SBS where you also had a subdural hematoma

and no trauma-the classic "triad" of symptoms. The presence of retinal hemorrhages is no longer considered dispositive of such a diagnosis and the significance of the presence of retinal hemorrhages is now very much in dispute.

Dr. Hubbird testified repeatedly that where you have a subdural hematoma, RH's, and swelling of the brain that that is "virtually ... diagnostic, meaning it tells us what it is ... pe[illegible] call it shaken baby syndrome". Tr. 175. He went on to say "When you have these three things, the swelling of the brain, the subdural hematoma, and the retinal hemorrhages, a light goes on, that's shaken baby syndrome". Tr. 176. He added, "then if you get the history of there's trauma, you know if the light's on and if somebody is home, you know what happened". Tr. 17[illegible] When asked if a grown man shaking a child could have caused MINOR's injuries Dr. Hubbird said "yes that's the documented way to do it". Tr. 177. He further stated "this was not accidental". Tr. 177. And finally he repeated again on direct, "this was a non accidental trauma. This was from child abuse and it was basically shaken baby type syndrome or shaken baby syndrome". Tr. 179. On cross, Dr. Hubbird stated that when he sees "retinal hemorrhages in association with subdurals, and with severe edema, swelling of the brain, that is child abuse to me". Tr. 205. He also testified that brain swelling does not cause retinal hemorrhages that widespread and multi layered. He testified that that is "caused by shaking a baby". Tr. 206. On re-direct Dr. Hubbird testified that the retinal hemorrhages, the swelling, and the subdural were the "big three" the he "relied upon" in his diagnosis of shaken baby. Tr. 226.

Dr. Linda Christman testified that retinal hemorrhages are very significant because they "occur much more frequently in babies who are shaken or intentionally injured as compared to those injured accidentally". Tr. 234. She further testified that these specific RH's found in MINOR's eyes were not the kind that you would find from swelling of the brain and that they

were the type that would be caused by shaking. Tr. 245-246. She stated "the hemorrhages were not the kind of hemorrhages that occur when there's pressure on the brain only". Tr. 244. She stated that these are hemorrhages that are very characteristically seen in shaken baby syndrome. Tr. 244. When asked specifically could the subdural hematoma have caused the RH's in this case she testified that "in this case it was shaken baby". Tr. 260. And she went on to say "there is not a question in my mind" as to that finding. Tr. 260. Moreover, she testified there wasn't "a question in her mind that this child was a shaken baby". Tr. 261.

Dr. Christman also testified that shaken baby syndrome involves "bleeding around the brain, retinal hemorrhages ... and the absence of history of significant trauma or injury". Tr. Dr. Christman's testimony was especially persuasive because she was presented as a physician with international credentials. She testified that she was currently "involved with the International Retinal Hemorrhage Network" which she said was looking into retinal hemorrhages and how they relate to findings in child abuse cases. Tr. 233.

Dr. Abel testified that MINOR "had swelling of the brain, she had retinal hemorrhages, and she had subdural hematoma. And the cause of her horrible medical condition ... was related to the acute subdural hematoma related to shaking because the eye findings were fresh and they could not be attributed to shaking three weeks ago". Tr. 298. She also testified when asked if she had any doubt this was shaken baby that "there's no doubt in my mind". Tr. 298.

When asked what kind of trauma could have caused MINOR's injuries Dr. Close testified "I believe this baby was shaken and then some. Retinal hemorrhages are very typical, the optic nerve hemorrhages are very typical, almost to the point of being kept in line of shaken baby. Because if you get one blow, you may have a few bleeds, but when you get shaken over and over

again, violently shaken, those bleeds start occurring in a lot of different places". Tr. 360 He said this would have been "brutal" shaking to cause these injuries. Tr. 361 He said you don't see bleeds like this from things like falling from shopping carts. Tr. 361 This kind of injury is more in line with "bad car wrecks" or a fall from a "third floor window". Tr. 361

Dr. Burns who performed the autopsy on MINOR when asked if the findings of retinal hemorrhages, subdural hematoma, and brain swelling were consistent with Shaken Baby Syndrome testified that is "consistent with all the literature descriptions of that". Tr. 411

Thus all of the experts testified to the significance of retinal hemorrhages in shaken baby. Advances in medicine and science have disproven the diagnostic significance of retinal hemorrhages in the context of shaken baby. A 2002 paper by Ommaya suggests that it is biometrically improbable for shaking to produce retinal hemorrhage because of the small mass of the eye. *Supra* at 9. A study by Gil Binenbaum found no retinal hemorrhage in piglets subjected to acceleration /deceleration levels twenty times greater than possible in inflected injury/ "SBS." See Gil Binenbaum, et. al., *An Animal Study to Retinal Hemorrhages in Nonimpact Brain Injury* Journal of AAPOS (Feb. 2007). In 2004 Dr. Patrick Lantz published a case report finding perimacular retinal folds, retinal and optic sheath hemorrhage in a child hurt when a television tipped over and hit him on the head- an injury mechanism that involved none of the rapid acceleration/deceleration of shaking that had been hypothesized as necessary to create retinal hemorrhages. Patrick E. Lantz, et al., Evidence Based Case Report: Perimacular retinal Folds from Childhood Head Trauma, 328 BR. MED. J. 754 (2004).

Two years later, Dr. Gregg T. Leuder and colleagues reported on an infant who died and presented with retinal hemorrhages and retinal folds after another child tripped and fell on top of

the infant- again debunking the myth that only shaking could cause such eye injuries. Gregg T. Leuder et al., *Perimacular Retinal Folds Simulating Nonaccidental Injury in an Infant*, 124 Archives Ophthalmology 1728 (2006) (App. Tab 12). In yet another case, a ten-week-old child suffered a skull fracture with subdural and subarachnoid hemorrhages, as well as retinal hemorrhages extending of a type previously ascribed exclusively to SBS, along with retinal folds, when his mother, who was carrying him in a front-holding papoose, tripped and crushed his head between her chest and a wooden barrier. P. Watts and Obi E., *Retinal Folds and Retinoschisis in Accidental and Non-Accidental Head Injury*, 22 EYE 1514 (2008).

The conclusions reached by Lantz, Leuder, and Watts and Obi were later verified by study conducted by the Dallas Medical Examiner in 2010. The Dallas Medical Examiner's Office routinely removes eyes from corpses for evaluation. To access the hypothesis that certain eye findings were associated with "SBS", the office studied the eyes and records in cases involving deceased children. On February 24, 2010, Dr. Evan Matshes reported that retinal hemorrhages are commonly found in natural and accidental deaths, as well as in homicides, and identified a statistically significant relationship between retinal and optic nerve sheath hemorrhage and the restoring of cardiac rhythm following advanced life support and cerebral edema, regardless of etiology. In other words, where there is hypoxia (lack of oxygen), increased intracranial pressure and prolonged resuscitation efforts, retinal hemorrhages of all kinds follow, such hemorrhages are not diagnostic of nor caused directly by shaking. The study concluded that eye evaluations are of "limited value" in child death investigations. Evan Matshes, M.D., *Retinal and Optic Nerve Sheath Hemorrhages Are Not Pathognomonic of Abusive Head Injury*, 16 PROC. OF THE AM. ACAD. FOR SCI. 272 (2010).

In sum, scientists now believe that retinal hemorrhage simply reflects an abrupt increase in retinal venous pressure, which can be caused by any abrupt increase in intracranial pressure. Thus, it is most likely that retinal hemorrhage results, not from shaking, but as a secondary effect of brain swelling – which can occur for a multitude of reasons.

Studies have repeatedly shown that retinal hemorrhage can result from accidental head trauma. A paper by Uscinski suggests impact from a short-distance fall can produce stretch injury at the cranio-cervical junction with damage to the brain stem respiratory center, acute brain hypoxia and swelling and an abrupt rise in intracranial pressure leading to retinal hemorrhage. R. Uscinski, *Shaken Baby Syndrome: Fundamental Questions,* British Journal of Neurosurgery 217 (2002). Dr. Plunkett's 2001 study on short-distance falls, mentioned earlier, found that out of the six children who had an eye examination post-mortem, four – a full 66% - had bilateral retinal hemorrhage. In 2004, Goldsmith and Plunkett reported a child with extensive bilateral retinal hemorrhage in a videotaped fatal accidental short-distance fall. *Supra*, at 14. In a study by Aoki and Masuzawa, short-distance falls from sitting or standing positions were described to be the cause of acute subdural hemorrhage and retinal hemorrhage in 26 infants. See Aoki N & H. Masuzawa, Infantile Acute Subdural hematoma: Clinical Analysis of 26 Cases, J. Neurosurg. 1984; 61: 273-80 (on file with the Pace Post-Conviction Project).

III. NEW EVIDENCE ESTABLISHING THE DANGEROUSNESS OF SHORT FALLS AND THE INACCURACY OF THE "SBS" HYPOTHESIS REQUIRES A NEW TRIAL FOR NATHANIEL MITCHELL PURSUANT TO RULE 29(b) OF THE RULES OF CRIMINAL PROCEDURE

The new consensus of the medical and scientific communities concerning head injuries in children, specifically the recognition that short falls can be fatal and that the "triad" of symptoms formerly considered exclusive to the hypothesis of "Shaken Baby Syndrome" are not pathognomonic, is "newly discovered" evidence requiring that Nathaniel Mitchell's conviction

be vacated. In preceding paragraphs, Mr. Mitchell established that in the almost thirteen years since his trial, the consensus of the relevant medical community has inexorably changed regarding which inferences can be reliably drawn from brain injuries in children.[5]

In the sections that follow, Nathaniel Mitchell explains how the sea change in scientific thinking about head injury in children constitutes "newly discovered" evidence as defined by Rule 29(b) of the Rules of Criminal Procedure. First, for general guidance, Mr. Mitchell looks to courts in England and Canada as well as to the Supreme Court of the United States. Next Mr. Mitchell reviews recent state court precedent finding new science to be new evidence undercutting what was formerly unquestioningly believed about "SBS." Finally Mr. Mitchell returns to South Carolina Rule of Criminal Procedure 29(b) to argue that the new science revealing the danger of short falls and the unreliability of the "SBS" hypothesis requires that he be granted a new trial.

A. Courts in England, Canada and the United States Acknowledge the Change in Scientific Opinion About "Shaken Baby Syndrome."

The United Kingdom and Canada have been markedly proactive in considering whether new evidence undermining the reliability of the "SBS" hypothesis requires courts to re-assess child death and child abuse convictions, especially when those convictions were supported by opinion evidence relying primarily upon the "diagnosis" of "SBS" arrived at through observation of the classic "triad" of injuries. Between 2005 and 2006, the United Kingdom Attorney General conducted a seven-month review of 88 "SBS" cases, including guilty verdicts and pleas. The review was triggered by a 2005 Court of Appeal decision, which concluded that disputed and uncorroborated medical evidence, standing alone, cannot sustain a conviction in an infant death

[5] The new wave of research on which Nathaniel Mitchell relies has been published in peer-review medical literature and strictly scrutinized by mainstream physicians. Mr. Mitchell does not claim that all physicians and scientists accept the findings of this research as fact, but only that it is the subject of honest, legitimate debate.

case. The Court of Appeal held that a case must be dismissed for insufficient evidence when there is more than one explanation for the death of an infant, when each reason is supported by research and proposed by respected doctors, and at least one of which leads to the conclusion that the defendant did not intentionally cause the infant's death. R. v. Cannings, [2004] EWCA Crim. 1. The Court reasoned that:

> [W]e recognize that justice may not be done in a small number of cases where in truth a mother has deliberately killed her baby without leaving any identifiable evidence of the crime. That is an undesirable result, which however avoids a worse one. ...Unless we are sure of guilt the dreadful possibility always remains that mother ... may find herself in prison for life for killing [her baby or babies] when she should not be there at all. In our community, and in any civilized community, that is abhorrent. *Id.*

In 2008, the province of Ontario, Canada began a massive review of "shaken-baby" deaths. After several documented, publicized, wrongful accusations and convictions in childhood death cases, the Ontario government established "The Inquiry into Pediatric Forensic Pathology" led by Court of Appeals Justice Stephen Goudge. Commissioner Goudge held hearings and gathered evidence for more than a year before issuing a lengthy report on October 1, 2008. Stephen Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario*, Committee Report to the Attorney General: Shaken Baby Review (2008), *available* at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/sbdrt/sbdrt.pdf (last visited January 12, 2015).

The Report observed that "one of the deepest controversies surrounding pediatric forensic pathology concerns shaken baby syndrome." *Id.* at 527. The Report noted the "evolution in forensic pathology in this area" had progressed such that ***"the predominant view is no longer that the triad on its own is diagnostic of "SBS". Instead, the issue is fraught with controversy."*** *Id.* at 528 (emphasis added). The Report concluded that "our systemic ex... has identified this particular area of forensic ***pathology as one where change has raised the real***

possibility of past error." *Id.* at 531. (emphasis added). Commissioner Goudge called for a review of SBS convictions from 1986-2006 because of ***"[t]he significant evolution in pediatric forensic pathology relating to shaken baby syndrome" and "the concern that in light of the change in knowledge, there may have been convictions that should now be seen as miscarriages of justice."*** *Id.* at 533(emphasis added). Following his recommendation, a Committee was established. The reviewing committee of doctors and attorneys concluded "recent research and clinical studies in the medical community as to how to interpret the 'triad' of findings have led to a change in science in relation to pediatric head injury cases. The issues have not yet been resolved, and will continue to evolve as scientific knowledge progresses. "Therefore, it seems reasonable that in a case involving a diagnosis of "SBS" today, other medical and non-medical evidence must be examined in order to determine the medical cause of death and, ultimately, to determine whether it is possible to discern how the injuries occurred."[6] In other words, no one should be prosecuted on the strength of medical evidence alone. Significantly the Committee acknowledged **"that very serious or fatal injuries may be caus[illegible] by a short fall."** *Id. at 31.*

This past term, the U.S. Supreme Court acknowledged the medical community has substantially re-considered the scientific foundation for "SBS" convictions. *Cavazos v. Smith*, 132 S. Ct. 2, 6-7, 181 L Ed 2d 311 (2011) *reh. denied*, 132 S. Ct. 1077, 181 L Ed 2d 794 (2012). Although the majority upheld the sufficiency of the evidence under the very deferential standard for reviewing constitutional sufficiency-of-the-evidence claims in federal habeas review, a dissent, authored by Justice Ruth Bader Ginsberg and joined by two colleagues, noted that "[w]hat is now known about shaken baby syndrome (SBS) casts a grave doubt on the charge leveled against Smith..." *Id.* at 7. "In light of the current information, it is unlikely that the

[6] Committee Report to the Attorney General: Shaken Baby Review (2008), at p. 6.

prosecution's experts would today testify as adamantly as they did in 1997." *Id.* at 6. Ultimately, the majority's suggestion that clemency might be appropriate given doubts about guilt prevailed, and Governor Brown granted Smith clemency on April 6, 2012.[7]

B. Post-Conviction State Courts Reverse Convictions in Light of New Scientific Casting Doubt on Trial Evidence of "SBS."

In 2003, Jennifer Del Prete was convicted at a bench trial of first degree murder of intentionally killing a three month old child by shaking. The child had no external injury, but CT scans revealed subdural hematomas and doctors saw retinal hemorrhages. Both the defense and the prosecution called a single expert witness. The state's expert testified that the injuries were the result of "SBS" and that the injuries were inflicted just before the child became obviously ill. The defense expert countered that the injuries did not result from shaking and had occurred 24 hours earlier. In March 2012, the District Court for the Eastern Division of N.D. Illinois ordered a hearing so that Ms. Del Prete could develop her "actual innocence" claim. Mentioning Edmunds, the District Court concluded that Ms. Del Prete "presented a facially plausible claim of actual innocence" based on the new scientific evidence that submitted to the Court establishing that "subdural hematoma and retinal hemorrhages would necessarily be accompanied by other physical injuries if they were the result of shaking and that because the victim did not exhibit any such injuries, her new scientific evidence 'completely excluded the State's theory as a possible cause'" of the victim's death. *U.S. ex rel. Del Prete Hulett*, 10 C 5070, 2012 WL 774992 (ND I11 Mar. 6 2012).

[7] "Last week Brown granted her clemency, saying that 'it is clear significant doubts surround' her conviction. In the intervening years since Smith's conviction scientific evidence has questioned the validity of SBS and the expert testimony used by the district attorney to convict Smith. Even at the time of the trial some experts claimed that it was not SBS, but rather it was Sudden Instant Death Syndrome (SIDS)." Z. Shapiro, Governor Brown Grants Shirley Ree Smith Clemency, Taking the Fifth-A Criminal Law Blog, *available* at http://takingthefifth-acriminallawblog.com/2012/04/09/governor-brown-grants-shirley-ree-smith-clemency/ (last visited February 16, 2013).

In 2008, Audrey Edmunds, a day-care provider convicted of shaking an infant to death, was exonerated after an appellate court in Wisconsin concluded that "a shift in mainstream medical opinion had undermined the basis of the SBS diagnosis, raising the distinct possibility that [she] had done nothing whatsoever to harm the child." *State of Wisconsin v. Edmunds*, 2008 Wis. 2d 374, 746 N. W. 2d. 590 (2008). The Wisconsin Court of Appeals, applying a statute comparable to New York C.P.L. §440.10, determined that:

> Edmunds presented evidence that was not discovered until after her conviction, in the form of expert medical testimony, that a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic they symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome. Edmunds could not have been negligent in seeking this evidence, as the record demonstrates that the bulk of medical research and literature supporting the defense position, and the emergence of the defense theory as a legitimate position in the medical community, only emerged in the ten years following her trial. *Id.* at 386.

Audrey Edmunds was convicted of killing a child in her care by violent shaking. The child, Natalie, was an infant – only six months old at the time of her death. The prosecution's proof was exclusively medical. Ms. Edmunds did not confess. No witnesses claimed to have seen her harm Natalie or act in any way that could be argued as consistent with guilt. "The experts testified to a reasonable degree of medical certainty that the cause of Natalie's death was violent shaking or violent shaking combined with impact that caused a fatal head injury." *Id.* at 378. The witnesses also testified that "after being injured, Natalie would have had an immediate and obvious response and would not have appeared normal." *Id.* at 378. That medical opinion ruled out the possibility that the child was brought to the day care center with a pre-existing injury.

Thus, the state's proof consisted of only medical testimony, and the medical testimony supplied proof to satisfy every element of the crime. Medical testimony "proved" the cause of the injuries – shaking or shaking with impact. Medical testimony "proved" the child was

intentionally killed – rather than accidentally hurt or the victim of a disease. Medical testimony also "proved" the identity of the killer – it had to be the person she was with when she became ill, because doctors believed Natalie would have been comatose and unresponsive immediately upon sustaining her injuries.

Thirteen years later in 2008, the Wisconsin Court of Appeals reversed Edmunds' conviction on the grounds of newly discovered scientific evidence explaining: "We agree with the circuit court that Edmunds established the first four factors of the newly discovered evidence test by clear and convincing evidence. The evidence is material to an issue in the case because the main issue at trial was the cause of Natalie's injuries, and the new medical testimony presents an alternate theory for the source of those injuries. This evidence is not merely cumulative, in that it differs from the substance and quality of the defense evidence at trial." *Id.* at 386.

Edmunds, like Nathaniel Mitchell, called a single expert witness at trial to counter the prosecution theory. In both cases, at the time of trial, the defense witness opinions were not given serious consideration by the court or jury because they could not at the time explain the problems with the state's scientific evidence. Now, the consensus of opinion in the relevant community has substantially changed. Mr. Mitchell will present evidence to this Court that identification of the "triad" does not inexorably signal shaking and that short falls can kill – something science did not believe just 10 years ago. Indeed, a growing number of experts say that evidence for the very existence of "SBS" rests on unconvincing medical ground, supported by questionable research, which causes it to be misdiagnosed and over-diagnosed. Even the name Shaken Baby Syndrome has been called into question as it suggests death by shaking,

which many medical experts explain cannot be scientifically proven. Instead, the name "Abusive Head Trauma" or "Non-Accidental Head Trauma" has replaced "SBS."[8]

There is one significant difference between the situations in *Edmunds* and Mitchell. Ms. Edmunds was convicted and later exonerated of killing a six month-old child. Mr. Mitchell has been convicted of killing a 2 ½ year-old toddler. Babies who are not yet walking, such as the infant in *Edmunds*, have weaker neck muscles and larger heads than toddlers and are likely more susceptible to rotational injuries.[9] Indeed, the "SBS" hypothesis *depends* on the weakness of the infant neck and the relative largeness of the infant head, as well as the small weight of the infant body (which, according to the hypothesis, makes it possible for adults of normal strength to shake an infant with sufficient force). A child of MINOR's size and strength simply is not compatible even with the original "SBS" hypothesis, let alone with the new medical evidence that undermines the medical community's ability to diagnose it on the basis of brain and eye injuries alone. In other words, because of her size and age, MINOR was less likely to have been injured by shaking and more likely to have been injured through a fall than a baby. MINOR had the ability to support her own head, run, climb, jump, and injure herself.

Other state courts have followed Wisconsin's lead. In the fall of 2012, an Arizona state court reversed Drayton Witt's second-degree murder conviction. Emily Bazelon, *The Exoneration of Drayton Witt*, Slate. Witt was convicted of shaking his 4-month-old baby and causing fatal injuries in 2000. At trial the medical examiner testified that the existence of the classic "triad" of symptoms proved that the child was shaken to death. Norman Guthkelch,

[8] In 2009, the American Academy of Pediatrics revised its position paper on shaken-baby syndrome. It urged physicians to stop using that term and instead describe injuries as "abusive head trauma." WWW.aap.org

[9] *"SBS...most often involve[s] infonts younger thon 6 months of age."* American Academy of Pediatrics, Shaken Baby Syndrome: Inflicted Cerebral Trauma, Committee of Child Abuse and Neglect. Pediatrics, Vol. 92 No. 6, December 1, 1993, *available* at http://pediatrics.aappublications.org/content/108/1/206.full (last visited February 16, 2013).

British pediatric neurosurgeon who first generated the "SBS" hypothesis, reviewed Witt's medical records and determined that there were many other possibilities that could have caused the child's death. Post-conviction counsel argued that the verdict should be set aside based on new scientific evidence. The court agreed and overturned the verdict.

In December 2012, the Texas Court of Criminal Appeals granted Cathy Lunn Henderson's application for a writ of habeas corpus and awarded her a new trial. *Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. Dec. 5, 2012). Ms. Henderson had been convicted of intentionally killing an infant in her care. At trial, doctors testified that "this is the worst case of head injury [at that hands of a person] I [have] ever seen." Id. At 838. In June 2007, the Court of Criminal Appeals ordered the trial court to conduct an evidentiary hearing. *Ex parte Henderson*, 246 S.W.690 (Court of Criminal Appeals, 2007). At that hearing six experts presented the new developments in the science of biomechanics. The defense experts all agreed that the child's injuries could have been caused by an accidental short fall. Significantly, the medical examiner who had testified at the original trial said that a short fall could not cause severe brain injury, changed his mind and told the court "he now believes that there is no way to determine with a reasonable degree of medical certainty whether [the infant's] injuries resulted from an intentional act of abuse or an accidental fall." *Supra*, a fn 8, at the majority opinion. The trial court concluded that Ms. Henderson had established "by clear and convincing evidence" that no reasonable juror would have convicted her of capital murder in light of her new evidence. *Id.*

In December of 2014, New York County Court Judge James M. Pampiano granted a motion for a new trial to Rene Bailey who was convicted in December of 2001 on the theory of Shaken Baby Syndrome. In that case, Ms. Bailey was a day care worked who was caring for two

and a half year old Brittney Sheets on the day that she sustained a head injury which ultimately led to her death. According to Ms. Bailey Brittney fell off of a bench and hit her head while Ms. Bailey was in the restroom. However, the medical doctors who treated Brittney diagnosed her with Shaken Baby Syndrome. At trial all of the State's medical experts testified in a similar manner to the experts in Nathaniel Mitchell's case maintaining that the constellation of symptoms including brain swelling, subdural hematoma, and retinal hemorrhages meant a diagnosis of Shaken Baby Syndrome for Brittney Sheets. As in Mr. Mitchell's cases, Ms. Bailey was unable at trial to counter the medical evidence because the science had not advanced far enough. Judge Pampiano found that because of the advances in the medical research and literature surrounding Shaken Baby Syndrome that Ms. Bailey was entitled to a new trial.

C. New Scientific Evidence Meets the South Carolina Standard for Vacating a Conviction Based on After Discovered Evidence

Motions for a new trial based on after discovered evidence are governed by Rule 29(b) of the South Carolina Rules of Criminal Procedure. Pursuant to that rule, in order to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *Jamison v.* State, 765 S.E.2d 123 (2014); *McCoy v. State*, 401 S.C. 363, 368 n.1, 737 S.E.2d 623, 625 n.1 (2013) (*quoting Clark v. State*, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993).

In the case at hand, the State presented its theory of Shaken Baby as a fait accomplis. The State's medical experts testified that if you have the trifecta of retinal hemorrhages, brain swelling, and a subdural hematoma that the only explanation for this is shaken baby syndrome. Each of the doctors stated there was no question and no doubt in their minds that this child was

shaken to death because the three symptoms listed above meant shaken baby syndrome. This was the State's entire theory and comprised their entire case from opening to closing. This jury literally left with no choice after hearing this medical expert testimony. Had the jury known that there were other possible explanations for these injuries or that these injuries could result from accidental injury, the result would have been different. Nate was a man with no prior record who was in the process of adopting these three siblings out of the love in his heart and the desire to nurture a family. All of the non-medical evidence supported a finding of not guilty.

This evidence could not have been and was not presented to the jury. While vague references were made to the emerging debate surrounding shaken baby, the jury was not presented with any meaningful information in this regard challenging the fait accomplis that is shaken baby syndrome. As detailed in the first section of this Memorandum of Law, new scientific evidence has undermined the hypothesis of a "Shaken Baby Syndrome." Medical experts now acknowledge that shaking is not the only or even the most likely way a young child can suffer severe brain injury, and they also recognize that retinal hemorrhages, subdural hematoma, and brain swelling can be induced by a variety of forces. Scientific experts no longer see the "triad" as exclusively diagnostic of shaking, as they did in 2002 when Nathaniel Mitchell was tried for homicide. And, experts now believe that short falls are dangerous and can cause fatal injuries.

Balancing the persuasive power of the new scientific evidence against the proof at trial, it is clear that the verdict cannot stand and Mr. Mitchell must be granted a new trial. Had the jury heard that short falls can cause fatal head injuries in children, and that the "triad" is not exclusively diagnostic of "SBS," the jury would have acquitted.

In the end, it was the medical testimony – and only the medical evidence- that convinced the jury that r. Mitchell shook MINOR to death. Now new medical research disputing all of the hypotheses presented as established scientific fact to the jury undercuts the prosecution's evidence case and corroborates Nathaniel Mitchell's innocence. Had the jury heard this evidence, the jury would have acquitted.

This new medical and scientific evidence cannot be described as immaterial, cumulative or impeaching. The medical evidence was not simply central to the prosecution's case, it was the whole case. What Dr. Plunkett could now tell the jury would result in an acquittal as it would provide a framework for the jury to consider the medical and scientific experts that undermines the absolute certainty and irrefutable testimony presented by the state's doctors.

WHEREFORE, Petitioner respectfully requests that this Court grant his motion for a new trial on the basis of after discovered evidence.

Respectfully submitted,

E. Fielding Pringle
Attorney for Defendant Nathaniel Mitchell

January 12, 2015

State of South Carolina	)	
	)	In the Circuit Court
County of Richland	)	
	)	
	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	2000-GS-40-05066
	)	
versus	)	
	)	
Nathaniel Mitchell,	)	TRANSCRIPT OF RECORD
	)	
Defendant.	)	
	)	

Monday, February 9, 2015

BEFORE:

The Honorable Robert E. Hood

APPEARANCES:

Joanna A. McDuffie, Esquire
Attorney for the State

E. Fielding Pringle, Esquire
Attorney for Defendant

Karen Ambroziak, RPR
Official Court Reporter

INDEX

DR. JOHN PLUNKETT

Direct Examination by Ms. Pringle..... 9

Cross Examination by Ms. McDuffie.....106

Redirect Examination by Ms. Pringle.....154

Recross Examination by Ms. McDuffie.....168

Certificate of Court Reporter.....174

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
S-1	Transcript	126	127
D-1	Motion for New Trial	1	
D-2	Ayub Ommaya Article	1	19
D-3	Biomechanics Article	1	
D-4	Infantile Subdural Article	1	21
D-5	NPR Article	1	
D-6	August 1972 Article	1	23
D-7	Whiplash Article	1	7
D-8	Fetal Head Injury Article	1	
D-9	Mortality Article	1	
D-10	Evidence-Based Article	1	38
D-11	Statement (Handwritten)	1	40
D-12	Statement (Typed)	1	40
D-13	SBS Article	1	
D-14	Analysis Article	1	

		ID.	EV.
D-15	Child ATD Article	1	
D-16	Biomechanical Article	1	
D-17	Biomechanical Article	1	
D-18	Biomechanics and Neuropathy Article (Withdrawn from the Record-Duplicated)	1	
D-19	Perimacular Article	1	76
D-20	Retinal Folds Article	1	76
D-21	CT Findings Article	1	79
D-22	Imaging Article	1	79
D-23	SBS Article	1	88
D-24	SBS Article	1	88
D-25	Abusive Head Trauma Article	1	
D-26	Imaging Nonaccidental Article	1	79
D-27	Position Paper Article	1	
D-28	Position Paper Article Revised	1	
D-29	Aaliyah Lavern MINOR Report	1	
D-30	Operative Report	1	102
D-31	Deaths From Falls Article	1	91
D-32	Annual Risk of Death Article	1	91
D-33	Exam Report	1	102
D-34	CV John Plunkett	1	14
D-35	Memo	1	

(Defendant's Exhibits Number 1 through 35 were marked for identification by the court reporter.)

PROCEEDINGS

THE COURT: We are on the record in the State of South Carolina versus Nathaniel Mitchell. This is Indictment Number 2000-GS-40-50660 and present for the State is Joanna McDuffie and Nicole Simpson. Good morning. Are you Mr. Mitchell?

THE DEFENDANT: Yes, sir.

THE COURT: How are you doing?

THE DEFENDANT: I'm doing all right.

THE COURT: Where did you come in from?

THE DEFENDANT: Kershaw.

THE COURT: From Kershaw? Let's see. Is that in Lancaster County? The prison is in Lancaster, isn't it?

THE DEFENDANT: Yes, sir.

THE COURT: You didn't think I knew that, did you? I've been to that prison before. Mr. Mitchell is present and his counsel, Ms. Pringle, Fielding Pringle, of the Public Defender's Office is present. Ms. Pringle, why don't you start us off with where we're going and the way in which we're going?

MR. PRINGLE: Can I have just two minutes?

THE COURT: Absolutely.

(Whereupon, there is a pause in the proceedings.)

MS. PRINGLE: We're here in the Matter of the State versus Nathaniel Mitchell. This motion was filed originally by Kris Hines back in April, April 4th of 2012, motion for new trial based on after-discovered evidence pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure.

What happened was Mr. Mitchell was tried in 2002. He was represented at that time by Mr. Doug Stickler and Ms. Lee Coggiola. He was convicted of homicide by child abuse in a trial in 2002.

THE COURT: When was he arrested or when -- yeah, when was he arrested?

MS. PRINGLE: It's in 2000. The early morning hours of March 31st, 2000, I believe. The warrant may have been served on the 30th. Somewhere around midnight.

THE COURT: Okay.

MS. PRINGLE: His case proceeded through direct appeal. It was affirmed. It was remanded to the Court of Common Pleas for post conviction proceedings. He was appointed to Ms. Tricia Blanchette at that time.

Ms. Blanchette began her investigation into the case, reading the materials and the records, and

determined that she believed it would be better offered in the form of a motion for new trial. She approached Judge Barber, I guess the appointed judge at that time, or the assigned judge at that time, and he remanded the case, held the PCR in abeyance and appointed my office for purposes of filing a motion pursuant to Rule 29.

Ms. Hines represented Mr. Mitchell for a year or so and then I actually took over the case and have been handling it ever since.

THE COURT: So when did the direct appeal conviction come back?

MS. PRINGLE: He was indicted during the June 2000 term. Direct appeal, State versus Mitchell, Opinion Number 3918, South Carolina Court of Appeals, January 10th, 2005. An application for post conviction relief was filed October 8th of 2007 and in 2008 Ms. Blanchette was appointed, and then in 2012 she filed a motion for abeyance and/or dismissal without prejudice.

THE COURT: Okay.

MS. PRINGLE: I have filed to supplement the motion for a new trial filed by Ms. Hines in April. I filed a memorandum of law in support of the motion for the new trial which has been served upon Ms. McDuffie,

opposing counsel, and the Court. That is actually marked for purposes of these proceedings as Defendant's Exhibit Number 35. The motion for new trial filed by Ms. Hines has been marked as Defendant's Exhibit Number 1.

THE COURT: All right.

MS. PRINGLE: We are ready to proceed today, Your Honor. We have one witness that we intend to offer today, which is Dr. John Plunkett, to testify about the medical and scientific issues in this case.

I don't believe that the State intends to offer any witnesses today, and that would be our sole witness for today.

THE COURT: All right. Anything from you, Ms. McDuffie, before we start?

MS. McDUFFIE: Your Honor, that's correct. We do not intend to offer any witnesses today. We'd ask the Court, since we didn't receive the basis for the motion until January the 14th of this year, if we could proceed with Mr. Plunkett's testimony today and then if the State felt the need to offer any additional argument or witnesses, that that would be done at a later time.

THE COURT: All right. We already agreed on that amongst the parties in a status conference on the

case. So there are no procedural challenges to the form of this motion?

MS. MCDUFFIE: Your Honor, yes, I do have procedural challenges if you'd like to hear them.

THE COURT: Where is Dr. Plunkett from?

MS. PRINGLE: Minnesota.

THE COURT: All right. Well, let's go ahead and get him out of the way and then we can circle back around.

MS. PRINGLE: There has been no notice of any procedural challenge and I haven't been informed of any motions or issues. I would just ask whatever time we take that up I have the opportunity to respond and research that matter.

THE COURT: I mean, I saw three just in the factual scenario you gave me so. All right. Let's go ahead and start with Dr. Plunkett.

MS. PRINGLE: The Defense calls Dr. John Plunkett.

MR. PLUNKETT: I thought you were kicking me out.

THE COURT: No, come on down. Welcome to South Carolina.

MR. PLUNKETT: Thank you, sir.

THE COURT: I'm going to go ahead and skip other things and get you in and out so that you can make

whatever plane you need to and try to be as accommodating to you on time as possible.

MR. PLUNKETT: Thank you, sir. Flight isn't until six so I've got all day.

THE COURT: Great.

MR. PLUNKETT: Meeting with Ms. Pringle last night, it might be all day.

THE COURT: All right.

(Witness sworn.)

THE CLERK: Please have a seat and state your full name.

THE WITNESS: John -- J-O-H-N -- Jerome with a "J" -- Plunkett -- P-L-U-N-K-E-T-T.

THE COURT: All right, Ms. Pringle?

JOHN PLUNKETT, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. PRINGLE:

Q Good morning, Dr. Plunkett.

A Good morning.

Q Doctor, where are you from?

A Welch, Minnesota, which is a farming community about 45 minutes southeast of the Minneapolis/St. Paul airport.

Q That's where you actually live now?

A Yes, it is.
Q And, sir, if you don't mind I'm going to put these down just so I can see you. Do you have room down here?
A All my earthly possessions.
Q And, Dr. Plunkett, what do you do for a living? What is your profession?
A I'm a retired general pathologist which is anatomic and forensic pathology, or anatomic and clinical pathology, and I'm also board certified in forensic pathology and I continue to practice forensic pathology almost exclusively at the request of defense counsel in cases such as Mr. Mitchell's.
Q And tell the Court a little bit about your education.
A I attended and graduated from the University of Minnesota Medical School. After medical school I had a one-year rotating general internship at St. Paul Ramsey Hospital, which was the county hospital at that time.

After internship I had five years of additional training, four of them in general pathology at Ramsey and one as a fellow in forensic pathology at the medical examiner's office in Minneapolis. I finished that training in 1978. I took board certification examinations in three areas: anatomic pathology,

clinical pathology and forensic pathology. I passed those exams which means that I'm board certified and that was the end of my formal education.

However, in order to maintain licensure in Minnesota and Wisconsin -- and this is true in many other states -- not all -- I'm required to have a minimum of 25 hours a year of certified continuing education, which I have had for years and years and years.

Q Okay. And your employment history; where did you end up working?

A I only had two jobs in my professional career. One was as a deputy or assistant medical examiner from approximately 1975 through 1985. After I finished my residency, I became the laboratory and medical education director at a small community hospital southeast of Minneapolis/St. Paul near Redwing and I was the appointed coroner, what we would call in many states the medical examiner, since I was the forensic pathologist, for several Minnesota counties at the time I retired from my hospital responsibilities at the end of '04 or '05. Those counties had a total population of about 850,000.

Q And so you had two jobs; one was 10 years and the other was until you retired?

A '78 through '05, whatever that is.
Q Okay.
A Twenty-seven years.
Q And so you were the lab director and assistant coroner in '04 -- until '04?
A Well, I was actually the coroner. I was the appointed coroner until, I think, about 2000. My partner and I did a flip-flop. She became the coroner and I became the assistant coroner, because at that time I wanted to -- to emphasize laboratory medicine and surgical pathology.
Q And the Regina Medical Center, was that sort of the umbrella term for what you were operating?
A That's correct.
Q And that serves a total population of about 750 -- 850,000?
A The coroner's office did. The hospital itself was fewer than 50 beds but we covered a large service area.
Q And in the course of your career, did you perform any autopsies?
A Yes, I did.
Q Do you have any idea about how many?
A It was over 2,000; probably not over 3,000 but I did not really keep track so if I performed 100 a year for

20 years that would be 2,000.

Q A lot.

A It was a lot. There's people have performed a lot more than I have.

Q And I see, Dr. Plunkett, from your CV which has been marked as Defendant's Number 34 you have a number of publications and national presentations in your history.

A That's correct.

MS. PRINGLE: And I'm not going to go through all those, Judge. I'm going to hand his CV up to you in just a moment ---

THE COURT: Great.

MS. PRINGLE: --- rather than list all 27 approximately of those.

Q Correct?

A That's correct. Now, the majority of those are either presentations or abstracts, not original manuscripts. Original manuscripts, I'm going to guess that there's 10 or 12 and most -- almost all of those have been since 1998.

Q And have you testified before?

A I have.

Q Do you have any idea about how many times?

A It's probably over 300. Earlier in my career when I

was testifying almost exclusively at the request of the State, I may have testified -- and this is a guess -- 150 times. Since '04 I've testified about 15 times a year including a couple of times in '04 in South Carolina, so if that's 10 years that's an additional 150, so my guess is that it's over 300.

Q And you said -- you mentioned you've testified twice in South Carolina?

A I did. You and I spoke last night. I looked it up and I testified once in '04 and once in '05.

Q And ---

A And a third time. The third time was actually at a sentencing hearing where I had not testified in the trial and I think that was '07 or '08.

Q But three times in South Carolina you've been qualified?

A That's correct.

Q And qualified in what areas, sir?

A Anatomic pathology, clinical pathology and forensic pathology.

Q All right.

MS. PRINGLE: At this time, if I may hand up his CV. I'll offer Defendant's Exhibit 34, CV of Dr. Plunkett, into the record and I would offer him as an expert -- that he be qualified as an expert in the

areas of anatomic, clinical and forensic pathology.

THE COURT: Ms. McDuffie, have you seen his CV?

MS. MCDUFFIE: I have seen his CV, Your Honor.

THE COURT: Any objection to him being an expert?

MS. MCDUFFIE: No, Your Honor.

THE COURT: Okay. Thank you. And we did anatomic, clinical and forensic; is that what you requested, Ms. Pringle?

MS. PRINGLE: Yes, sir.

THE COURT: All right. He is found to be an expert in those areas based on his experience, education, and he will be allowed to testify as an expert in those areas.

Q Dr. Plunkett, throughout the course of your career, did you develop an interest in a particular area?

A I did.

Q What is that?

A Early in my career my primary interest was what's called decision analysis, how you use predictive value to help you to know what tests to order in order to care for a patient, and that was my primary interest from my residency until the mid '80s. In the mid '80s I began to develop a particular interest in infant head injury evaluation so that began in '85 or '86 and today that is still my primary interest.

Q And what prompted that interest? What prompted you to start that in the mid '80s?

A I was involved in prosecution in Minnesota where the State had alleged a year and a half old toddler had died as a result of being shaken by her mom. The story was that the child had been standing on the arm of a sofa and did a header hitting the linoleum floor adjacent to the couch and she developed a large volume subdural hematoma and she died.

The medical examiner said that the death had been the result of shaking and I said well, there's an impact injury, why can't that have caused it, and I was told because we never see it. We never see serious or fatal head injury from a short-distance fall.

Well, it was pretty obvious that that was a circular argument and I knew from my experience with adult deaths that adults can die from brain injury from a ground-level fall. Dr. Adkins, the diet doctor, for example, in New York, died four or five years ago from a slip and fall in the ice right outside of his apartment building in New York.

So I started to research the actual studies regarding head injury in -- in human beings, not somebody's opinion but rather the actual scientific

data and that escalated through the next 14 years until it probably crystalized, I'd say, in 1999, 2000.

Q Okay. So basically you encountered a case that didn't match, I guess, the science or the understanding of what had happened to that child?

A Well, that was the problem. It did match the science but it didn't match the opinion of others. That was the problem.

Q And when you talk about shaking, will you tell the Court -- because you've been talking about, sort of, being generally interested in the mechanisms of head injury, but you mentioned shaking with respect to this child. Tell the Court what you're talking about.

A Your Honor, back in the '60s there was a neurosurgeon and biomechanical engineer named Ayub -- A-Y-U-B -- Ommaya -- O-M-M-A-Y-A -- who worked at Georgetown, was a professor of neurosurgery at Georgetown, and actually worked for the National Institute of Health on injury mechanisms in human beings.

His primary focus was to try to prevent whiplash injury and in order to prevent whiplash injury, you have to understand how whiplash injury occurs, and so he designed a series of experiments using Rhesus monkeys and he put those monkeys on a rocket sled and he developed a contraption to contain those monkeys so

that the only thing that would move when the rocket sled hit the end of the run was the head.

So he was isolating what is called impulsive loading or rotational acceleration from the effects of impact, so he was the first one to do these studies and he was in his mid 30s when he was doing this back in the '60s.

Q Is that around 1969, late '60s?

A '68 is when he published the first article in the medical literature. That one was in the Journal of the American Medical Association. He had a couple of previous ones published in the engineering literature. He had one published in 1969, I believe, in the New York Academy of Sciences publication.

Q Let me hand you what's been marked as Defendant's Exhibit Number 2 and ask you if that refers to one of those articles you just mentioned.

A This is the article that was in the Academy of New York -- the bulletin of the New York Academy of Medicine in 1969.

Q And does that describe that study that you're talking about?

A Yes, it's a background on the experimental knowledge at that time and what has been done and needs to be done.

Q And this was actually in 1969, this article ---
A Correct.
Q --- but this addresses what you're talking about which is the foundation for shaken baby; is that right?
A Correct. It was not done -- Dr. Ommaya did not do that as the foundation for shaken baby. He did that to evaluate whiplash injury. Unfortunately, what he did was subsequently misinterpreted.
Q And we're going to get to that in just a second.

MS. PRINGLE: I'd offer Defendant's 2 into the record. Ms. McDuffie has been provided all of the exhibits and seen them all in advance.

MS. MCDUFFIE: No objection to the article.

THE COURT: Okay. That's a 1969 article?

MS. PRINGLE: That one is, yes, sir.

Q And so Ommaya's actually studying whiplash injuries, not shaken or babies or anything like that; is that right?
A That's correct.
Q And what happens next in the evolution of this?
A There is a British neurosurgeon named Norman Guthkelch -- G-U-T-H-K-E-L-C-H -- who published an article -- if I remember correctly it was in the British Medical Journal in 1971 -- and an American radiologist named John Caffey -- C-A-F-F-E-Y -- who published articles

in the American pediatric literature in 1972 or 1974 and they took Ommaya's data and basically misinterpreted it and applied it to their theory that shaking was causing subdural bleeding -- subdural bleeding and retinal hemorrhages in infants.

Q And were they literally relying on the Ommaya study? Is that where it came from, although I understand you're saying they misinterpreted it?

A Well, that was -- that was the scientific basis for their theory. Guthkelch's was just simply an observation. He said, you know, I wonder if these kids -- if whiplash is causing it. Caffey relied in part on a series of anecdotes, one which he actually obtained from a Newsweek Magazine article published in 1957 about a nurse from Connecticut who supposedly shook a couple of kids to death, and so that was his scientific basis, were anecdotes that he had gleaned at least in part from the press rather than from actual scientific reports.

Q And before we go any further into the history of this, what is shaken baby syndrome?

A Shaken baby syndrome as originally defined was a brain injury, specifically subdural hemorrhage and brain swelling associated with bleeding in the back of the eyes, retinal hemorrhage, as a consequence of shaking.

Q And would you describe it as a diagnosis, a hypothesis, I guess, at least when it first came into being in the '70s?

A Well, one of Caffey's articles was titled On Theory and Practice, et cetera, so it's clear at least initially that this was an hypothesis. However, it almost immediately became scientific fact without any attempt to validate it whatsoever. It was simply accepted.

Q Let me show you a couple of articles. Defendant's Exhibit 4, what is that?

A This is Guthkelch's article from -- it was the British Journal of Medicine -- what they called at that time the British Medical Journal in 1971, so that's Dr. Guthkelch's. He's still alive. He's in his 100s. He would be 100 years old, lives in Toledo.

Q And ---

A September 2nd.

MS. PRINGLE: I would offer Defendant's 4 into the record at this time.

THE COURT: All right.

MS. PRINGLE: And --

THE COURT: Any objection?

MS. MCDUFFIE: No, Your Honor.

THE COURT: Okay.

Q Dr. Guthkelch is from where?
A Well, he's from -- he was actually born in Wales. He's been in this country for 30 years because when you're 70 years old and -- 65 years old in Great Britain, you're not allowed to practice medicine anymore.
Q And so he moved to the United States ---
A He moved to the United States ---
Q --- in order ---
A --- practiced for another 15 years.
Q And since -- I don't know -- do we call it an article or a study that he issued in 1971 ---
A It's an article.
Q Since this 1971 article has he expressed doubts or concerns or has he revisited those findings?
A He has.
Q And tell the Court a little bit about that.
A Well, he's basically recanted the things that he said 40-some years ago. He has said that publicly in interviews with various news organizations and he's said it in press in a commentary that was written for the -- it's the Houston Journal of Health Science and Law, or something like that. Published two years ago. He said I got it wrong.
Q And has he issued cautions or asked for warnings and

people to be cautious in finding shaken baby?

A Yes, he has.

Q Let me show you what's been marked as Defendant's Exhibit 6. What is that?

A This is Caffey's 1972 article titled On the Theory and Practice of Shaking Impacts -- Shaking Infants, American Journal of Diseases in Children, 1972.

MS. PRINGLE: Offer Defendant's 6 into the record at this time.

MS. MCDUFFIE: No objection.

MS. PRINGLE: And -- I'm sorry.

Q Defendant's Exhibit 7.

A This is Caffey's article in Pediatrics, which is the official journal of the American Academy of Pediatrics, published in 1971.

MS. PRINGLE: And I would offer Defendant's Exhibit 7 into the record at this time.

THE COURT: Any objection?

MS. MCDUFFIE: No, Your Honor.

THE COURT: Thank you, ma'am.

Q So you've described Ommaya's study with the Rhesus monkeys which was really a study of whiplash injury, the offshoot studies of Guthkelch and Caffey.

A Correct.

Q That's where shaken baby came from?

A It is.

Q And then what happened?

A Well, it was accepted -- basically accepted as fact by the pediatric community but not by the forensic pathology community. They, for the most part, were not even aware of it. Matter of fact, the first time that a death had been prosecuted as shaken that I was involved with in about 1986, some 12 years to 15 years after the original publications, but the pediatricians started using it as fact and accepted it as fact.

It wasn't until 1987 when a neurosurgery resident at the University of Pennsylvania named -- D-U-H-A-I-M-E -- was encouraged by her Ph.D. advisor Larry Thibault -- T-H-I-B-A-U-L-T -- to do some scientific experiments to simply study motion. In other words, how fast, back and forth can you shake a one-month-old model? It doesn't have to be biofidelic. It doesn't have to look like a baby. All it has to do is wave that model so that you can move it back and forth as fast as you can and measure the distance and measure the time over which those back-and-forth motions occur.

So if you know the frequency and if you know the amplitude, you can determine -- you can calculate or you can actually measure the force that's involved.

In order to do this, Thibault developed -- he had three different types of necks. One was the equivalent of a steel rod that would have been very stiff. One was simply a floppy hinge and one was a rubber hinge in between segments of the steel and the hinge. And then they got a bunch of University of Pennsylvania football players -- not Penn State -- the University of Pennsylvania -- to shake that model back and forth to see how -- what's the acceleration and that was the study.

It was the first study that was used to evaluate shaking as an injury mechanism and they showed that accelerations -- as part of that shaking -- at the end of the shaking the impact of the head against either a steel rod or a steel rod that had been padded with rubber foam in order to try to decrease the accelerations and the accelerations associated with shaking were in the order of 10 times the acceleration due to gravity, while the shakings associated with impact were in order of magnitude, at least a factor of 10.

Q And are you talking about the Thibault study or the Duhaime study?

A Well, Thibault was actually the one who did it. She's the author. She's the lead author but Larry is the

one that designed the model, interpreted the results for her, et cetera.

Q And when you say Thibault, is that T-H-I-B-A-U-L-T?

A Yeah, it is.

Q And Duhaime, is that D-U-H-A-I-M-E?

A It is. I'm sorry. When I'm referring to that study, Duhaime is the lead author.

Q That's the same study?

A That's the same study.

Q And that's ---

A 1987 study in general neurosurgery.

Q I'm going to back you way up, because we got into the history before I got some of the stuff I wanted at the very beginning. So let me back you up. We'll pick back up at 1987. Okay? Did I contact you at some point with respect to the case of State versus Nathaniel Mitchell?

A Yes, you did.

Q And do you recall when I contacted you?

A I don't recall. I can look at my notes. It was July 25 of '13.

Q And I don't want you to go into this case specifically as to your findings at this time, but did I ask you to review a number of materials, records, medical records, discovery relating to this case?

A Yes, you did.
Q And have you reviewed the trial transcript of this case?
A Yes, I have.
Q And what was the State's theory as to the cause of death of -- the deceased in this case, her name is MINOR ; correct?
A Correct.
Q And what was the State's theory as to -- their theory as to the cause of death of MINOR ?
A Shaking caused her death.
Q Shaken baby syndrome?
A Yes.
Q And did they advance that theory in opening statements?
A Yes.
Q And do you remember who the PICU treating physician was?
A Let me look it up.
Q PICU would be the pediatric ---
A Pediatric intensive care unit.
Q --- care unit. If you would just look at page 175.
A Oh, in the transcript?
Q Uh-huh.
A I've got three sets of transcripts here.

Q Go to the green one. I can ask you this without -- we can talk about the names later, but the pediatric intensive care unit, the treating physician, his finding was what?
A Shaken baby syndrome.
Q And do you recall the State calling a pediatric ophthalmologist?
A I do.
Q And what was her theory?
A She said it was shaking.
Q And do you recall her saying there's not a question in her mind that it was shaken baby?
A That's correct.
Q And do you recall them calling a forensic pediatrician who had been involved in the care of MINOR ?
A Able?
Q Yes.
A Yes, I do.
Q And do you remember what she said the cause of death was?
A She said it was shaking.
Q And did she also indicate there was no doubt in her mind?
A If you'd give me just a second to take a look at the --

Q I would just refer to page 298, for the record, in the transcript, lines eight to 15 on 298. I'm sorry. Line 24, page 298.
A That's correct. There was no doubt in my mind. That's what she said.
Q And do you recall them calling a radiologist?
A I do.
Q And the radiologist testified to neuroimaging scans taken in this case?
A That's correct.
Q And do you recall his findings?
A Yes.
Q What was that?
A Injury due to shaking.
Q And the doctor who performed the autopsy, Dr. Ron Burns, did he also agree at trial that these injuries were consistent with shaken baby?
A He did.
Q There was one last Dr. Clay Nichols offered in reply. What was his cause of death?
A That shaking caused the injury and death.
Q And what injuries -- again, I don't want to go into great specificity at this time, but just generally what were the injuries that led these physicians to find shaken baby in MINOR ?

A MINOR had a large-volume, acute subdural hematoma requiring surgical evacuation. She developed malignant cerebral edema which is longhand for bad brain swelling. Matter of fact, the neurosurgeon noticed the brain swelling when he was doing the evacuation of the right-sided subdural hematoma, and she had extensive bilateral retinal hemorrhage and those three things, subdural hemorrhage, retinal hemorrhage and brain swelling, in 2000 and in 2002 at the time of the trial, equaled shaken baby syndrome with very little question on the part of physicians, including at that time forensic pathologists.

Q And so those three things, are those sometimes referred to as the triad?

A They are.

Q Those three symptoms or manifestations, you said equaled shaken baby at that time?

A At that time they did.

Q And that was in 2000 when they would have been treating her?

A That's correct.

Q And would you, sir, turn to page 909? I can hand it to you, if that's faster. Would you just start at line 18? This is Dr. Clay Nichols in reply. Would you just read line 18 at the bottom of the page? This

is actually on cross examination.
A This is ---
Q No, it's on direct.
A --- 909 beginning on line 18. This is a classic case of shaken baby syndrome. We have an individual two-year-old that has subdural hemorrhage. You have the cerebral edema caused by brain injury. You have the retinal hemorrhage, which in this case is not just retinal hemorrhage, but all the way back to the brain. It doesn't get any more classic as far as the definition for shaken baby.
Q And that was Dr. Nichols testifying for the State?
A That's correct.
Q And does that summary reflect the mainstream and traditional beliefs of shaken baby in 2000?
A On the part of pediatricians and pathologists, yes, but not by biomechanics.
Q And in 2002 as well when he testified?
A That's correct.
Q And before we get back to the history, have there been -- has there been a change from 2000 or 2002 to 2015 in the understanding of pediatric head injury?
A There has.
Q And can you tell the Court just generally, are there some specific areas in which the science surrounding

shaken baby or infant head injury has evolved?

A Well, there are -- there are many areas but if you wanted to -- or break them down, there's probably 10 or 12. One important change is the understanding that low velocity impacts, in other words, kids standing on a chair or even falling from a ground level can on occasion suffer serious or fatal head injury.

Another change has been the knowledge that dural compartment bleeding in a specific location is not specific to a specific mechanism. To explain that in 2000 almost all physicians said that dural compartment bleeding in a space between the right and left cerebral hemisphere was diagnostic of shaking. It's not so that was incorrect.

Physicians in 2000 believed that an ultimately fatal head injury in an infant or toddler cannot be associated with a lucid interval, period of time in which the child appeared to be okay. That was incorrect. Physicians believed that retinal hemorrhage indicated shaking. That was incorrect.

The understanding of the differences, the mechanical differences between infant, toddler, child and adult head injuries was not understood in 2000 or 2002. That for the most part is understood today, at least by the forensic pathologists -- most forensic

pathologists, not all -- by most forensic pathologists and certainly by the entire biomedical community.

The role of confessions in evaluating injury is better understood today than it was 15 years ago. I think those are just some of the changes that have occurred in the last 15 years.

Q And we're going to go through some of those, but not all of those, but generally speaking there has been a -- how would you characterize it? A substantial change since 2000 to 2015?

A Well, it's been a significant enough change that the courts have overturned several convictions that were based on the State's theory that shaking caused the injury. It's significant in that several of the pathologists involved in cases where their original conclusion was that shaking had caused it, or that it was impossible that anything other than shaking caused it, have changed their testimony. They said I was wrong; that was not -- what I testified to was incorrect.

Q All right. And we were last talking about some of the studies that started taking place in the late 1980s, but given the very scant amount of literature that you've described with Guthkelch and Caffey springing off of Ommaya, how on earth was this theory able to

take hold and become so entrenched?

A That is very, very difficult for me to explain, especially when the first goal of the physician is to do no harm. I think that it's incumbent upon physicians, before they make a diagnosis or instigate treatment, to have some basis for that other than what you've been taught. You may be taught in medical school, as you're taught in trade school, or as you're taught in law school, but I think that the student has a responsibility to go to the original source literature to try to determine whether or not what you have been told is true, and I can't -- I honestly cannot explain how this happened.

Q But to be fair, it is what they are taught in medical school, physicians and pediatricians, that that is or was or both the theory.

A That's correct.

Q Shaken baby syndrome is taught to physicians; is that correct?

A That's correct.

Q And they are taught that those three things, the triad, is diagnosis of that. When you see that it's shaken baby syndrome.

A Until just the last four or five years when they changed the name from shaken baby syndrome to abusive

head trauma.

Q And in 2002 or 2000, there probably was no doubt in their mind. That was their training at the time.

MS. MCDUFFIE: Objection, Your Honor.

THE COURT: Speculation. Sustained.

Q Was that the training in 2000/2002?

A Yes.

Q If you would tell the Judge please about the concept of evidence-based medicine and the interplay between that with this area.

A Yes, beginning in the late '80s or the early '90s, as a response to the evaluation of various drug trials, for example, treatment of breast cancer or treatment of various types of cancers, a group from Hamilton, Ontario developed an algorithm for evaluating published findings and the algorithm was divided into either three or four parts.

The best evidence when you are reviewing a study is going to come from prospective, well-controlled studies with appropriately meshed controls and large enough numbers to have statistical significance. That's level one that's sometimes referred to as level one and two evidence.

Level two of evidence, the next one down, are individual case reports or studies which lack

significant statistical power because it's small numbers or because of lack of significant appropriate controls, and that's okay as evidence as long as you recognize the problems with that evidence.

Level three evidence is someone's opinion and opinion is fine, but opinion can always be trumped by evidence, and that's basically it. Scientific studies, individual case reports and opinion.

Q And was there -- let me show you what's been marked as Defendant's Exhibit 10. What is this?

A This is an article by an Australian -- he's from New South Wales -- epidemiologist and general practitioner named Mark Donohoe -- D-O-N-O-H-O-E -- and he was asked by the Crown in the late '90s to evaluate the scientific basis for shaken baby syndrome.

At that time he'd had no experience with that at all, so he just decided to look at the literature that had been written and he evaluated it and he wrote his own article as well. Article was published in the American Journal of Forensic Medicine and pathology in 2003 and he concluded that the scientific basis -- I'm just going to paraphrase -- for the syndrome was really lacking.

There weren't any studies with sufficient controls to be able to say anything. In other words,

it was a large body of opinion and very little in terms of actual literature with appropriate controls. Now, in fairness, you're not going to be able to get, under almost any circumstances, a level one study involving this, but you can get level two studies, in other words, studies with appropriate controls.

Q And explain why that is. Why can't you get a level one?

A You -- you can't -- you can't take enough experimental animals, you can't take any humans, and subject them to shaking in sufficient numbers to generate statistically significant and valid answers; however, you can look at the biomechanical data or you can look at reconstructed individual events, especially those that happen to be on videotape, and use that as evidence.

Q Level one, you simply can't perform the experimentation that you would have to do ---

A You can't -- you can't perform it.

Q And so he concluded that the scientific -- the literature that actually we've been discussing was lacking and this is in what year?

A 2003 this was published and he only went up to 1998 in his literature. He had -- he had 55 references. This article was criticized because people have said that

he used the wrong search term, shaken baby syndrome. His response to that and my response to that is please show me which articles he missed, and no one has been able to show me or Dr. Donohoe one article that he missed.

Q One article that he didn't include in this ---

A That's right.

Q --- scientific ---

A That would have been found using a different search term.

MS. PRINGLE: That's Defendant's 10 offered into the record.

Q Dr. Plunkett, because we can't perform these level one studies and it's difficult to gain data on this, are confessions or so-called confessions, have they been important in supporting this theory?

A Well, that is the fall-back position today. It's really the only thing that pediatricians have to rely on, because the biomechanical data just simply does not support what they're saying, so it's fallen back on confession and probably to a lesser extent retinal hemorrhage.

Q And have there been -- were there, in fact, statements given in this case?

A There were.

Q I'll show you Defendant's 11 and Defendant's 12. Can you tell the Court what those are?

A Yes, these are Mr. Mitchell's statements. The first one was shortly after midnight on March 31st of 2000. The second one was earlier than that, about nine p.m. on the 30th, so these are separated by about three and a half hours.

Q Okay. And included in these statements, is there a confession to shaking by Mr. Mitchell?

A Well, there is.

Q Would you read to the Court that portion of the statement?

A Yes, I will.

Q Can you find it?

A This is from the one at 0036 on the 31st. When I got to MINOR -- this is after her diarrhea told him something was wrong -- that's in brackets. He didn't say that. I said that. I'm not going to interject. When I got to MINOR she was gagging for air and her eyes were rolling. I shook her back and forth, side to side, trying to get her to breath. Question: How long did you shake MINOR ? It seemed like a couple of seconds. It may have been longer. How hard did you shake MINOR ? I didn't think I was shaking her hard. What happened next? I called my wife at work

and then came back and took MINOR to the hospital.

Q And that's the portion of the statements where he discussed shaking?

A That's correct.

MS. PRINGLE: And if I could hand up please I'd offer 11 and 12.

MS. MCDUFFIE: No objection.

THE COURT: All right.

Q Has there been any research or study into the validity of confessions as supporting the foundation of shaken baby?

THE COURT: I'm sorry. I didn't hear you.

MS. MCDUFFIE: Object. I believe this is outside the scope of his expertise.

THE COURT: What was the question?

MS. PRINGLE: Has there been any research into the validity of confessions in the issue into researching shaken baby syndrome. It's research and articles that he's familiar with that he maintains a library of that he has studied that he is intimately familiar with, probably as much as anyone in the country. I'm not going to ask him to go into what is the science of false confessions. I'm just going to --

THE COURT: He's not qualified to go into

anything about false confessions at all.

MS. PRINGLE: I'm not going to ask him to do that. I'm just asking him if there -- he is qualified to talk about the evolution of shaken baby syndrome, the validity of shaken baby syndrome and what the underlying support for shaken baby syndrome has been. This is -- these are articles -- I'm not going to ask him about the science of false confessions.

THE COURT: Okay.

Q Has there been any research into the area of confessions as to the validity of shaken baby syndrome?

A There have.

Q And can you identify please Defendant's 13 and 14 and tell the Court what those are?

A 13 is an article by Jan -- Jan -- J-A-N -- Leestma -- L-E-E-S-T-M-A. He is a forensic neuropathologist from Chicago. He wrote an article in the Journal of American Physicians and Surgeons in 2006 evaluating confessions in shaken baby syndrome.

The second one is an article by Suzanne Starling who is from the Eastern Virginia Medical School and she published an article in Pediatrics in 2004 titled Analysis of Perpetrator Admissions To Inflicting Traumatic Brain Injury in Children.

THE COURT: When was the first article written?

THE WITNESS: The first one was 2006 and the second one was 2004.

THE COURT: Okay.

Q And what were they studying?

A Well, Leestma looked at all of the published articles that have included confessions and re-evaluated those confessions. Starling looked at a series of cases from various institutions, not only Eastern Virginia but Denver and a couple of other places, Norfolk, Virginia, and analyzed confessions to shaking and confessions to impact cases in which there had been a confession.

Q And so has the reliability of confessions been questioned since 2002 in forming the support or foundation for shaken baby syndrome?

A It has.

Q And has that evolved since 2002?

A It has.

MS. PRINGLE: I would offer Exhibits 13 and 14.

MS. MCDUFFIE: Your Honor, I object to relevance. There's no factual foundation that this -- this was in any way a false confession nor have they offered any indication that it was and I don't understand the relevance at this time.

MS. PRINGLE: It's not that it's a false confession. It's that the science of relying upon confessions to substantiate a diagnosis or scientific theory when you have confessions such as what was offered in this case, which is not a confession.

That's kind of the point, is that, you know, part of the support and I suspect if they bring in witnesses they'll say -- and they say in this record -- if you read the transcript the doctors say how do we know it happens; because people tell us it happens; because defendants tell us it happens; because perpetrators tell us it happens.

Well, they would consider that a confession and so I think that it calls into question the validity of the foundation of the science which is the reason that we're here. I'm not saying it's a false confession. Exactly what he said he did wouldn't have caused this injury and that has evolved since 2002.

THE COURT: Okay. There's no evidence that this is a false confession then so I think -- I guess what you're trying to say is how confessions play into the medical diagnosis.

MS. PRINGLE: Well, it goes back to evidence-based medicine and it goes back to how they -- how shaken baby took hold and part of the basis for it is

they say confessions, and this is a great example of it's not a confession. It's not really a issue of false confessions in this case, but there has been study. Part of the reason this theory has become so entrenched is they believe -- physicians often believe that because they're told, you know, the person admitted or confessed to shaking, but these studies indicate that when they go back and they look at the actual confessions, there are some questions about how extensive those confessions are, whether or not they actually describe what the physicians are saying is required to cause these injuries.

THE COURT: Anything else?

MS. McDUFFIE: No, Your Honor.

Q Dr. Plunkett, I'm going to shift to the issue of biomechanics and specifically I want to talk to you about your experience and interest in the study of short falls. Low velocity falls; is that what you call them?

A They're called low velocity.

Q Okay. And --

MS. PRINGLE: Beg the Court's indulgence.

Q If I could show you what's been marked as Defendant's Exhibit 8 and if you could tell the Court what that is.

A Yes, this is an article that I wrote in 2000. It was published in 2001 in the American Journal of Forensic Medicine and Biology. In 2001 that journal was the official journal of the National Association of Medical Examiners and it's titled Fatal Pediatric Head Injuries Caused by Short Distance Falls.

Q And you are the author of this article?

A I am.

Q All right. And can you tell the Court what led you to write this article?

A Well, it began with my involvement in this other case in 1986 when I realized that what was being taught was incorrect and I knew that because of some knowledge of the biomechanical literature, and I wanted to be able to show, if I could, that low velocity impacts can, in fact, cause death.

Actually I already knew that. The purpose of the study was to see if there was any evidence of lucid intervals and I wanted to try to find a database that would include witnessed events, if possible. The reason I wanted witnessed events is because the pediatricians and most pathologists were saying that they were so sure that what they were saying was true, unless there was an independently witnessed event or if the caretaker tells you it wasn't shaking and it

wasn't a motor vehicle accident or it wasn't a fall from a third-story window, they're right.

As a matter of fact none of the authors in the pediatric community said essentially that in 1999 so I looked at -- I was familiar with the U.S. Consumer Products Safety Commission database for a number of different topics and I called the clearinghouse and I asked them if they had a database on playground equipment, thinking that, you know, playground incidences are likely to have been witnessed by somebody, and they did.

So I received their records, approximately a total of 600 records. I looked at those records. There were 114 fatalities. Of those fatalities, the majority involved a piece of equipment breaking or collapsing and striking someone. The next most common was accidental strangulation where a jacket drawstring, for example, had been caught in the slide and somebody strangled.

The least common were actual falls, and there were 18 falls in that database resulting in fatalities. I was able to retrieve the complete medical records, all autopsies, all police reports, all photographs, all death certificates ---

THE COURT: Who are you?

UNIDENTIFIED SPEAKER: Just a co-worker.

THE COURT: Get out of my courtroom.

UNIDENTIFIED SPEAKER: I was trying to say hello ---

THE COURT: Get out of my courtroom.

MS. PRINGLE: Your Honor, may we approach?

THE COURT: Yes.

(Whereupon, a bench conference was held off the record.)

THE COURT: Mr. Whittle, go get Ms. McBride or Ms. Kelly.

MR. WHITTLE: Get Ms. McBride?

THE COURT: Ms. McBride or Ms. Kelly right now. Hang on, doctor. We're going to take a recess so the court reporter can take a break, a 10-minute break.

(Off the record)

THE COURT: Sorry for the interruption, Dr. Plunkett. Okay. We were on low velocity falls and his article from 2001.

Q I believe where we left off, you were describing you had obtained -- you had looked at 18 falls and you had obtained the autopsies and all the medical records, and I think that's where we were interrupted.

A I was able to obtain complete medical records in all of those cases, complete law enforcement -- basically

everything that I would have needed if the death had occurred in my own jurisdiction. I even contacted several parents in order to get permission to get the medical records.

I was not able to get one autopsy report because of state law in Virginia; however, I was able to talk to the pathologist and she told me the autopsy findings.

Q Just to clarify, you were not able to get that one?

A That one. That's the only record I was not able to obtain. And so I looked at all of these and I simply wrote an article about it, saying that this is what was described, this is what happened: A number of impact fatalities, a number with lucid intervals, a number with retinal hemorrhage and I not only described what happened but then I also discussed the biomechanics of injury, in other words, why it happened.

Q Okay. And what was the basic conclusion or conclusions of your -- of this study?

A Low level falls in the pediatric age group -- and the kids in this study were ages one to 13. It wasn't because people over 13 aren't injured from falls. It's that most people over the age of 13 aren't on teeter-totters and slides at playgrounds.

The same thing for those under the age of one, so it was not because of selection bias that I didn't have anyone over 13 or under the age of one. It was criterion wise. I used that particular database.

And so my conclusion was that it's been sub to fatal head injury from a variety of causes, from large volume subdural hematomas to malignant cerebral edema. They may have extensive retinal hemorrhage of a type at the time described as being specific to shaking.

All of the kids that were in that study who had dural compartment bleeding had it in the location -- I think there were seven or eight that were said prior to that time to be specific to shaking. I think 12 of the 18 had a period of time following the injury in which they appeared to be okay.

Q That would be a lucid interval?

A A lucid interval.

Q And when you said a couple of times subdural hematoma specific to shaken baby or retinal hemorrhage specific to, when you say specific to what does that mean?

A Well, at that time the characteristics of the dural bleeding were said to be specific for shaking as a cause.

Q Meaning only that ---

A Pathognomonic. If you see this, it's shaking, period.

Q You're going to have to spell ---
A P-A-T-H-O-G-N-O-M-I-C (sic).
Q And how do you say that?
A Pathognomonic.
Q And is that the ---
A Don't pronounce the "G".
Q Basically it means diagnostic of?
A It does.
Q Go ahead.
A The same thing with the retinal hemorrhage. The retinal hemorrhage that was described at that time was said to be diagnosis for shaking as an injury.
Q You said that these 18 fatalities that you studied, the symptoms and injuries and manifestations of injury were the same as the triad of injuries that were considered specific to shaken baby?
A In many, not all, certainly. Some of them, for example, involving a 13-year-old with a skull fracture, so it would not describe that as shaking. Some of the kids -- there were only eye examinations done with six of the 18 kids and four of those had the type of bleeding said at that time to be diagnostic for shaking. I don't know what the eyes looked like in the other 12, because they weren't looked at.
Q And in context, sort of, chronologically, was this one

of the first studies? This was in 2001; correct?
A That's correct.
Q What had been done prior to then?
A There was an article written by an ER physician/surgeon named John Hall -- H-A-L-L -- from Cook County, Chicago. He was the lead author. Dr. Robert Stein, who was the medical examiner from Cook County at that time was one of -- I think there was four authors in that study -- and Hall reported a series of fatalities involving falls where the kids came into Cook County Hospital.
Q Defendant's Exhibit 9, what is that?
A Yes, this was published -- or actually five authors -- this was published in 1989. Sudden fatalities, including fatalities caused by low level falls. It's a three-page article and it was one of the first, I think. There may have been -- this wasn't the first, but if there was an earlier one that had enough detail in it to be able to evaluate it, I don't recall it.
Q So the Hall study and your study from the time that -- from the '70s -- early '70s until 2002, are there a whole bunch of other studies like these that support your conclusion that low velocity short falls can cause fatality?
A No, the Hall study was really the first one and they

had -- a lot of the kids were older kids. By older, I mean 10 to 15 years old where I would hope that someone is not able to imagine shaking as a potential injury mechanism, but Dr. Hall -- these were really well documented events in part because the deaths went to the Cook County medical examiner and the Cook County medical examiner actually investigated the deaths, didn't just perform autopsies but actually did an investigation, so I think this is probably the first one with good documentation. Probably -- my study in '02 is probably the second one and since that time, beginning in probably '03, there have been some.

Q Okay. So there are these two studies. In 2000 and 2002, is it widely understood and accepted that low velocity falls can kill or cause the same fatalities as you see in shaken baby?

A No.

Q And you again reviewed the transcript in this case.

A That's correct.

Q And if I could hand you transcript page 176 of Dr. Hubbard and when Dr. Hubbard, who was the PICU treating physician, was asked could a fall or an accidental fall cause this kind of injury, at line seven what does he say?

A He says -- I'm going to quote -- no, the only trauma

that I know of, and I've never seen this but from what's reported, that can cause anything even similar to the big time automobile accident either head on or side impact or the child is ejected from the car, and I guess it's a potential but then you'd see associated other injuries as well. When you have these three things, the swelling of the brain, the subdural hematoma, the retinal hemorrhage, a light goes on. That's shaken baby syndrome.

Q Okay. He says a fall of an accidental type from a short distance cannot cause that injury.

A That's correct.

Q That's Dr. Hubbard.

A That's correct.

Q If I could refer you to page 246, Dr. Cristman when asked about whether a fall of that nature could cause that sort of injury, line one, what does the ophthalmologist testifying for the State have to say?

A She says no. She says that she agrees with Hubbard that a very severe fall from so many stories is required.

Q And if you recall Dr. Abel, when asked if a fall -- the forensic pediatrician, when asked if a -- if some type of fall could cause this injury, she says what?

A Multi-story fall, and that paraphrases it.

Q Yes, sir. What does the neuroradiologist -- what did the neuroradiologist, Dr. Close, do in this case? What was the role of the neuroradiologist?

A The neuroradiologist interpreted MINOR 's initial CT scan and he interpreted it as a large volume right-sided acute subdural hematoma with a chronic component.

Q Okay. And we'll come back to that in a little bit. When asked on page 361 of the transcript by Ms. Campbell to Dr. Close, who is the neuroradiologist; correct?

A Correct.

Q She says doctor, how would you characterize the type of shaking or trauma that it would take. If you could start at line 14 and read on down to the bottom. Dr. Close says what?

A In response to your question that would be brutal. I've seen children fall. Kids come to the hospital after falling out of shopping carts and things like that. We don't see bleeds from that kind of trauma. We see this bleed from bad car wrecks. You see it -- when I was a resident and a child that had fallen out of a window -- third story window. It's significant trauma. Those children that come in from car wrecks you know because of the history. Children that fall

out of a window, we know because there are other bruises and breaks.

Q So all of these doctors testified that an accidental fall from a short distance could not cause that injury.

A That's correct.

Q And is that true?

A No, it's not.

Q Do we know that is not true?

A We do.

Q Doctor, I understand your study was in 2001. Was it widely known? Was this an unusual opinion to be held by physicians ---

A Quite ---

Q --- in 2002?

A Quite frankly, publication of that article shocked the pediatric and pathology community.

Q And what was the reaction? Did they accept it and then endorse it?

A No, they tried to find out what was wrong with it. It was widely criticized.

Q And so ---

A Not in print.

Q Say that again?

A Not in print but widely criticized, you know, in the

blogosphere at that time.

Q So in 2002 the medical community had not accepted that proposition, that such a fall could cause these -- the severity of these injuries?

A That's correct.

MS. PRINGLE: The Court's indulgence just a moment.

Q Show you Defendant's 15 and 16. What are those?

A 15 is an article which I co-wrote with Dr. Chris Van -- V-A-N -- Ee -- capital E -- small E -- who is a biomechanical engineer from Novi, Michigan, which is a suburb of Detroit, called Designing Your Search Engineering. And he and I and three other co-authors reconstructed a fatal fall for which I have the videotape.

Exhibit 16 is an article in which I am a co-author with Professor Lerner Goldsmith who at the time was a professor of bioengineering at the University of California Berkeley. He subsequently died. He died in '03 at the age of 79 and this article was published in '04.

Q Okay. And are those articles -- do those represent follow up to the 2001 article that you described in that study?

A They do.

Q So did you continue to study that issue and that area?
A I did.
Q And conduct research into that?
A Not so much research other than, you know, these types of publications. For example, I laid out the biomechanical basis for the injuries in the 2001 study. In the 2004 study Goldsmith and I discussed those mechanisms.
Q So it's additional analysis of what you had learned in 2001?
A That's correct.
Q And those two articles are 2009 and 2004?
A That's correct.
Q Well after this trial in 2002?
A That's correct.
Q And doctor, of the 18 -- I believe you mentioned that one of the ways that you knew short falls could kill, you actually have a video a grandmother was taking of a child in one of those case; is that correct?
A That's correct.
Q And do you have that here with you today?
A I do.
Q And do you know have certain restrictions on us making that a part of the Court record?
A I don't want -- I have the family's permission to use

it for teaching and Court purposes. I do not want it to become part of the Court record because quite frankly I don't want to see it on Fox News next week.

Q I understand.

A This happened 22 years ago.

Q But do you have it with you here today on your laptop and Judge Hood could review it?

A I do.

MS. PRINGLE: At this time I'd like to do that however you prefer, Judge.

THE COURT: Somebody tee it up and bring it here.

MS. PRINGLE: And bring it to you?

MS. MCDUFFIE: Your Honor, we haven't had the opportunity to review it.

THE COURT: Okay. Well, how long is it?

THE WITNESS: A minute and a half.

THE COURT: All right. Let Ms. McDuffie see it first.

(The videotape is viewed by Ms. McDuffie off the record.)

MS. PRINGLE: Would you prefer that we bring it up to you?

THE COURT: Yes.

MS. PRINGLE: If Dr. Plunkett could, sort of, stand and describe to you what ---

THE COURT: Sure.

THE WITNESS: First I'll just explain ---

THE COURT: You can come stand right here. It'll make it easier. Okay.

THE WITNESS: This is one of the cases that I published in 2001. A twenty-three-month-old girl who was at her parents' home with her four-year-old brother, her parents and her grandparents and gets to playing in the garage, the parents' garage. The kids are playing on a Fisher Price -- I think it's Fisher Price -- treehouse in the barn -- or in the garage and the garage floor was concrete covered by an area rug and another rug.

The twenty-three-month-old climbs onto the structure. She's straddling the side railing and she loses her grip and falls and strikes the second piece of carpet with the right side of her head. She initially strikes carpet, loses consciousness about five or 10 minutes later. She's brought into the local hospital, has a large volume acute subdural hematoma which was surgically evacuated but she dies a couple days later.

THE COURT: Okay.

(The videotape is viewed by the Court off the record.)

Q Dr. Plunkett, when did that accident actually take place?
A 1993.
Q And when did it come to your attention?
A 1999.
Q And it was included in your 2001 ---
A That's correct.
Q --- study? And that child suffered what injuries?
A A large volume acute subdural hematoma, a bruise on the left side of her forehead and no other injuries. She had extensive retinal hemorrhage.
Q And did she ultimately have brain swelling as well?
A She did.
Q And was that the cause of her death?
A It was.
Q So ---
A I'm not sure whether it was the large volume acute subdural hematoma that caused it or the subsequent brain swelling. It would be the same argument with MINOR . I don't know whether I would say it's the subdural hematoma or the brain swelling, because certainly in either case if a surgeon had not attempted surgical evacuation the kid was going to die.
Q And approximately how high is that structure?

A Well, the thing that she is straddling was 28 inches above the ground and that fall is with a zero initial velocity. She's not running. She's not walking. She's not doing anything. It's the equivalent of her standing and falling in school and the reconstruction shows that she's hitting the ground at between 18 and 20 feet per second, which is about 12 or 13 miles an hour.

Q You discussed reaction to that study and the lack of acceptance of that study. Was there one individual in 1991 who performed a study on falls?

MS. PRINGLE: Just a moment. Sorry. Beg the Court's indulgence.

Q Doctor, did you supply me with two studies this morning? Do you recall me asking you for the Chadwick studies this morning?

A Yes.

Q Okay. And can you describe to the Court while I look for them what Chadwick -- who is Dr. Chadwick?

A David Chadwick is a pediatrician from San Diego. First you asked me last night and I was supposed to email them to you last night but I forgot, so I emailed them to you this morning. One of them is an article from 1991. The second was published in Pediatrics in 2008.

Q I'm going to hand you what's been marked -- although not on this copy -- as Defendant's Exhibit 32 and can you tell the Court what that is?

A 32 is an article written by David Chadwick as the lead author and there's probably half a dozen co-authors published in Pediatrics in 2008 titled Annual Risk of Death Resulting From Short Falls Among Young Children: Less Than One In One Million.

Q And 31 would be what?

A 31 is an article in the journal Trauma published in 1991, published again by Chadwick and four co-authors titled Deaths From Falls In Children; How Far Is Fatal.

Q And can you describe to the Court his conclusions?

A Well, I think it's probably -- the best thing to do is to read from Chadwick's conclusions in 1991. When children incur fatal injuries in falls of less than four feet, the history is incorrect. In other words he's saying it can't happen. Somebody's lying to you. That's his conclusion in '91.

Q And then is it 2008 is the second one?

A 2008 he -- I'm going to paraphrase -- he says well, yeah, it can occur but it's rare.

Q And does he give a number or a statistic that's often cited?

A One in a million falls.
Q And so from 1991 to -- in 1991 he says falls can't kill.
A That's correct.
Q Of this type.
A That's correct.
Q In 2008 he says they can but it's uncommon.
A He says it's rare.
Q It's rare.
A That's correct.
Q All right. So there is a shift even with him between '91 and 2008 ---
A That's correct.
Q --- acknowledging that it does happen.
A That's correct.
Q So I think you said this but just to be sure for the record, the floor covering in the video was what?
A Carpet.
Q And so ---
A Indoor/outdoor carpet.
Q Doctor, you discussed quite a bit the issue of biomechanics and your studies and research in that regard. Did you publish an article in 2004?
A I have it. No, I don't.
Q We've gone into that so I'm going to move on. When

did the issue of biomechanics begin -- in your experience and research and reading extensively, when did the issue of biomechanics begin to intersect with shaken baby syndrome?

A The mid to late '90s.

Q And when I say biomechanics, what does that mean?

A Biomechanics is the application of the principles of mechanics with the principles of motion to evaluation of living objects, so it could be a cornstalk in Minnesota. It could be a head injury in a child. It could be an abdominal injury in a man. You're applying Newton's principles of motion to injury evaluation.

Q Okay. And I want to ask you about a couple of studies. Look at Defendant's Exhibit Number 3 and tell the Court what that is and the date please.

A This is published in the British Journal of Neurosurgery in 2002. Three authors, Ayub Ommaya who I referred to earlier, Lerner Goldsmith who was the lead author on the 2004 study where I was a co-author and Larry Thibault who was the person who designed Duhaime's 1987 experiment. The title of their review article is Biomechanics and Neuropathology of Adult and Pediatric Head Injury.

Q And you're saying Ommaya -- that's O-M-M-A-Y-A.

Doctor, this is the Dr. Ommaya -- is it the same as the 1969 doctor who did the research into whiplash injury ---

A It is.

Q --- with the monkeys? And so was he revisiting his earlier findings or this issue in this 2002 article?

A In part he was and then he was updating it with later studies. For example, Larry Thibault did most of his stuff in the '70s and the '80s.

Q And what is the conclusion or impact of this study?

A Well, this is a nice -- it's a review article of the differences between child, adult and infant injury. In terms of the evaluation of MINOR 's injury, MINOR is 27 months old. Infant injury -- infant -- a year or one year of age or even toddler mechanics are not really applicable to her. We have to understand it as an adult patterned injury. There's plenty of data on adult patterned injuries. There's less data on toddlers and even less on infants, although there is some now.

Q Okay. And then in 2005 did a Dr. Bendeck conduct a study into the ---

A Yes.

Q --- biomechanics?

A Yes, he did.

Q And tell the Court about that study please.

A Bendeck was the director of the National Highway Traffic Safety Administration in Washington, D.C. He's a professor of neurology at the Wayne Hebert -- H-E-B-E-R-T -- Uniform Medical School. That's the Armed Forces medical school in Washington, D.C.

He published a study in '05 in Forensic Science International looking at neck failure thresholds that would be involved in shaking and he used known experimental data, two from humans and one from -- I think it was either sheep or goats -- I don't remember which -- and one from baby baboons to evaluate what would happen to the neck during shaking and he concluded that if an infant were shaken hard enough to cause subdural bleeding and other types of brain damage, the neck -- the baby would literally be decapitated.

In other words you just simply can't put enough back and forth motion by humanly achievable shaking to cause brain damage without causing major neck injury.

THE COURT: What year was that article?

THE WITNESS: 2001.

THE COURT: Thank you.

Q And Defendant's Exhibit 17 is another article in that issue of Biomechanics relating to that issue.

A This is actually published in the Journal of Forensic Biomechanics, which is primary an engineering journal and a kinesiologist -- K-I-N-E -- et cetera -- which is not a biomechanical engineer -- kinesiology is the study of motion but particularly as it relates to physical medicine and rehabilitation -- named John Voight and he's from Florida with three co-authors -- four co-authors one of whom was the head of engineering at South Florida University.

He had an article published in 2011 looking at the head motion during infant shaking and comparing it to pediatric activity of daily living. Among others he used his own seven-month-old son who he put into a jumper room and then instrumented it and measured the head motion.

Q What do you mean by jumper room?

A One of those little jumpy seats that you put the kid in and it's got springs and the kid can jump up and down.

Q Like, you attach it to a door frame?

A Sure.

Q And they can bounce?

A Yeah, it's a bad idea. They can get leg injuries from doing that.

Q But that was ---

A Stress fractures.
Q --- that was included in his study?
A No, he was looking at head injuries.
Q Okay.
A I don't think his wife gave him permission to use his son.
Q Probably not. So, doctor, those studies are all -- well, Ommaya was 2002 which was the year this trial was taking place; correct?
A That's correct.
Q And Bendeck was 2005?
A Correct.
Q Lloyd is 2012?
A Correct.
Q What do we know now about whether or not it is physically possible to shake a child to death?
A Well, the -- the evidence from the biomechanical studies strongly suggests that it's not possible. It's not a good idea to use terms such as always and never in science because as soon as you do that, something comes back and bites you in the bottom so what you have to do is look at the data and say look, this is where the data leads us. This is the strength of that argument one way or the other and then take it from there, always being willing to re-evaluate it if

there's new evidence.
Q Is that ---
A Not new opinion, new evidence.
Q What do you mean by not new opinion, new evidence?
A Well, opinion -- science is not an office. You don't take a vote to decide whether a certain thing is going to happen or not happen. You do an experiment.
Q We'll come back to that in a little bit, but explain to the Judge what -- we've been talking about retinal hemorrhages. What are retinal hemorrhages?
A Retinal hemorrhages are bleeding in the photoreceptor parts of the eye in the back. They can be way in the back near what's called the macula which, if you'll look directly into the eye is in about the center. They can be in the center of the optic nerve, which comes in toward the inside. They can go all the way out to the side, the part -- the retina can go all the way out to the side and there could be bleeding within the retina that is limited to a few just little dots and blots, or it could be extensive and go all the way out to the sides, and it could even be so significant that it splits the retina causing a tear.
Q And the traditional way of thinking about retinal hemorrhages in the context of shaken baby syndrome, what role have they played?

A They have played a significant and almost central role. Over the years the belief system has evolved from simple retinal hemorrhages as being due to shaking alone and when that was proved wrong, to the concept of profuse retinal hemorrhage equals shaking. That's been proved wrong. Each reiteration of the specificity of retinal hemorrhage for shaking as an injury mechanism has been proved wrong. Even experimentally -- well, experimentally or either experimentally -- this was, you know, going back to studies done at the Mayo Clinic in the '50s or by a French ophthalmologist named Terson over 110 years ago; a couple of neurosurgeons named Muller -- M-U-L-L-E-R -- and Deck -- D-E-C-K -- published in the mid '70s to Patrick Watts published in Eye in, I think, 2007. Each iteration of specificity of retinal hemorrhage from shaking.

Q In 2002 and in your review of this transcript, what role did retinal hemorrhages play?

A Oh, it was a critical role.

Q And what do you mean?

A That completed the triad. If MINOR did not have retinal hemorrhages, I'm not sure that the physicians would have said quite as strongly that shaking caused the injury.

Q Would that have been the training in medical school at the time?
A Yes.
Q And Dr. Hubbard on page 175, he describes those three things, including retinal hemorrhages, as what, starting at line nine?
A This says those three things together virtually are diagnostic, meaning it tells us what it is. They used to call it and a lot of people still call it shaken baby syndrome.
Q So he's saying that triad, if you have it, that's what it is?
A That's correct.
Q And did you see that kind of language or testimony throughout the transcript?
A I did in everyone who testified except for Wayne Ross.
Q Dr. Cristman, the ophthalmologist, testified that retinal hemorrhages occur much more frequently in shaken babies than accidentally injured babies. Is that true? Do we know that to be true today?
A Well, it's a circular argument. If you see the retinal hemorrhage, you say it must be shaking, therefore you're going to see it more frequently. The problem with that statement is the lack of a gold standard. How do you know that it's shaking? And the

answer is well, we know that it's shaking either because of confessions or because of retinal hemorrhage. Confirmation bias.

Q Okay. She also testified as other witnesses did that these retinal hemorrhages presented in multiple layers in all four quadrants, and I believe that's on page 243, and that that would have been in this case caused by shaking.

A That's correct.

Q Is that statement true?

A No, it's not.

Q Is it supported by the science today?

A Today? No.

Q She also testified that -- what is intracranial pressure?

A The pressure within the brain itself.

Q And what, in the context of what we're talking about, causes the intracranial pressure when you have these kinds of injuries?

A Let me give you -- we are subject to atmospheric pressure, 14 or 15 pounds per square inch, whatever it is. In order for blood to circulate it has to get above atmospheric pressure or it just sits there. Arterial blood pressure ideally is about 120 millimeters systolic and about 80 diastolic. Venus

pressure is much, much less than that. It might be 10 or 15 or 20 millimeters. It has to be a lot less than arterial pressure, otherwise the blood could never get out of the capillaries and back to the heart. Intracranial pressure has to be even lower than venus pressure. If it's higher than venus pressure the veins collapse, so it's a well-regulated mechanism basically to keep blood flowing.

If the intracranial pressure exceeds venus pressure because of swelling, because of structural abnormality or for whatever reason, then the veins collapse. If the veins collapse the arteries cannot get the blood out of the capillaries. This has been well described experimentally. It's been well described in what's called retinal hemorrhage as a re-perfusion finding. In other words, somebody has a cardiopulmonary arrest. They get the heart going again and lo and behold, there is bleeding in the retina, not because of the resuscitation but because you have dead capillaries which are now being supplied with blood and they're damaged.

Q Okay. Dr. Cristman, the ophthalmologist, testified at trial that retinal hemorrhages can occur from intracranial pressure, but they look different than when you have shaking.

A Again, that's a problem with circular argument and that has been why, every step of the way, it's been shown that what ophthalmologists have said and then changed and then changed and then changed again has simply been incorrect.

Q She also testified that she was involved with research with the International Retinal Hemorrhage Network. Have you ever heard of that?

A I'm not sure. That may be a listserv of ophthalmologists. I'm not familiar with that at all.

Q And do you recall Dr. Close testifying on page 360 that these retinal hemorrhages are very typical almost to the point of being kept in line with shaking baby?

A I do.

Q Is that a scientifically supportable statement today?

A No.

Q Is there any way to know if the retinal hemorrhages you see in this case or any case are caused by an injury versus brain swelling where you also have brain swelling?

A No.

Q And Dr. Nicholas said the retinal hemorrhages are throughout the eye and all the way throughout the optic nerve all the way to the back of the brain and that this is classic because you have the hemorrhages

plus edema plus subdural hematoma. Specifically with respect to the through the optic nerve all the way to the back of the brain, does that mean anything in this analysis?

A Well, not only does it not mean anything, it's incorrect. It's a mischaracterization of Dr. Burns' autopsy findings. She had bleeding of the retina. She had optic nerve sheath damage but it certainly didn't go all the way to the back of the brain.

Q And would that ---

A Even if he's correct, which is anatomically impossible, it would have no significance.

Q And I want to show you Defendant's Exhibits 19 and 20 on this issue. What are those?

A 19 is an article by Pat Lantz, who is a professor of pathology at Wake Forest University in Winston-Salem, published in the British Medical Journal in 2004 entitled Perimacular Retinal Folds from Childhood Head Trauma. That was the first article that showed that the so-called retinal folds that were said at that time to be diagnostic of shaking were not.

THE COURT: What year was that?

THE WITNESS: 2004.

A The second one is from 2008 -- from 2008 published in Eye -- E-Y-E -- by Patrick Watts and Dr. Opi -- O-P-I

-- I don't know what his first name -- first initial is B -- entitled Retinal Folds and Retinal Schisis in Accidental and Non-Accidental Head Injuries. And in that article Watts and Opi showed two cases, one accidental and one not accidental, with identical eye findings and retinal fold and retinal schisis -- R-E-T-I-N-A-L -- S-C-H-I-S-I-S -- which had been said to be diagnostic of shaking. These two authors said no, it's not.

Q So do those two studies represent a change since 2000 -- between 2002 and 2015?

A That's correct.

MS. PRINGLE: I would offer these into the record as well, Defendant's 17 and Defendant's 20.

THE COURT: Objection?

MS. McDUFFIE: No, Your Honor.

THE COURT: All right.

COURT REPORTER: Did you say 17? I thought you said 19 before.

MS. PRINGLE: It is 19.

THE COURT: Did you say 19?

COURT REPORTER: 19.

THE COURT: All right.

Q I can't remember. I believe you mentioned when you were talking about the evolution of the science

regarding shaken baby, something about mimics. What does that mean, that term?

A Mimics is a term first really used by a radiologist named Pat Barnes to describe conditions, usually medical conditions, which may be misinterpreted as mechanical from and to be findings said to be diagnostic for shaken baby syndrome, and these mimics are a couple of pages in volume.

With the exception of low velocity impact injuries, most physicians prior to -- well, with no exception prior to 2000/2009, physicians were simply not aware of these other types of conditions that had caused dural hemorrhage, brain swelling and retinal hemorrhage.

Barnes has pointed out in a couple or maybe three articles, a whole list of things that can and need to be taken into consideration when evaluating a brain injury in a child.

Q Let me show you Defendant's 21, 22 and 26. Are those the articles that you're referring to?

A In part they are. The first one, 21, is an article that Pat Barnes published in 2000 pointing out that the findings of bright white blood and dark blood on a CT scan, which in 2000 was said to be diagnostic of acute and chronic dural bleeding, may well be due to

dural bleeding that has clotted -- that's the white -- and bleeding that has not clotted -- that's the dark. That's the first time that I'm aware of where this observation had been made and written about.

Q What year is that?

A That's 2000 and that's important in the evaluation of MINOR 's injury. 22 is an article that Pat wrote with Michael Krasno Kutsky -- K-R-A-S-N-O -- K-U-T-S-K-Y. Both of them are known radiologists and he calls it. This is published in Magnetic Resonance Imaging in 2007 entitled Imaging of the Central Nervous System in Suspected or Alleged Non-Accidental Injury Including Mimics, and finally there's an article in which Pat was the only author published in The Radiology Clinics Of North America in 2011 titled Imaging of Non-Accidental Injury and the Mimics; Issues and Controversies in the Era Of Evidence-Based Medicine.

Q And what year is that?

A That is 2011.

Q And those three articles, do they represent an evolution of Dr. Barnes' thinking about these issues reflected in those articles?

A They do.

MS. PRINGLE: I would offer those into the record

at this time.

THE COURT: 21, 22 and 26?

MS. PRINGLE: Yes, sir.

THE COURT: Okay.

Q And you mentioned something about -- you were talking about neuroimaging and how it can lead to misdiagnosis or that's one of the things he's looking at in 2000?

A Correct.

Q And can you talk to the Court about in this case -- in this case was a CT scan performed?

A It was.

Q And was that performed shortly after she got to the hospital?

A It was.

Q And you've reviewed the transcript. There was a defense expert by the name of Dr. Wayne Ross. Do you recall reading his testimony?

A That's correct.

Q And did he rely on neuroimaging in forming his opinion?

A He did.

Q And what did he find?

A He said that MINOR had acute and chronic dural bleeding at the time that she collapsed and that in part, if not in large part, her death was the result

of new bleeding in a chronic subdural hematoma.

Q In other words, a re-bleed of an old injury?

A That's correct.

Q And would that be uncommon in 2002 for a pathologist or a radiologist to look at a film and based on the way it looks, find that to be acute and chronic?

A No, it would not, not at all.

Q What did Dr. Barnes' studies reveal?

A He showed that the dark and white may very well represent what's called hyper acute bleeding, something that has occurred so recently within the previous few hours that blood has not simply clotted. This was in 2000 and today we know that a significant number of cases with that presentation are, in fact, simply hyper acute bleeding, especially those with large volume dural compartment bleed such as MINOR .

Q Okay. I'm going to turn you to this case, to your evaluation of the materials that I provided to you. Do you have a list for the Court of the materials that you reviewed at my request?

A I do.

MS. McDUFFIE: Objection, Your Honor. We weren't provided any notice in any of defense counsel's filings that Mr. Plunkett reviewed anything in this case. The first I heard about this is when I asked

Ms. Pringle on Friday about that. She then called me back at 3:30 on Friday and gave me a verbal two-minute synopsis of what Mr. Plunkett's findings were.

THE COURT: So what's your objection>

MS. McDUFFIE: Your Honor, prior to that we had asked the Court on numerous occasions for her to let us know what the basis of this motion was and what they were relying on. Your Honor, she submitted on January the 14th of this year a 30-something page document, none of which mentioned that Dr. Plunkett had reviewed anything specific to this case, what he was relying on specific to this case or, Your Honor, what his conclusions were specific to this case.

Your Honor, if you do allow the testimony we would just ask for a break in between so that we can have time to prepare since this is all new to us.

THE COURT: Ms. Pringle?

MS. PRINGLE: I don't know how I would even do this hearing if I didn't have him testify as to finding. He has reviewed the materials in this case. They've known about this witness for -- be a year at this point. I did tell her -- she asked me for the specific finding on Friday and I got the specific words from him and called her on Friday and gave that to her. I don't know that that changes anything in

what we're doing as far as what she would need to do to prepare.

THE COURT: I'll give you whatever time you need.

MS. McDUFFIE: Thank you, Your Honor. Your Honor, if there's any report or notes or anything that he's relied on, we haven't had access to or seen a copy of that and we'd ask that that be provided us -- to us as well.

MS. PRINGLE: He has some notes that I'll be happy to provide for them ---

THE COURT: Okay.

MS. PRINGLE: --- when I ---

Q Did you review some materials with respect to this case?

A I did.

Q And what did you review?

A Ms. Pringle, I'm going to read from my notes because there's no way that I can remember it.

Q That's fine.

THE COURT: All right. Let's make a copy of the notes. Mr. Whittle, make a copy of the notes please. Somebody make a copy of the notes.

MS. PRINGLE: If we can just take a break until he gets back?

THE COURT: That's fine.

MS. PRINGLE: Actually I think we can go back and pick up on one last topic I didn't cover. We can shift back, if that's all right, while that's getting done.

THE COURT: All right.

Q I want to ask you some questions about you've been studying this since the '90s; is that right?

A I started in the mid '80s, but I had a full-time job being a general in forensic pathology so I wasn't a magazine doctor, I wasn't a university person who had a lot of time to sit there and do something I spent time on. So it wasn't until about '99 or 2000 when my partner and I switched positions that I was really able to indulge a significant amount of time in this area.

Q And you do that now?

A I do.

Q And do you maintain a library of materials you've cited? We've entered a number of materials. Do you maintain a library of materials?

A I do.

Q About how many?

A I'd say -- I'd have to go through and count it, which I could. It's going to be over 3,000 articles specifically on issues of injury in children, head

injury, abdominal injury, things like that.

Q And I want to ask you when did you start testifying about this?

A Well, the first testimony was in 1986 or 1987 and it may have been one or two a year up until about 2000. Then it may have been a half a dozen a year from, say, in 2000 or 2004. May have been more than that. I just don't remember. It's been an average of about 15 times a year since '04.

Q Did you participate with a proceeding in 2007 in which -- when did you start to see some traction in the courts with respect to acceptance of the changing science?

A Well, the first change actually occurred in Great Britain in '05 or '06 where Peter -- Sir Peter Goldsmith, who was the attorney general for the United Kingdom, had a series of hearings. I testified at those hearings and the courts held that a number of convictions in that country based on allegations of shaking were what they called unsafe, which means they were convictions not supported by the data today. And that was -- I think that was in '06.

In '07 there was a series of hearings in Ontario on the same topic and those hearings resulted in several cases being overturned. Audrey Edmunds in

Wisconsin in '07 or '08 -- I think the decision came out in '08. Her conviction was overturned.

Q Is that considered the first one?

A In the United States.

Q 2008?

A In the United States, yes.

THE COURT: What year was that?

THE WITNESS: 2008 was the ---

MS. PRINGLE: Was that a ---

THE WITNESS: --- Supreme Court decision in Wisconsin.

Q Was that a post conviction proceeding?

A It was. She'd been convicted in -- I'm going to say -- '95, been in prison for 12 years in Wisconsin. Drayton Witt -- W-I-T-T -- oh, and in that case in '08, that was one in which the pathologist changed his mind.

Q Who was that?

A Robert Huntington -- H-U-N-T-I-N-G-T-O-N. He changed his mind.

Q He had been the original pathologist?

A He'd been the original pathologist and he testified that his original statements were incorrect.

Q After reviewing -- okay.

A And Drayton Witt -- W-I-T-T -- in Tucson, same thing,

conviction overturned in 2010, plus or minus a year, and in that case also the pathologist changed his mind and said he couldn't support his earlier testimony which had been in 2000 or 2001.

Cathy -- with a "C" -- Henderson in Texas, her conviction was overturned in maybe '08. Renee -- R-E-N-E-E -- Bailey in Syracuse, New York, her conviction was overturned just this past April. Actually the decision didn't come out until October or November of 2014.

The Roark -- R-O-A-R-K -- case in Texas in December of '14, so there have been several.

Q Did you describe -- you mentioned the study or the inquiry in Canada, but what came of that? Do you know?

A Well, it was an entire revamping of the practice of forensic pathology and especially pediatric forensic pathology in Canada and an attempt to institute evidence and evidence base for the opinions of the pathologists who give evidence in court.

Q And so you're familiar with each of those proceedings?

A I am.

Q And the issues in those proceedings, do they involve the same thing, the evolution of the science and literature and research in this area?

A Oh, they do.
Q Just a couple more things on this topic and we'll turn to this case. What is the AAP?
A American Academy of Pediatrics.
Q And does the AAP issue policy papers or position papers at times?
A They do.
Q And have they issued some position papers relating to shaken baby and head trauma?
A They have.
Q And have those position papers changed at all over the years?
A They have.
Q I'm going to hand you Defendant's Exhibit 23 and ask you to identify that.
A 23 is a position paper from 1993 titled Shaken Baby Syndrome; Inflicted Cerebral Trauma, and it was published by the committee on child abuse and neglect sometimes abbreviated COCAN -- C-O-C-A-N -- which is a committee of the American Academy of Pediatrics, and they discussed what the concepts were in 1993.
Q Okay. And Defendant's Exhibit 24?
A 24 is the American Academy of Pediatrics technical report published in 2001 titled Shaken Baby Syndrome; Rotational Cranial Injuries technical report, talking

about shaking as an injury mechanism.
Q So 23 and 24 discuss shaken baby syndrome?
A That's correct.
Q And Defendant's 26, what is that?
A 26 was published in '09 and what pediatricians did was to change the name from shaken baby syndrome to abusive head trauma in infants and children. The reason ostensibly given for that change was that shaken baby syndrome does not include all the possible ways to cause head injury in an infant.
Q That was in 2009?
A Right.
MS. PRINGLE: I'd offer 23, 24 and 26 into the record.
THE COURT: All right.
Q What is the difference between today, pediatric community versus the pathologist community with respect to this issue?
A There's a huge disconnect between the pediatric community and the forensic pathology community regarding head injury mechanisms -- head injury mechanisms and potential outcomes in infants and children.
Q And ---
A Just to be clear, Passion is a 27-month-old so they're

not talking about infant injury evaluation or even toddler injury. We should be talking about adult injury mechanisms.

Q And what is the disconnect that you're referring to?

A Well, the pathologists for the most part -- not exclusively -- are saying that you can't cause these injuries by shaking; certainly you can't cause these injuries by shaking an almost 30 pound, 27-month-old. The pediatricians, at least many of them, are continuing to say yes, you can.

Q And who is studying this issue?

A Actually doing the studying is biomechanical engineers.

Q What is the organization with the acronym of NAME?

A National Association of Medical Examiners.

Q And what is that?

A It's the group of forensic pathologists really throughout the world. It says national but it's not limited to the U.S. nation. Canadian, South American, European, Asia.

Q And have there been position papers issued by this organization on this issue?

A Yes, there have.

Q Defendant's 27 and 28, and ask you what those are.

A 27 is a position paper that was written in 1998 by a

group asked by the board of directors of NAME to do a position paper on fatal abusive head injury in infants and children. This paper was accepted by the board of directors in 1998.

It wasn't published until three years later because the editor of the journal refused to publish it, saying this is a nice paper but it shouldn't be a position paper and he finally did publish it with a disclaimer that can be found on the front page in the lower left corner.

This paper sunset in 2003, in other words, that was it, no more position. However, the authors tried to republish it with a revision from 2003 that expired in 2008 and the board of directors said no, you can't do that. This paper is sunsetted. There is no more position.

Q What do you mean by sunsetted?

A It's done. It's like you've got a five-year tax on balloons, say, and after five years it's no longer going to apply.

Q And what are they saying in these papers? What is ---

A They're saying -- it's the party line about shaking.

Q The party line, the traditional way of thinking about ---

A Correct.

Q --- shaken baby?
A Correct.
Q To include the triad and the things that you've discussed ---
A That's correct.
Q --- this morning?
A An incorrect characterization of the mechanism of injury.

MS. PRINGLE: I did locate the Chadwick articles, 31 and 32, and I'd just offer those into the record at this time.

THE COURT: Okay.

Q Okay, doctor, back to this case and what materials you reviewed in this case. Can you list those for the Court?
A You took my copy.
Q Oh, yeah.
A Okay. Your Honor, I'm just going to read from my review ---

THE COURT: Don't read too fast.

A Okay. Palmetto Richland Memorial Hospital clinic records for MINOR including her copies of her CT scan. I did not get those scans digitally. The Richland County coroner's report and the autopsy report, including 17 microscopic slides; Department of

Social Services records for N.G. and J.G. who are MINOR 's older siblings, and MINOR , including reports of black and white plain paper photographs of N.G. who was the oldest, I think five at the time of this; the Richland County Sheriff's Department records, including scanned and imbedded autopsy photographs and home photographs and a CD of digitized home and autopsy photographs which were scanned from color prints; arrest warrants and indictments and transcripts of the complete trial testimony. I received 1,053 pages of testimony.

Q Okay. And did you read, review and evaluate these materials? Did I ask you to determine what you thought the cause of death to be?

A Yes, you did.

Q To a reasonable degree of medical certainty what would your opinion after reviewing all of these materials be as to the cause of death?

A MINOR had an impact head injury. Her head was in motion and stopped suddenly against a solid surface. That stopping caused differential motion of the brain relative to the skull, causing bleeding within the dural compartment that was of sufficient size to increase her intracranial pressure and the neurosurgeon performed an immediate craniotomy in an

attempt to save her life and was unable to, so the impact she - when MINOR came into the hospital she didn't have any evidence of any skin injuries any place and that's really not unusual with a head impact in an infant, toddler or even a child.

If you've got a head impact that's behind the hairline you're not able to see it because it's covered by hair. You might get a goose egg but goose eggs usually occur if there's an associated skull fracture. When you get to be five, 10 or 20, goose eggs became uncommon.

The only evidence that MINOR really had, but for an the impact injury that subsequently caused her death, was the black and blue mark around her left eye which didn't appear until almost a day after she was admitted to the hospital.

Q Okay. So talk to the Court about that. She develops a black eye essentially on the left side.

A Correct. Correct.

Q Is there any indication in the medical records or the testimony at trial that that injury was apparent when she was admitted?

A No, it was not. There's no mention in the neurosurgeon's notes, the ER notes, the PIC unit -- pediatric intensive care unit notes. Nowhere did they

comment on the black eye.

Q And do you recall how long it was until they actually first note that?

A It was about 24 hours. It might have been 48. Let me see if I've got it in the notes. I have 28 to 31 hours after admission they noticed the shiner on her eye.

Q I want to refer to the transcript, page 290, for the record. And what is the significance of that? MINOR comes in with a massive head injury and the absence of any signs of bruising or injury. What is the significance of that?

A Well, that's objective evidence for impact injury.

Q And it didn't exist when she got there?

A There was no objective evidence for it; correct.

Q But is it possible that that injury developed after she -- as she -- in the hours after she sustained it?

A I think it did. Keep in mind that the neurosurgery procedure was on the right-hand side so it's unlikely that that bleeding associated with the surgical procedure on the right-hand side would go over to the left-hand side, although it's possible. But this is the type of thing that is seen relatively frequently, especially with infants and young children where you've got a head injury on the front and over time it

leaks down into the tissues above the eye.

Anybody that's had a forehead injury knows that a couple of days later you can get a significant shiner. It just happens. It didn't happen at that time. Tissues -- the soft tissues around the eye are just incredibly vascular, lots and lots of blood inside, real loose, real lose.

Q And so what is the significance when a child presents with these injuries? Adult brings them in and says there's been no accident, there's been no trauma.

A You would see no evidence that there was any mechanical problem.

Q How does that factor into ending up where we are today ---

A Well ---

Q --- with shaken baby?

A --- I think that it immediately focuses on shaking as an injury mechanism in 2000. I think in 2015 the physician would hopefully say wait a second, we need a detailed history of what happened here as far as, you know, the details, and if the detailed history as subsequently stated by Mr. Mitchell had been known and correctly understood, we may have gone down a different path.

Q Okay. And you said, I believe, that -- were there --

do you agree that there were retinal hemorrhages present?

A I do.

Q And what -- were those -- is it your opinion that there was any shaking in this case?

A No, there was not.

Q And to what do you attribute the retinal hemorrhages?

A An increase in intracranial pressure.

Q And what is that? Does that have a name or is there a term that you use to describe the effects that ---

A Well, sometimes it's referred to as Terson -- T-E-R-S-O-N -- without an apostrophe "S" -- syndrome. Terson was a French ophthalmologist who wrote about this in either 1900 or 1903. I don't remember when. But it's come to mean an increase in intracranial pressure causing retinal hemorrhaging.

Q And what is the cascade effect?

A Cascade refers to something that is following another event, so the primary injury that MINOR had was not retinal hemorrhage and was not brain swelling; however, the dural compartment bleeding led to an increase in intracranial pressure which then led to the retinal hemorrhage and the whole focus of injury prevention by the biomechanical engineers and trauma centers, et cetera, is focused on prevention of the

secondary events because you can't keep people from falling; you can't keep football players from hitting other football players, so you're trying to mitigate or change the secondary events or effects.

Q And as far as retinal hemorrhages, do we now know for a fact, and in light of especially Dr. Lantz' article and the Dr. Opi article -- those two have addressed that specific issue of retinal hemorrhages; correct?

A They have.

Q Well after this trial which was in 2002?

A That's correct.

Q Doctor, do you know what MINOR weighed?

A She weighed about ---

THE COURT: I thought you said she weighed 27 pounds; is that right?

THE WITNESS: That is correct. That was three and a half months prior to this event.

Q Was there a weight in Dr. Burns' autopsy?

A No.

Q Do you recall Dr. Abel's testimony as to what her estimate of MINOR 's weight was?

A Yes, she said 12 kilograms. She said she was 25 to 30 pounds. That's not actually but that's close enough.

Q And I'll hand you Defendant's Exhibit 33. What is that?

A 33 is the children's hospital outpatient center record for MINOR on November 19, 1999. She's about three weeks -- two and a half weeks shy of her second birthday.

Q And what is her -- is her height and weight listed on there?

A It is.

Q And what are her height and weight?

A Her weight -- her height is 32 and a half inches, which is at about the 10th percentile, and her weight is 26 pounds which is at about the 50th percentile.

Q And that would have been approximately four or five months prior to -- four months prior to this injury?

A Three.

Q Three? Three and a half. Dr. Plunkett, based on what we know now, is it possible even for a six-foot-four large man to take a 27, 28-pound toddler and exert enough force in shaking to cause the subdural hematoma and the subsequent injuries that MINOR sustained?

A Ms. Pringle, I'm loath to use the term never, but it would be extremely unlikely, especially when you factor in the necessity for neck damage prior to brain damage.

Q And can you just describe for the Court what the

understanding of shaken baby? What -- what is the actual physical act that doctors describe constitutes shaken baby?

A Well, the doctors describe shaking back and forth and you can actually model that. You can take a 10-pound or a 30-pound model and shake it back and forth and then just simply measure how many times you can do that a second, how far it goes, and from those two calculations you can calculate the accelerations and subsequently the force.

So it's been done with -- as I stated earlier -- with 10-pound models. I am not aware that it's been done on 30-pound models, however I have picked up 25-pound bags of cat food and just tried to shake it back and forth and measure how many times I can do it a second. I can't do it one time a second, let alone the 12 or 13 times a second that would be required to cause brain injury.

Q But, in fact, that is what the doctors testified to at trial, that she sustained these injuries from a vigorous back-and-forth shaking as you've described?

A Well, I'm not sure if it said back and forth -- all said that but at least one of them. Able said that and they described vigorous shaking.

Q And you're aware -- who is -- do you know who Dr.

Wayne Ross is?

A I do. I know him. I don't know him personally. I've never met him. He's a forensic pathologist from -- it says Penn State back in 2000. I know he's not at Penn State anymore, so I don't know where he is now.

Q He is a pathologist.

A That's correct.

Q And he testified in this trial.

A He did.

Q And you reviewed that testimony?

A I did.

Q And you talked earlier about the neuroimaging and mimics and misdiagnosis. Was there -- there was a CT scan in this case?

A That's correct.

Q And showing you Defendant's Exhibit 29, what does that tell us?

A The exhibit is the impression of Dr. Hudson, the neuroradiologist and he says in his conclusion right subdural hematoma with significant mass effect as described above. There is a mixture of densities suggesting acute and chronic trauma.

Q Let me just ask you: Did Dr. Ross testify? Did he -- he testified -- when you say a rebleed, he believed there was old blood and new blood?

A That's correct.
Q And do you agree with that?
A No, I do not.
Q And what would he have been relying on, what would any doctor rely on, in making that determination at that time?
A In this specific case he must have been relying on what the neuroimaging said because that's not what the neurosurgeon said and that's not what the pathologist who performed the autopsy said.
Q So the neuroradiologist would review the scan; is that right?
A That's correct.
Q I believe he testified to the way it appeared, the scan appeared differently in some respects?
A That's correct.
Q What did the neurosurgeon who actually saw and evacuated the blood say?
A He said it's all acute.
Q And who was the neurosurgeon? Do you remember his name?
A I don't. I can look it up.
Q I've got it right here. Show you Defendant's Exhibit 30.
A Dr. Smith did the dictation and he was the

neurosurgeon.

Q And this is the postoperative report of Dr. Smith.

A That's correct.

MS. PRINGLE: Defendant's 30, I'd offer it into the record, as well as the CT scan report which is Defendant's 33.

Q How did Dr. Smith describe the bleed?

A I'll read it. Immediately upon opening the dura, acute subdural blood delivered itself under pressure.

Q So he doesn't describe seeing any old blood.

A That's correct.

Q And the pathologist, Dr. Burns, does he describe seeing any old blood?

A No, he does not.

Q So the people that actually saw the inside describe it as fresh?

A That's correct. Neurosurgery and the autopsy are the gold standard, not the medical imaging.

Q But the CT scan as reported at the time by that doctor, that was the understanding of CT scan -- interpreting CT scans at that time, in 2002?

A Unless you were Pat Barnes or familiar with his ---

Q So that is what I was going to ask you. Dr. Barnes figured that out but did everybody know that in 2000 and 2002?

A No.
Q Was it widely accepted?
A Now, that I don't know. I think you'd have to ask somebody like Barnes.
Q Is it now accepted and understood that CT scans don't necessarily reflect what's actually going on in terms of old versus new?
A That's correct.
MS. PRINGLE: Beg the Court's indulgence just a moment.
THE COURT: Okay.
Q Would it be fair to say in your extensive experience and years of studying and research in this area that you're fairly familiar with the major and the minor players in the field of the study of shaken baby head trauma?
A I am, not all of them certainly.
Q Is Dr. Ross one of those people?
A No, he really has not been. He's not come out except in a couple of cases of his that I reviewed. That's not to say he doesn't know what he's talking about. He's just not part of the group that has discussed this and participated in it.
Q Is there anything else about MINOR 's injuries that you relied upon or that you would like to share with

the Court in terms of coming to your conclusions and your findings that I have not asked you?

A Yes, I think there's several things. First, I think it's important to understand that if MINOR were running down the hall and fell, tripped and fell, hit her forehead or the left front side of her head, that she could have had an immediate loss of consciousness and dural compartment bleeding that ultimately killed her, and that's understood, I think, by most people today. It was not understood in 2001.

Q Stop right there. You're saying that the severity of these injuries could have been -- she could have been running, fell, hit her head against the door jamb or whatever, a non-yielding object, you said?

A Yes, that's correct.

Q And these same injuries could be sustained?

A That's correct.

Q And is that borne out by that video that we saw and the other studies that you reviewed?

A Yes, there are several studies in addition to the ones in ---

Q Go ahead. I'm sorry.

A It's important to understand that no evidence for impact of the scalp or skull when MINOR came into the hospital does not mean that she did not have an

impact injury. It's important to understand that a retinal hemorrhage is a secondary event, not a primary injury, and does not indicate a specific injury mechanism.

Q Speak up a little bit.

A And it does not indicate a specific injury mechanism.

Q Okay. And, Dr. Plunkett, just finally, have there been significant and substantial changes in the science involving shaken baby syndrome and head trauma since 2002 to 2015?

A There have.

Q And does this body of literature -- is that all of the literature and the medical research that bears out that statement?

A No.

MS. PRINGLE: I think that's all I have at this time.

THE COURT: All right. We're going to break for lunch. It's about 12:36. We're going to return for cross examination at two o'clock.

Doctor, you're not allowed to discuss your testimony with anybody. You're free to go out and -- I don't know if it's raining yet or not, but otherwise enjoy a little bit of a warmer day than you're probably used to. Do not discuss your testimony and

we'll see you back at two o'clock.

(Off the record)

THE COURT: All right. Cross examination?

MS. MCDUFFIE: Thank you, Your Honor. May it please the Court.

CROSS EXAMINATION

BY MS. McDUFFIE:

Q Dr. Plunkett, I don't mean to summarize or generalize, but the basic premise of the after-discovered evidence that you've offered this Court in your testimony here today has been that now it's clearly understood that based on biomechanical literature and real scientific experimentation that's been done to clearly document that these sorts of injuries as seen in MINOR occur from impact-related trauma and not from shaking?

A Well, I think you have to define the role of the scientific community. I think that's clearer to the biomechanical engineers, the people that actually determine injury mechanisms. I know that it's clearer to the majority of the forensic pathologists. Whether or not it's clear to pediatricians, especially with regard to this specific case, I just don't know. I'm not a pediatrician.

Q So with that caveat, that statement was correct?

A Yes, I think so.

Q And wouldn't it also be correct that your testimony and the after-discovered evidence you're offering the Court is that shaking, in and of itself, according to all the literature does not cause these sorts of injuries, subdural hematoma, brain swelling and retinal hemorrhage?

A Extremely unlikely.

Q And you're saying that that testimony could not have been presented in 2002?

A Well, I think it may have been presented in 2002, but I don't think that the scientific basis for it was as firm as it is today.

Q So if someone made a statement in -- someone could have made the statement in 2002 that shaking, in and of itself, according to the literature doesn't cause these sorts of injuries?

A They could.

Q And that would have been a true statement according to you?

A That's correct.

Q And that would have been based on the literature, just not quite as much literature as today?

A I'm not sure that the literature is the correct term. I think the correct term is an understanding of the biomechanics of injury because that includes a lot of

things, many of which do not directly address the issue of shaking, and for which you have to extrapolate information from various studies and say well, how does this apply to shaking.

Q But this information that we just discussed could have been discussed with the jury in 2002?

A Yes, that's correct.

Q And so nothing about what you just discussed with Ms. Pringle and your findings as to MINOR :'s death and the mechanism of injury would not have been known in 2002?

A Well, it depends on who you ask again.

Q I'm asking you. You ---

A I ---

Q --- could have testified to that?

A Could I have testified to it? Yes.

Q So nothing you testified here to today you would not have testified to in 2002?

A I'm not sure if I'd say nothing.

Q As it's relevant to MINOR 's injuries.

A I think that's correct.

Q So there's no after-discovered evidence that you can present today that you -- you personally could not have presented in 2002?

A With the exception of the literature support, that is

correct.

Q So naming a few studies for the jury, that would have been the extent of the difference?

A It would have basically been -- I think that's correct. Certainly fewer than a handful of actual studies.

Q So less than five studies are the difference between 2002 and today, but your conclusions would have been the same?

A They would have been with the understanding that we're talking about a 27-month-old where for the most part adult injury criteria apply, not a three-month-old or a 16-month-old. I think it's important to make that differentiation.

Q So in 2002 she was 27 months old and you would have testified the exact same way you did today? Nothing would have changed with the exception of the five studies that you would have quoted for the jury?

A I'm not sure that's correct and I'm not trying to be evasive, but I don't know exactly what I would have said. I certainly know things differently today from what I knew in 2002, 13 years ago.

Q What didn't you know in 2002 that you testified here to today?

A Well, I'm not sure, but I'm sure there's things I did

not know.
Q So you're not aware of what the after-discovered evidence is in this particular case?
A Well, I know what was testified to and I know what the physical findings were and I know what my conclusion would have been then and what my conclusion would be today.
Q And your conclusion in 2002 and your conclusion today are the same.
A That this was an impact injury that caused dural compartment bleeding, brain swelling, retinal hemorrhage and death, and the bruise on the left side.
Q And so had you been called in 2002 and procured by the defense to testify, your testimony would not be different today versus 2002?
A Substantively I don't think so.
MS. McDUFFIE: Beg the Court's indulgence.
Q Dr. Plunkett, how much are you being paid to be here today?
A Ms. Pringle's office authorized $2,500 for reviewing the documents, consulting with her and $3,500 for travel and court time, a flat fee both ways.
Q So six grand?
A Six grand.
Q And you testified -- is that your normal rate you

charge?

A Well, it is as long as somebody can pay. Most often in post conviction relief cases, which is half of what I do, the defendant is represented by the Innocence Project and I don't charge anything either for testimony or review, and many times my -- my expenses are not even covered.

Q And how much did you make last year testifying for defense attorneys in these kind of cases?

A Well, testifying I'm not sure.

Q Just total fees for ---

A Total -- total income was about $85,000.

Q And the year before that?

A It was about 90.

Q The year before that?

A I don't remember. It's about a third of what I made as a general pathologist.

Q So you're making between 85 and $90,000 ---

A Sure.

Q --- give or take, a year?

A Sure.

Q And you've been testifying exclusively for the defendants in these types of cases since 1994?

A Oh, no. Since 2005.

Q Do you remember testifying in this very courtroom in

2005 in the State of South Carolina versus Byron Andrews?

A I do not.

Q Would it help to refresh your memory if I showed you your testimony from that case?

A It probably would.

Q June 27th through July 1st of 2005.

MS. PRINGLE: Can I be provided a copy of this? I've never seen it. I don't know what it is.

THE COURT: Apparently it's his testimony. You can show her a copy of it.

MS. PRINGLE: It's too much for me to read right now, but I have not been provided it. I don't know anything about it.

MS. McDUFFIE: Your Honor, we'll get her a copy.

MS. PRINGLE: I'd ask for the record, how many pages is it?

MS. McDUFFIE: It starts on page 192 and ends on 319.

Q Dr. Plunkett, did you remember testifying in June of 2005 that you consulted primarily for defense attorneys and testified on average of 10 times a year for the last 10 years, so a total of 100 times since 1994?

A I do not recall that.

Q Is that a true statement?
A It's approximately correct. It's the testimony I gave this morning.
Q So since -- from 1994 to 2005 you testified 10 times a year for defense attorneys?
A That's correct but that was not your question. Your question was exclusively.
Q And how many times did you testify for the prosecution?
A I can't tell you. It was part of my official responsibilities. From either '94 to '04 I was testifying at the request of the prosecution including child abuse cases.
Q How many times did you testify for the prosecution in shaken baby or abusive head trauma cases from 1994 to 2004?
A I don't recall. I just don't recall.
Q And 100 times for defense attorneys?
A That's probably close. Ten times a year from '94 to '04, that's going to be approximately correct.
Q And you testified since that case an additional 150 times exclusively for defense attorneys, you testified?
A In 10 years, that's probably close.
Q So 250 times for defense attorneys?

A That's correct.
Q From 1994 to the present?
A That's correct.
Q And in 1994 what was your testimony in these cases or what was your theory in terms of shaken baby syndrome?
A Boy, I can't tell you. I can just tell you when I finally realized that shaken baby syndrome was an invalid diagnosis and that was about '99 or 2000. My earlier departure was with regard to the potential injury caused on impact.
Q And you have testified in courts all over this country?
A I've testified in probably 35 states. I have not testified in any of the New England states with the exception of Massachusetts. I have not testified in Alabama to the best of my recollection. I haven't testified in Wyoming. I haven't testified in Alaska. I've pretty much testified everywhere else. I think 35 states.
Q And you've also testified, I think you said earlier, in Great Britain?
A I have.
Q And in Canada, Ontario, as well?
A That's correct.
Q And you're here today to give your opinion?

A That's correct.
Q And you said that you started looking at these kind of cases in 1986?
A That's correct.
Q And in 1986, what was your opinion in terms of shaken baby syndrome?
A I believed it was a valid diagnosis.
Q And why did you start looking into it more?
A Well, because people told me that impact could not cause these injuries, so my point of departure at that time was well, if shaking can cause these injuries why can't impact cause these injuries, so that was my point of departure and my point of inquiry, and as time went on not only did it become clear that low velocity impact can cause injuries, but that the force involved in impact injuries was some 10 to 100 times the force involved in shaking until I finally realized in '99, or it might have even been as late as 2000, that shaking just simply wasn't a valid injury mechanism.
Q And so in 1987 when the Duhaime study was published, you didn't give much weight to that?
A I doubt that I read that study in 1987. It was probably in the early '90s before I read that.
Q And so in the early '90s you didn't give any weight to

that study saying that there's no way possible it was shaken baby.

A I said I most likely did not read that in 1987. I had a full-time job.

Q I believe I just asked you -- you said you read it probably in the early '90s ---

A Correct.

Q --- so I'm asking you when you read it in the early '90s did you not give much weight to that study?

A Well, it wasn't much -- the fact of giving it much weight. I didn't understand the mechanics in the early '90s.

Q And so in order to understand the mechanics, what kind of courses, classes, what have you done to further your education into the mechanics or into biomechanics or engineering?

A First of all, I need to understand college level physics using calculus. Okay. Secondly, you need to read the relevant literature which is basically the engineering literature and you need to understand it. If you don't understand it you either need to take classes in it or you need to work with established biomechanical engineers who can help you to understand these concepts.

Q So in the early '90s you'd already had college level

physics?

A I had.

Q And you understood that?

A I did. Well, I probably forgot it. I took college level -- I graduated from college in '69. I had to relearn all that stuff.

Q And so what classes, courses ---

A Oh, all I had to do was take Halliday and Resnick's two-volume physics book and reread it.

Q So you're self taught in biomechanics?

A No, I'm not self taught.

Q Well, please tell me ---

A I took ---

Q --- what courses you've taken.

A --- college level engineering physics.

Q But you said you'd forgotten that by this point.

A I had to relearn it. Okay?

Q So you forgot it and you retaught it to yourself?

A Oh, sure. Didn't need somebody in front of the room to help.

Q Okay. What other formal training have you had in that field?

A None formally; that's correct.

Q So you said earlier that in 1999 or 2000 is when you had read up enough on biomechanics and understood it

to know that shaking alone could not cause these injuries.

A Well, it wasn't the fact that I had read up on it. I knew Warner Goldsmith personally. I knew Larry Thibault personally. I knew Tom Gennarelli personally. I knew all of the people, probably a dozen or 15, who were active in the field of infant injury evaluation and research from a biomechanical perspective and it was at that point, after working with them for three or four years -- I met Thibault in probably '96 -- that I finally had a eureka moment and understood it.

Q And all of that, your understanding, your reading of the literature, the studies by the individuals you just cited, all of that was done prior to 2002?

A That's correct.

Q So your understanding of the biomechanics, your ability to grasp those concepts, the other studies that you mentioned, all of that was done prior to this case ever being litigated?

A That's correct.

Q When Ms. Pringle asked you earlier, you said that the change from 2002 to present -- and you named six things: that low velocity impact can occur -- can on occasion cause fatal head injury.

A That's correct.
Q And when did you realize that?
A Oh, I probably knew that a dozen years before.
Q So in 1990?
A Certainly by then I did.
Q So that was not discovered from 2002 to 2015?
A No, not by me.
Q That dural bleeding is not -- that shaking is not a specific mechanism for the dural bleeding.
A That's correct.
Q When did you discover that?
A I knew that certainly prior to 2002. I knew it. I knew it.
Q You knew that. That you can have a lucid interval, when did you know that?
A I knew that prior to 2002.
Q That retinal hemorrhages are not only from shaking or that shaking does not produce retinal hemorrhages.
A I knew that prior to 2002.
Q That the biomechanics of this, the difference in infants, toddlers and adults in head injuries and understanding the biomechanics, did you also know that prior to 2002?
A I'm not sure if my understanding was complete in 2002. It probably was because that's when I wrote the

article.

Q You wrote the article in 2001?

A Yes, the article had been written or I had written the article.

Q And ---

A And I certainly knew it when Goldsmith and I published the article in 2004.

Q And the last thing that you mentioned was a change from 2002 to the present is confessions in terms of evaluating injury are not reliable.

A That's correct.

Q And when did you realize that?

A Oh, that was much later. I was not familiar at that time with the Innocence Project on confessions, for example. That's only been the last three or four years. I was not familiar with Richard Ofshe or Richard Leo from UC Berkeley and from UCLA who had written about this. I was just not aware of that. It's only been, I'd say, maybe since 2004 or 2005 that I became aware of problems with confessions.

Q So when she asked you on direct the change in the science and the change in what you understood from 2002 to the present, the real only difference is about the confession literature?

A In terms of my understanding, that's correct.

Q And so in 2002 had you come into this courtroom, you understood all of that and could have testified before the jury regarding those things?
A That's correct.
Q So the only difference in your understanding that has changed from the time this case was initially litigated to the present is about false confessions?
A Most likely that's correct.
Q So about evidence-based medicine, you talked about the 2003 article by -- or correct my pronunciation. He did a review of the literature.
A Correct.
Q Published known existing literature was what he looked at.
A That's correct.
Q And the articles that he looked at were from what year to what year?
A I think it was '69 to '98.
Q So when he published that study in 2003, there was nothing new. It was all based on prior studies that had been done ending in 1998?
A That's correct.
Q So everything that he published in 2003 was already known by at least 1998 or no later than 1998?
A Yes, it was.

Q So nothing new that could not have been brought up in this case in that study?
A The obvious point is that anything that could have been brought up would have been irrelevant ---
Q And why is that?
A --- to Mr. Mitchell's case, because there was no evidence base for it, so you not only had to cite the literature, but you had to say this is the evidentiary basis for it and the court and the jury would have to understand what that means.
Q So in 2002 based on the literature, his findings were that there was no evidence base for shaken baby syndrome?
A That the evidence base was very shaky, and I'd actually prefer quoting directly from his article, if that's okay. I don't want to paraphrase it. Do you remember which exhibit it is?
Q I do not.
A Ms. McDuffie, I'm just simply going to read from his conclusion, if that's okay.
Q Sure.
A Conclusions: There was no evidence on the subject of SBS that exceeded QER, which is quality of evidence, level 32, which is case studies with inadequate controls by the end of 1998, which means that there

was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment or any other matters pertaining to SBS. The majority of evidence achieved only a level of QER4, opinions that shed no new light upon SBS and did not add to knowledge about SBS.

Many of the authors repeated the logical flaw that RH and SDH are nearly always seen in SBS. The presence of RH and SDH, quote, prove, closed quote, that a baby was shaken intentionally. Many of these other studies assumed that the presence of RH and SDH was sufficient to make the diagnosis of SBS in terms of case selection.

The remainder of studies are QER33 as noted above. The inclusion of case series without controls would normally not occur, thus the data available in the medical literature by the end of 1998 were inadequate to support any standard case definitions or any italicized standards for diagnostic assessment.

Before 1999 there existed serious data gaps, flaws of logic, inconsistency of case definition and a serious lack of tests capable of discriminating NAI, non-accidental injury, cases from natural injuries. By 1999 there was an urgent need for properly conducted prospective studies into SBS using a variety

control. Without published and replicated studies of that type, the commonly held opinion that the finding of STH and RH in an infant was strong evidence of SBS was unsustained, at least from the medical literature.

Q So from the medical literature up and until 1998, there was no evidence basis for shaken baby syndrome?

A That's correct. Other than opinion.

Q And that was known from '69 to '98.

A Well, if you were a statistician and an epidemiologist, you probably knew it. If you were a practicing pediatrician or even a practicing pathologist, you probably didn't know it.

Q But if you read the study it would say what the methodology was, what they were basing their findings on?

A That's correct.

Q And so you could learn from reading the study what they were basing it on?

A I could.

Q And a normal doctor couldn't?

A I don't know what a normal doctor could do. Obviously they didn't. If they had they would not have been giving the testimony that they did in 2002.

Q You came out with your study about short falls in 2001.

A That's correct.
Q And you've read through the transcript in this case?
A I have.
Q And your study was actually brought up both on cross examination of Dr. Hubbard and, I believe, Dr. Close in this case?
A I don't remember if it was Close or if it was Nichols. One or the other. I know Hubbard was asked but he said -- he said he was unfamiliar with it.
Q But your article was mentioned?
A That's correct.
Q And it was known to the defense at the time of this trial?
A Yes.
Q Your name was known to the defense at the time of this trial?
A That's correct.

MS. PRINGLE: I'm going to object. He can't testify to what they knew. He can testify to what's in the transcript.

THE COURT: Did they quote your article in the transcript?

MS. McDUFFIE: Your Honor ---

THE WITNESS: Your Honor, I don't remember. Nobody contacted me about the case.

THE COURT: All right. We'll let her figure out where it is.

Q Page 211 and 212. If you could start on page 211, line 24, question by Doug Strickler.

A Okay. This is a question by Strickler. What line?

Q Line 24 on page 211.

A So are you acquainted with the article entitled Fatal Pediatric Head Injuries Caused By Short Distance Falls by John Plunkett in the American Journal of Forensic Medicine and Pathology from last year? Answer: No, I am not.

Q And that was Dr. Hubbard saying no, he wasn't?

A That's correct.

Q But Doug Strickler who was asking the question obviously was familiar with your article or at least knew the title?

A That's correct.

MS. McDUFFIE: Your Honor, if we could mark the transcript and introduce it into evidence?

THE COURT: Okay. State's 1.

(State's Exhibit Number 1 was marked for identification by the Court Reporter.)

MS. McDUFFIE: Your Honor, we'd offer State's 1 into evidence.

THE COURT: State's 1 is in.

Q And your study looked at falls off of playground equipment?
A That's correct.
Q Taken from the -- what database did you take it from?
A U.S. Consumer Product Safety Commission database.
Q And in your study how many deaths were reported?
A 114.
Q And how many did you focus on?
A The 18 that were due to falls.
Q And the 18 were due to falls, how do you know that they died from falls?
A Well, I wasn't there so I can't tell you that any of them are. All I can tell you is what the police record said, what the medical record said, what the witness statement said, what the autopsy report said, what the photograph said and what the microscopic slides said. That's all I can tell you.
Q So in those cases where the caregiver or the witness reported that the child fell, you took that as good enough to include it in your study?
A Well, I took what law enforcement said as good enough. As I said, I was not there for any of it.
Q And you weren't there when MINOR died.
A That's correct.
Q And when law enforcement in this case said that she

was shaken and this defendant said that she was shaken, that's not good enough?

A Not even close.

Q But it was good enough for your scientific basis?

A No, no one in my study said that they shook a child who was unconscious side by side. In none of my cases was that stated and that accepted as evidence of shaking. None.

Q But it's okay -- it's okay to say someone fell and that be accepted as ---

A If it was documented either by eyewitness observers or by the police investigator.

Q So in this case which was documented by an eyewitness observer that he shook the child and then she started to become symptomatic and ultimately died, and by police that's not ---

A Ms. McDuffie, I simply cannot accept Mr. Mitchell's statement about shaking as having anything to do with MINORn's death, nothing.

Q But you accept caregiver statements to include in your study?

A If they are consistent with the injuries observed and Mr. Mitchell's statement as to what he did is absolutely inconsistent with MINOR 's injuries.

Q In your opinion?

A That's correct.
Q Your opinion?
A Right.
Q And in evidence-based medicine, I think you testified earlier that -- I don't want to misquote you -- that opinion is the least reliable and can always be trumped by evidence.
A Well, I am basing my opinion on evidence.
Q Actually the jury found him guilty of homicide by child abuse, so please tell me again what evidence you're basing this on.
A Knowledge of the biomechanics of injury; knowledge of the physical condition of MINOR , including the bruise over the left side of her forehead; knowledge that the so-called acute and chronic subdural hematoma testified to by the pediatricians and by the defense pathologist in 2002 was incorrect, all of those things.
Q So it's okay for self-reported history in some cases like the basis of your scientific study, but not in others?

MS. PRINGLE: I'm going to object. This has been asked and answered and is rising to the level of argumentative. She has asked this several times now.

THE COURT: Overruled.

A Ms. McDuffie, I was not there. I can't tell you whether Mr. Mitchell told the truth or not. All I can tell you is two things: Number one, shaking did not cause or contribute to MINOR 's injury. There is no evidence whatsoever that shaking had anything to do with it.

And secondly, there is evidence that an impact injury occurred, and I can't tell you if she was running down the hall and tripped and fell, or Mr. Mitchell pushed her, or her older brother pushed her or what happened. All I can tell you is what I've said. It's not shaking and it is impact.

Q You weren't there that day; correct?

A That's correct.

Q So you can't tell me if he picked her up, shook her and slammed her head against the wall.

A Well, if he did there's no evidence of shaking.

Q But you can't tell me that he didn't shake her.

A That's correct.

Q So it's just as likely that he shook her and slammed her head against the wall as it is that she was running down the hall and tripped.

A No, that is not -- that is not true at all.

Q You just said you couldn't tell me the mechanism or the actual cause of the injury.

A That's correct but you're asking a likelihood question and ---

Q How ---

A --- if you're asking a likelihood question, first of all, that's a juror question. You have to take into consideration Mr. Mitchell's social history and all sorts of other things. All I can tell you is the mechanics of injury. This is what caused the injury. This is what did not.

Q And some of those things that you talked about with Ms. Pringle, about the problems with other studies was circular reasoning.

A That's correct.

Q Wouldn't it be circular reasoning that that was a question for the jury which the jury resolved, that he was guilty of homicide by child abuse? I mean, are you not just using circular reasoning right now to try and validate your point?

A Oh, absolutely not.

Q Interesting.

MS. PRINGLE: Object to the editorial comments.

THE COURT: No editorial comments, Ms. McDuffie.

Q Dr. Plunkett, in your study how many children were walking down the hall and tripped and died?

A None.

Q How many studies ---
A Not in that study.
Q In which study then?
A Well, you can take a look at the stairway fall that Pat Lantz described.
Q Not talking about stairways. I'm talking about onto a flat hallway.
A Published? There was none in that study. Zero. They're all playground equipment.
Q Which studies are you aware of where children were walking down the hallway, tripped and died?
A I have several case reports of that.
Q Which studies?
A None published -- no published studies. That's correct.
Q Let's talk about -- Ms. Pringle brought up retinal hemorrhages. You say those are not a result of shaking?
A That's correct.
Q And that that was proven, and I apologize -- I didn't get the name but I think you said -- by a Frenchman 110 years ago?
A Well, beginning with the publication of that article, Terson, it became clear that it was an increase in intracranial pressure that was causing the retinal

hemorrhage associated with intracranial hemorrhage. Initially it was subarachnoid bleeding from aneurysms, but over the subsequent 100 years it became clear that it was intracranial bleeding from whatever resulting in increase in intracranial which resulted in retinal hemorrhage.

Q And I'm sorry if I oversimplify this, but I think what you just said is that brain swelling leads to retinal hemorrhages?

A That's correct.

Q And that was known 110 years ago?

A Yes.

Q And that is also your opinion today?

A It's my opinion because it's substantiated in the literature. That's why it's my opinion.

Q So it's been substantiated in the literature for the past 110 years?

A That's correct.

Q It hasn't changed since 2002 or prior to then?

A Not by me. I don't know what other people's understanding was.

Q So you're not aware of what's in the literature regarding retinal hemorrhages?

A I'm aware of what's in the literature.

Q But in your opinion, in the past 110 years, brain

swelling causes retinal hemorrhages and that's your opinion today and that hasn't changed?

A No, that's -- there's other causes, diabetes, hypertension, all sorts of other things that can cause retinal hemorrhages, but the retinal hemorrhages associated with impact head injury is, with few exceptions, caused by increase in intracranial pressure.

Q And in terms of shaken baby today, you acknowledge that there is a debate among pediatricians versus forensic pathologists versus biomechanical engineers.

A That's correct.

Q And I think you said that pediatricians say that you can cause injuries to a child by shaking?

A I'm not sure what they say anymore. I just don't know.

Q And ---

A You'd have to ask a pediatrician.

Q And that forensic pathologists and biomechanic (sic) engineers, they say you can?

A Well, you're going to find some forensic pathologists, I'm sure, that, you know, say you can. I don't know any personally but that doesn't mean they're not out there. Biomechanical engineers, I'm not aware of any biomechanical engineer ---

Q And when did that shift -- or when did that shift occur?
A Oh, with the biomechanical engineers, I think they've known it forever ---
Q So in ---
A --- but they were not talking -- biomechanical engineers did not interact with practicing physicians at all. They were all out doing their thing and physicians were out doing their thing and it wasn't until the nanny trial in Boston ---
Q Which was 1997?
A --- in 1997 that people became aware of the contribution of biomechanics to injury evaluation.
Q So five years before this case was litigated that was common knowledge?
A No, it was not common knowledge at all.
Q Who ---
A As a matter of fact, Louise Woodward was convicted.
Q You're right. She was. Who ---
MS. PRINGLE: Objection ---
Q --- who ---
MS. PRINGLE: --- again. Ask that she simply ask questions.
THE COURT: Well, I ask that he simply answer the question and move on.

Q In 1997 you brought up the Louise Woodward case.
A I did what?
Q You just brought up the Louise Woodward case ---
A That's right.
Q --- that occurred in 1997. And that case, kind of, highlighted the debate between the pediatricians, the forensic pathologists and the biomechanical engineers in terms of whether shaking could or could not cause injuries.
A No, that was the first discussion.
Q So the first open, public discussion of this whether it could or couldn't was in 1997?
A That's correct.
Q And that was a highly publicized trial.
A That's correct.
Q So in 1997 there was at least consensus that there was a debate among these individuals.
A No, there wasn't a consensus at all.
Q So people agree that there was no debate, that it was clear, settled science.
A If you read the pediatric commentaries, including commentaries that I have, written as recently as two weeks ago, they say there is no debate.
Q Because pediatricians firmly believe that you can cause these injuries by shaking.

A They say that the debate is caused by a few, quote, well paid, close quote, fringe defense experts.
Q And would you consider yourself a ---
A That is exactly what they say.
Q --- well paid fringe defense expert?
A No way.
Q So there is a debate?
A I don't know if you can call that a debate.
Q How many people agree with you in terms of your -- your conclusions and your findings?
A I have no idea. Science is not a democracy. I have not taken a poll to see who agrees with me or who doesn't. You'd have to take what I say, show it to the forensic pathologists and say do you agree with this or do you not. The same thing with the biomechanical engineers.
Q Do you recall testifying in 2001 in the case of Her Majesty the Queen versus Catherine Patton November 26 of 2001 in Windsor, Ontario?
A I sure do not.
MS. PRINGLE: I do not have a copy ---
MS. McDUFFIE: I'll get you a copy of this as well.
THE COURT: All right. She'll get you a copy.
MS. PRINGLE: If I could have copies of anything

else that they intend to show him.

THE COURT: No, ma'am, that's not the way cross examination works. She'll give you a copy when she does it but you're not entitled to it beforehand. This is your witness. Where is her copy?

Q Dr. Plunkett, do you recall being asked on November 26 of 2001 your opinion on whether shaking a baby alone by a human being can cause injuries such as subdural hematomas and retinal hemorrhages?

A I do not.

Q What would your answer be today?

A No, it could not.

Q And your ---

A Or it would be highly unlikely to.

Q And in 2001 do you recall saying well, by itself it does not cause injuries or shaken baby syndrome; it can cause significant neck damage but I don't -- and I don't think it's a very good idea to shake a baby, but as far as I know you cannot cause either subdural hemorrhage or retinal hemorrhage by shaking a child?

A I don't think my opinion has changed in 14 years.

Q So your opinion has not changed since 2001?

A No.

Q Do you recall being asked what is your complaint with shaken baby syndrome?

A No.
Q Would you agree or disagree with your response? First of all it lacks a scientific foundation. Secondly it violates virtually every principle of mechanics known since Sir Isaac Newton published his principles of mathematics back in 1685.
A I would agree with that and say the same thing today.
Q And that hasn't changed since then?
A No, it has not.
Q Do you recall being asked is there a majority opinion in the medical community about shaken baby syndrome? Your response, among the child abuse people who are pretty closely ---
THE COURT: Slow down.
Q Among the child abuse people who are pretty close to being exclusively pediatricians, yes. What about the National Medical Examiners? No, absolutely not.
A That's correct.
Q And that would have been your testimony in 2002 as well?
A That's correct.
Q And you agree with those statements again today?
A Again, the first part of the statement?
Q Is there a majority opinion in the medical community about shaken baby syndrome? Your response, among the

child abuse people who are pretty close to exclusively pediatricians, yes.

A Correct, I agree with that.

Q And again, doctor, you were asked that your view as to shaken baby syndrome, you're in the minority view and your response was what I'm saying is that this is the evidence, this is the scientific evidence to support your opinion.

A That's correct.

Q So none of that's changed since 2002?

A That's correct. Not -- not by me it hasn't changed.

Q Do you recall also being asked in that same trial would you agree that in your opinion that the majority of the medical community would have been of the opinion that these symptoms are shaken baby? Your response, in 1993, yes; today, no. And then ---

A In 2001?

Q --- and you further clarified with regard to forensic pathologists, forensic pathologists are finally starting to learn that the mechanics of head injury and very, very few forensic pathologists agree or believe in the validity of shaken baby syndrome at all. Secondly, most forensic pathologists now understand not only the correct mechanism of injury in infants, but also understand that the amount of force

required to cause these injuries is much -- is much less than what they had been taught and can occur from seemingly innocuous events such as a two-foot fall.

A I said that in 2001.

Q 2001.

A I'd say it today.

Q Nothing in that has changed?

A No.

Q So in 2001 your testimony was and would have been consistent in 2002 that the majority of forensic pathologists and biomechanical experts would agree with you in terms of shaking ---

A Is that verbatim from the transcript?

Q I'll be happy to read it to you again, Dr. Plunkett.

A Okay. Read it verbatim.

Q With regard to forensic pathologists, forensic pathologists are finally starting to learn that the mechanics of head injury and very, very few forensic pathologists agree or believe in the validity of shaken baby syndrome at all. Secondly, most forensic pathologists now understand not only the correct mechanism of injury in infants but also understand the amount of force required to cause these injuries is much, much less than what they had been taught and can occur from seemingly innocuous events such as a two-

foot fall.

A You stuck in a phrase there about biomechanical engineers which you didn't include in your re-read, so which is correct?

Q In 2001 your testimony is that most forensic pathologists would agree that there's -- I'm sorry -- would agree that shaken baby syndrome is not valid.

A I agree.

Q Earlier you were asked do you agree that the majority of the medical community still believes in shaken baby syndrome. Your response, pediatricians certainly do; neurosurgeons, at least in the United States, are becoming increasingly wary of that diagnosis; and forensic pathologists with few exceptions do not believe anymore that it exists.

A I would repeat that today.

Q So none of that has changed since 2001?

A Not in my evaluation, no.

Q So your testimony to the jury in 2002 would have been that the majority of forensic pathologists and neurosurgeons as well as biomechanical engineers would agree with what you have said here today?

A I would say that's correct.

Q And so none of that would have changed from 2002 to the present?

A In terms of my testimony, no.
Q And in terms of this case and the specific injuries in this case, you said that the cause of death was impact head injury.
A That's correct.
Q That MINOR 's head hit a solid surface which caused, I think, differential motion and caused bleeding in the dural composition?
A Compartment.
Q I'm sorry. Compartment, which basically means subdural hematoma?
A Correct.
Q Which led to brain swelling?
A Yes, correct.
Q Which led to retinal hemorrhages?
A That's correct.
Q And that was your testimony now and it would have been the same in 2002?
A That's correct.
Q Would you agree or disagree, Dr. Plunkett, with this statement made by Dr. Hubbard? Dr. Hubbard: My cause of death was increased intracranial pressure, increased pressure of the brain secondary to a closed head injury, injury to the head, and that was secondary to non-accidental trauma?

A Well, the first two I agree with. The swelling and closed head injury, I would agree with those two, but it's a leap of faith to go from there to non-accidental trauma.

Q So you agree with the cause of death that Dr. Hubbard stated. You just don't believe that he can say whether it was an accidental or non-accidental?

A That's correct. And he did testify that it was shaking which is different from closed head injury.

Q But when specifically asked what is the cause of death of this child in your expert opinion, you would agree with his response, my cause of death was increased intracranial pressure, increased pressure of the brain, secondary to closed head injury, injury to the head, and you would disagree with and that was secondary to non-accidental trauma?

A I agree.

Q And that would have been the same in 2002 as it is today?

A That's correct.

Q So you would agree with Dr. Hubbard's findings in 2002 with the exception of whether he could say accidental versus non-accidental.

A That's correct.

Q And as we sit here today, you can't say whether the

injuries to MINOR were accidental or non-accidental.

A I cannot.

Q You just think it's wrong for him to say that?

A Well, it's not only wrong for him to say it, but he testified extensively about shaking as being the injury mechanism and that is wrong.

Q But ultimately you agree with his cause of death?

A The first two parts if -- I'm not sure what he means by -- I don't use closed head injury to include shaking and I'm not sure if he includes shaking as being part of closed head injury, so you'd have to ask him specifically what he meant.

Q In the testimony of Dr. Close in this case would you agree or disagree with the statement that in this case that it was probably shaken baby injury or impact?

A I would disagree. There's no evidence that shaking occurred.

Q But you agree with him in terms of the impact?

A That's correct.

Q So you agree with Dr. Hubbard as to his ultimate cause of death, just not the mechanism.

A Well, I think you've got to ask him what he means by closed head injury.

Q And you agree with Dr. Close that there was a blow or

an impact?

A Well, that's not what he said. He didn't say there was evidence of a blow. That was about the time when people were starting to talk about things such as shaking impact syndrome.

Q And Dr. Nichols, when he testified on page 905. Question: So in your opinion, doctor, this case then would be shaken baby as well as some kind of blow to the head? Dr. Nichols: That's correct. You don't agree with the shaking but you agree with the blow to the head?

A I do.

Q So you agree with Dr. Nichols' cause of death minus the shaking.

A That's correct.

Q And that's the same in 2002 as it is today?

A That's correct.

Q Dr. Ann Abel, the forensic pediatrician, so in this case your conclusions are twofold. Her answer: Yes. She was a battered child but she was also shaken.

A And the question is?

THE COURT: I don't understand what the question is.

Q Do you agree or disagree with that statement?

A I disagree with both ends. She's not a battered

child. She has an isolated head injury. She is not a battered child.

Q Are you aware ---

A That's a mischaracterization of her injury.

Q Are you aware of the bruising on her buttocks from spankings?

A Oh, okay, okay. Yes, she was spanked. That's correct. I would not call that a battered child in 2002. I think it's probably not very socially acceptable today to spank a child, but that may not have been true 13 years ago and I would not have characterized her as a battered child.

Q What about the bruises on her chest, arm and neck?

A Oh, those are -- those are wear and tear, and she also had some on her legs. Those are wear and tear bruises from a 27-month old.

Q And finally you disagree with Dr. Ross's opinion in this case?

A No, I actually agreed with a lot of what he said. He mischaracterizes the nature of the dural compartment bleeding because of the misinterpretation of the radiology findings. There's no evidence to support a conclusion that this is an acute and a chronic subdural hematoma and, in fact the evidence says it is not, direct observation by the neurosurgeon and direct

observation by the pathologist. Chronic subdural hematomas at surgery and at autopsy are not difficult to identify.

Q And you said that Dr. Patrick Barnes would have been able to know that in 2002.

A Well, he would have said in 2002 folks, you better be careful here when you're interpreting these findings because they may simply represent hyper acute bleeding, rather than acute chronic bleeding and there's only three ways to know which is true. Number one is do the surgical procedure and look. Number two, perform an autopsy if the person dies. Number three, follow the scans sequentially over several days and see what the change is.

Q And are you aware that the defense contacted Dr. Barnes in 2002 regarding this case?

A I was not aware of that until recently. Ms. Pringle told me about that just within the last several days.

Q And so Dr. Barnes was consulted?

A I have no idea. I know Dr. Barnes was incredibly busy from '97 until today. I don't know if somebody called him and he said he couldn't do it and referred them to others. I just don't know.

Q But you are aware that he was in contact with the defense in 2002?

A That's what I was told.
Q And he would have known what -- I don't want to misrepresent the medical terminology, but whatever you just said, he would have known that in 2002?
A If he had reviewed the records, sure.
Q But he was known in this community and, in fact, he was contacted by the defense and that's your knowledge?
A That's my knowledge.
Q On to the biomechanics, you're basing your theory that a child can't be shaken based on picking up a 20-pound bag of cat food and shaking it?
A Oh, no, I just gave that as an example. This is based on the totality of biomechanics, you know, skull fracture threshold, brain injury thresholds, tearing thresholds, compression thresholds, going back many years.
Q But you did pick up a 20-pound bag of cat food and shake it?
A Sure.
Q And that's part of what you're basing your opinion on?
A Well, that's just a demonstration.
Q And you think that's scientifically valid.
A Well, I'm telling you my experience. My experience is I can't pick up a 20-pound bag of cat food and shake

it back and forth more than once a second. It's just simply a demonstration.

Q And so when a person who's been convicted of homicide by child abuse says that they shook their baby and that's their experience, that's just as valid?

A I have no idea how to answer that question.

Q And again, Dr. Plunkett, your cause of death for MINOR was impact to her head.

A That's correct.

Q And you said it could be from intentional impact or accidental?

A That's correct.

Q You have no way of knowing.

A That's correct.

Q And you can't cite me to a study where a child tripped and fell onto a flat surface like the floor ---

A No.

Q --- that caused death? And again, Dr. Ross in this case was the defense expert?

A That's correct.

Q I asked you when we first started, your testimony today and to summarize it, it's understood that based on biomechanical literature where real scientific experimentation has been done to clearly document that there was -- that these sorts of injuries occur and

it's impact-related trauma and not shaking, and you agree with that statement?

A I agree.

Q You also agree that shaking, in and of itself, according to all the literature, does not cause these sorts of injuries.

A Defining these sorts of injuries as subdural hemorrhage, retinal hemorrhage and brain swelling absent neck damage, structural neck damage, that's correct.

Q And you agree with those statements and you would have testified to them yourself in 2002?

A That's correct.

Q Again, if I can direct your attention to the testimony of Dr. Ross, page 617 and 618.

THE COURT: Are you in the trial transcript?

MS. McDUFFIE: Yes, Your Honor, State's Exhibit 1.

THE COURT: Okay. Thank you.

Q Page 617, if you could start on line 22, the response of Dr. Ross.

A Sorry. Which line?

Q Line 22, and this is Dr. Ross's testimony in 2002.

A Okay. And you want me to do what?

Q Please read line 22.

A Answer, no, and it should be clearly understood that there is biomechanical literature out there which is done by -- where real sound scientific experimentation has been done to clearly document that these sorts of things can occur and it's from impact-related trauma and not from shaking. Shaking, in and of itself, according to all the literature, does not, in and of itself, cause these sorts of injuries -- the occurrence of the injuries. I assume referring to the injuries that MINOR had.

Q Thank you. So your testimony today is exactly what was presented to the jury in 2002.

A In part it is.

Q And again, the only thing that you have discovered or you have learned from 2002 to today is dealing with confessions in the literature regarding false confessions.

A The only thing I've learned. I don't think that's true.

Q The only thing that you have learned that is relevant and applies to this case, I think you testified earlier, is dealing with false confessions.

A Well, and the -- the literature that's been published since that time.

Q But none of that literature has changed your opinion

from 2002?

A That's correct.

Q So nothing has changed your opinion from 2002 to today with the exception of your knowledge of false confessions.

A That's true.

Q So the only after-discovered evidence that you are aware of that you could not have personally testified to in 2002 would be regarding false confessions?

A Well, first of all, Mr. Mitchell's confession is not a false confession. It's not a confession at all, so I would not need to address ---

Q And that's ---

A --- whether or not it's false ---

Q --- your opinion ---

THE COURT: Let him finish. You may finish, doctor.

A And so whether or not it's a false confession would not have come up during my testimony in 2002. I hope it would not.

Q So then there's absolutely nothing different from what you have testified here today that you could have testified to in 2002?

A I think that's true.

Q And you agree with what was presented to the jury by

Dr. Ross that there's biomechanical literature out there which is done by -- where real sound scientific experimentation has been done to clearly document that these sorts of things can occur and it's from related trauma and not from shaking. Shaking, in and of itself, according to all the literature, does not, in and of itself, cause these sorts of injuries.

A That's correct. I agree with that statement.

Q And that was presented to the jury in 2002 and there is nothing that you would change about that.

A That's correct.

MS. McDUFFIE: Beg the Court's indulgence. Thank you. Your Honor, nothing further at this time.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. PRINGLE:

Q Dr. Plunkett, do you recall Dr. Ross citing to a single scientific study, article, literature, anything specifically in his testimony?

A He did not.

Q On direct or cross examination?

A That is correct.

Q And he talked about G forces in his testimony; is that correct?

A That's correct.

Q And do you recall his background that he testified to was in car crashes primarily?
A Well, he's had an interest in car crashes. That's part of his background, so he was using automotive industry terms to describe injury.
Q He didn't cite a single article, no literature and he didn't cite to the Plunkett 2001 article either.
A Now, that part I don't recall one way or the other, but he did not, as far as I can recall, cite any literature on either direct examination or cross examination.
Q Did any attorney for Nathaniel Mitchell ever contact you regarding the defense in his case?
A No.
Q Anyone ever contact you about this prior to me in 2013?
A No.
Q And Ms. McDuffie asked you repeatedly that you knew all of this in 2002, and you knew all of this before and you had all of this information. How much of your life have you spent studying this issue?
A Oh, boy. My professional life since 2004 exclusively.
Q And are you familiar with the scientists, the researchers, the pathologists, the biomechanical engineers and experts and those people and in your

keeping up with the research and the studies and the literature, are you familiar with who those people are?

A I know them personally. I work with them personally. I teach courses with them personally. I organize conferences with them personally, probably a dozen biomechanical engineers in the United States, at least 20 forensic pathologists, a number of neuropathologists that I work with from this country, from the United Kingdom, Canada and Australia, South America that I work with on a daily basis.

Q And so in 2002 how many other experts, if these attorneys had exercised due diligence, would they have been able to find that knew everything that you know that you testified to today?

A I'm a little bit hesitant to say this but I'm not sure if there was anybody, including Ross because Ross clearly misunderstood the importance of the CT findings. There's probably a couple. Jan Leestma is a neuropathologist from Chicago. He understood these things back in '02 as I did. There could have been another couple of forensic pathologists. Certainly the bioengineers understood it, but I don't think that at that time most attorneys and certainly most physicians understood the importance.

Q In 2002?
A In 2002.
Q And so by my count of what you just said maybe four people in the entire world that they could have gone to?
A Well, I wouldn't say world. In the United States certainly.
Q Fair enough.
A That I know of. Could there have been others? Certainly. I'm just not aware of them.
Q You testified on direct that you didn't see this issue gaining any traction in the courts until '08.
A Well, it was in '05 and '06 in the United Kingdom where the World Courts of Justice, which is their equivalent of the Supreme Court, addressed this issue. The following year or maybe two years later in Canada when Justice Stephen -- S-T-E-P-H-E-N -- Gouge -- G-O-U-G-E -- from Ontario formed a commission to address this issue. Audrey Edmunds case in Wisconsin in 2008.
Q I don't ---
A So it was -- the first one was in England. The second one was in Canada and the third one was in the United States beginning in 2008.
Q And you consider that in 2008. They asked you about the Woodward ---

A Woodward case.
Q And that was in what year?
A That was '97 but that was conviction.
Q Explain to the Court, if you would, what happened in that case.
A Well, the Woodward case involved a British nanny who was accused of shaking to death a year-and-a-half old kid -- I'm not sure if he was a year and a half -- might have been a little bit younger -- kid who happened to be in her care. Mattie Eappen -- E-A-P-P-E-n -- died at Mass General. The treating physicians including Pat Barnes said that Mattie had been shaken to death. The pathologist who did the autopsy said no, this baby has an impact injury and an old skull fracture.

The prosecution ignored that evidence and basically railroaded the pathologist out of the courtroom so that he could not give effective testimony, the prosecution witness pathologist, and Louise Woodward was convicted of intentional murder and Judge Zobel -- Z-O-B-E-L -- at the end of the trial vacated the verdict and said if this is any injury at all, it's inadvertent or accidental and sentenced her to time served which was something under a year and she left that day.

Q So that was not a finding really involving ---
A No ---
Q --- the mechanics ---
A --- not at all.
Q --- of shaken baby.
A No, not at all.
Q Did anybody that's been mentioned here today -- did Dr. Barnes testify in that proceeding?
A In -- in the Woodward case?
Q Yes.
A Yeah, he testified at the request of the prosecution.
Q Okay.
A He was the prosecution expert -- neuroradiology expert and it was since that time in 1999 when he said wait a minute, what I've been saying is wrong.
Q And that's Dr. Patrick Barnes who they asked you about previously in the articles that we discussed this morning?
A That's correct.
Q So he's thinking that up until that time. This trial was in 2002; correct?
A That's correct.
Q In 2002 when you were testifying, what was reaction to your testimony to your position in 2002, 13 years ago?
A With few exceptions, I was treated as if I was the

idiot fringe.

Q What do you mean?

A No one believed me.

Q Has that changed in your experience?

A Oh, yes, it has.

Q And Ms. McDuffie asked you several questions about everything is exactly the same as you would have presented in 2002. Much of the literature that we presented today is post-2002; correct?

A I think almost all of it. That's correct.

Q And are ---

A With the exception of my short falls case. That was the only one.

Q And do those opinions, I guess, support what you thought in 2001?

A The subsequent publications?

Q Yes.

A Yes, they do.

Q And were those publications and that science -- were those available to the defense attorneys to support and back up these bare assertions by Dr. Ross at trial?

A No, they were not.

Q A lot of these questions about what you knew at the time, what you were learning, what you were proving in

2001, in the medical field does it sometimes take a while for theories to take hold and become known in the medical field?

A It does.

Q Is that common or is it common that if one study comes out, that it becomes widely accepted?

A No, the saying that you learn first day of medical school is that it takes 10 years to get a correct idea into medicine and it takes 100 years to get an incorrect idea out, and that is true. So first of all, you have to have presentation of the data supporting the new approach. Treatment of breast cancer is an excellent example of that and that took a long, long time to get to the point where we now treat breast cancer totally different from what we did 20 years ago.

Q Okay. And she asked you several questions about you agreeing with Dr. Hubbard. I'm going to ask you to look at page 155. What does he say line 15 to 20?

A My examination looked at subdural hematoma with the retinal hemorrhages and the abnormal neurological findings as the evidence of big time swelling and neurological deficit that included child abuse. That's what caused it. That's what it is.

Q Included child abuse. That's what caused it. That's

what it is; right?

A That's correct.

Q Page 173 on the direct of Dr. Hubbard, lines 15 to 17. Question.

A So this child died from head injuries that got from child abuse? Answer, yes, yes, that's correct.

Q Page 175, Dr. Hubbard, line seven to 12.

A Question, what type of trauma could cause these injuries. Answer, this is -- those three things together virtually are diagnostic, meaning it tells us what it is. They used to call it, and a lot of people still call it, shaken baby syndrome.

Q And line 16 to 23.

A Shaken baby syndrome is violent whiplash type shaking of an infant or small toddler. It has to be very violent. The human brain is meant to take a nice -- you know, if you fall you might be a little dazed. We are meant to take a quick trauma to the brain. It's -- if it's just a one-time deal, I mean, you wake up like that and it doesn't usually cause a big problem.

Q Do you agree with those findings?

A No, that's a mischaracterization of the nature of head injury.

Q And on page 176, Dr. Hubbard says when you have these three things, the swelling in the brain, the subdural

hematoma and the retinal hemorrhages, a light goes on. That's shaken baby syndrome. Do you agree with that statement?

A That's incorrect. That's his testimony but it's incorrect.

Q He says again on 177, asked again on direct, is that consistent with someone violently shaking a baby. Is that correct? It's like a big whiplash injury. Do you agree with that?

A I disagree.

Q Do you agree with the statement violent forces cause big injuries?

A Well, that's true. Violent forces do cause big injuries. Small forces may also cause big injuries.

Q Same page, 177, line 14. Ms. Campbell asked could a grown man shaking a two-year-old violently cause these types of injuries, and he says what?

A He says yes.

Q And then what?

A That's the documented way to do it.

Q Do you agree with that?

A That's incorrect. I do not.

Q At line 21 what does Dr. Hubbard say?

A His answer, no, this was not accidental.

Q He says on line 21 this would be ---

A Violent, violent shaking.
Q And finally on 179 he says?
A This was a non-accidental trauma. This was child abuse and it was basically shaken baby syndrome ---
Q Do you agree ---
A --- or shaken baby type syndrome or shaken baby syndrome.
Q Sorry to interrupt you. Do you agree with any of those statements?
A I disagree.
Q I asked you these in detail on direct, and I'm not going to go back through all of it, but Dr. Linda Cristman, Dr. Ann Abel, Dr. Close testified previously. They all testified that this was shaken baby syndrome.
A Correct.
Q And do you disagree with that?
A I disagree with that.
Q And do you recall Dr. Nichols stating that it doesn't get much more classic, as far as the definition of shaken baby, referring to the three, the triad of injuries, in this case? Do you recall that?
A I do.
Q Do you agree with that statement or testimony?
A That statement is -- is incorrect. I mean, that may

be what people say it is, but that's not what it is.

Q And she asked you were there studies about children tripping and falling and hitting their head and fatalities in that regard and you said no.

A That's correct.

Q But what are you basing that on?

A Well, I haven't read any studies that I can recall; however, I have reviewed cases in which that was the history and those cases were witnessed.

Q You have --

A I've seen cases, yes.

Q Okay. That's what I was asking. So your answer is that there are no studies, but you have actually seen and studied individual cases?

A I have. I have not -- as far as I know there are no published studies in the peer review literature that address this issue and you have to look at it from a biomechanical perspective. You have to get a volunteer 27-month-old kid wearing a helmet and padding to run down a hallway and then trip and fall, or you can reconstruct it using the models. You don't have to use a kid.

Q Do you spend some of your time, Dr. Plunkett, studying this issue and maintaining research and keeping abreast of it? Are you being paid for that?

A For the research?
Q Yes, sir.
A No.
Q And why have you devoted and dedicated so much of your life and time and testimony to this issue?
A Well, it's important. It's important as a physician. It's important as a scientist and most importantly it's important as a human being. It's important especially for physicians to get it right. If you don't get it right, people are going to be accused, convicted, incarcerated, et cetera. As Pat Barnes said we've got to get it right and I think he's correct.
Q And I realize you may be reluctant to characterize yourself this way, but you were a bit of a pioneer in this area, were you not?
A Well, I was one of the first people who really tried to address this from the scientific basis rather than from just an opinion basis and Pat Barnes did it, I did it, Jan Leestma did it. Mark Donohoe from New South Wales did it. You know, there were several of us that started to look at this and tried to improve the quality of evidence.
Q But unless these attorneys had hired one of those doctors that knew all of those things at that time,

unless they did that -- well, if they didn't do that then they were rendering ineffective assistance of counsel by not finding those doctors.

MS. McDUFFIE: Objection. That's asking him to make a legal characterization.

THE COURT: Sustained.

Q How many doctors were there -- just how many at that time could they have found?

A This is an estimate: Fewer than a handful that understood what I understand. There were biomechanical engineers but not physicians, with few exceptions.

Q And while there are some literature and documents in that stack that predate 2002, is there some in there that post-date it as well?

A They all do except -- I don't recall exactly if -- Chadwick's '91 article was earlier. My 2001 article was earlier. Paul's 1989 article was earlier.

Q And Caffey and ---

A Caffey, and Guthkelch's retraction of what he said in '71 was in -- my goodness -- I'm going to say it was in '11 -- 2011.

MS. PRINGLE: Thank you, doctor.

MS. McDUFFIE: Briefly.

~~~~~~~~~~
~~~~~~~~~~

RECROSS EXAMINATION

Q Dr. Plunkett, you're not an ophthalmologist.
A That's correct.
Q Someone has an eye injury they don't come see you.
A That's correct.
Q You're not a pediatrician?
A That's correct.
Q When was the last time you treated a live child?
A 1978.
Q 1970 when?
A Eight.
Q During your pathology fellowship ---
A Yes.
Q --- you treated a live child?
A I did. I used to follow my pediatric patients one half day a week in the pediatric clinic.
Q And you're not a neurologist, are you?
A That's correct.
Q If someone had a brain injury, they wouldn't come to you?
A That's correct.
Q And you are not a radiologist or a neuroradiologist?
A That's correct.
Q Pediatric radiologist?
A That's correct.

Q No one would come to you for those kind of medical diagnoses?
A They would not.
Q And you agreed with me -- the first question I asked you was the after-discovered evidence in this case to summarize your testimony is today it is clearly understood that based on biomechanical literature where real scientific experimentation has been done to clearly document that these sorts of injuries occur and it's impact-related trauma and not shaking.

MS. PRINGLE: I would object. This has literally been asked and answered word for word.

THE COURT: Overruled.

A With the phrase which you left out clearly understood by the biomechanical community and the majority of forensic pathologists. And also I think that answer said I don't know what the pediatricians believe. You're going to have to ask them.
Q And shaking, in and of itself, according to all the literature, does not cause these sorts of injuries.
A That's correct.
Q And that was testified to in 2002?
A By Ross, yes, it was.
Q And again, you are here today to give your opinion?
A That's correct.

Q And you testified earlier that in terms of evidence-based medicine, opinions are the least reliable.
A In terms of evaluating scientific evidence, that's true. It has nothing ---
Q Opinions are the least ---
A --- to do ---
Q --- reliable ---
A --- it has nothing to do with an opinion offered in court.
Q And over the last 10 to ---
A That's two different uses of the word opinion.
Q And over the last 10 to 15 years you've been paid over a million dollars for your opinion?
A After what?
Q In the past 10 to 15 years you've been paid over a million dollars for your opinion?
A Yes, I have.

MS. McDUFFIE: No further questions.

THE COURT: All right. Have a good day.

THE WITNESS: Thank you, sir.

THE COURT: You should have plenty of time.

THE WITNESS: I've got plenty of time. Six o'clock flight.

THE COURT: Thank you.

THE WITNESS: Thank you, sir.

THE COURT: Make sure you don't take any exhibits with you.

THE WITNESS: I'll mail them back.

THE COURT: Do we need to take a break or do you have other witnesses today? No. Okay. What's your plan, Ms. McDuffie?

MS. McDUFFIE: Your Honor, we would ask that since we weren't given a copy of his report, and I don't want to misquote him in any way, we be allowed to get a transcript of this so that we can decide if we're going to call witnesses and give those witnesses an opportunity to read a transcript before we call them to testify.

THE COURT: All right. So we're going to hold the hearing ---

MS. McDUFFIE: I'm sorry?

THE COURT: We're going to stop the hearing at this point, allow the State an opportunity to determine whether or not they want to call any reply witnesses or any -- I don't know that they're reply witnesses, but to call any witnesses on the issue and then we'll revisit at that time. How long do you think you need for you to be able to do that?

MS. McDUFFIE: Your Honor, we'd ask that we be able to get the transcript, so I guess that's up to

Ms. Ambroziak.

COURT REPORTER: I'm given 60 days to do it. I have other transcripts so it would be at least 60 days.

THE COURT: Okay. All right. So once you get the transcript, once Ms. Ambroziak provides the State with the transcript, then we would have -- from that point you would have 30 days to determine whether or not you would want to call somebody -- call any witnesses on the issue. Does everybody understand that?

MS. McDUFFIE: Yes, Your Honor.

MS. PRINGLE: Yes.

THE COURT: Okay. And if you want to call somebody, that's fine. We can schedule that hearing. If not, then we will reconvene another hearing for the purposes of legal arguments. Okay?

MS. McDUFFIE: Thank you, Your Honor.

THE COURT: Ms. Pringle, any objection to that?

MS. PRINGLE: I don't think so. I will submit a funding request to you. My understanding when we request transcripts of the same proceeding, they may request the original and then I'll request a copy which should be less, as I understand. We can't just get her to copy them for us?

THE COURT: Yeah, there's a court order that says that.

MS. PRINGLE: So I will be submitting that request to you once there's an estimate. I'm just -- I'll communicate with Ms. McDuffie about that.

THE COURT: Great.

MS. PRINGLE: As far as any legal arguments, I would just ask for some information about what they will be so I will know how to respond at the appropriate time.

THE COURT: Where are you on that?

MS. McDUFFIE: Your Honor, we will give her notice of our legal arguments prior to the hearing date.

THE COURT: Okay. All right. Thank you very much.

(Whereupon, the hearing was concluded.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

CERTIFICATE

Be it known that I, the undersigned Reba C. Hayes, Official Court Reporter for the Second Judicial Circuit of the State of South Carolina, prepared the transcript of the foregoing hearing in the above-referenced matter on.

The foregoing transcript of 173 typewritten pages represents a true, accurate and complete transcription of the testimony so given and the evidence introduced at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

IN WITNESS WHEREOF I have here unto set my hand this 2nd day of March, 2015.

S/Reba C. Hayes
Reba C. Hayes, CVR
Official Court Reporter

State of South Carolina) In the Court of General Sessions
) Fifth Judicial Circuit
County of Richland) 2000-GS-40-50660

State of South Carolina ,
Plaintiff,
vs.
Nathaniel Mitchell,
Defendant.

Transcript of Record

April 16, 2015
Columbia, South Carolina

B e f o r e:

The Honorable Robert Hood, Judge

A p p e a r a n c e s:

Joanna McDuffie, Esquire
Nicole Simpson, Esquire
Attorneys for the Plaintiff

Fielding Pringle, Esquire
Doug Strickler, Esquire
Attorneys for the Defendant

Bonnie H. Kelly, CVR
Circuit Court Reporter

I N D E X

WITNESS/DESCRIPTION					PAGE NO.
Motion/Ms. McDuffie					4
Response/Ms. Pringle					17
	DIRECT	CROSS	REDIRECT	RE-CROSS	
		TRICIA BLANCHETTE			
Ms. Pringle	34		48		
Ms. McDuffie		42			
		NATHANIEL MITCHELL			
Ms. Pringle	49				
Decision by the Court					52
Certificate Page					54

E X H I B I T S

NO.	DESCRIPTION	I.D.	EV.
C-1	Procedural Objection Document, 6 pgs.		18
C-2	Motion for Abeyance Document		48

THE COURT: All right. We're on the record in the *State of South Carolina vs. Nathaniel Mitchell*. Mr. Mitchell is present and represented by Fielding Pringle of the Public Defender's Office. The State is present and represented by Joanna McDuffie and Nicole Simpson.

We had a previous hearing on this case on or about February the 9th of 2015, based upon a Rule 29(b) motion filed by Mr. Mitchell, where we took the testimony of a Dr. John Plunkett --

THE COURT REPORTER: Plunkett?

THE COURT: P-l-u-n-k-e-t-t -- who is a retired forensic pathologist, I think, maybe. And so the State asked for time after that hearing to respond. So that's the purpose of this hearing. Ms. McDuffie?

MS. MCDUFFIE: Thank you, Your Honor. Your Honor, as you're aware, this -- the initial motion for a new trial, based on after-discovered evidence, was filed by Chris Hines, of the Public Defender's Office, on April the 4th of 2012.

To give Your Honor a little bit of background prior to that, Mr. Mitchell was convicted after trial in 2002. After that, he appealed his conviction and sentence, and that appeal was finalized or done with in October of 2006.

In October of 2007, he filed a PCR application in this case. And in 2008, Tricia Blanchette was appointed to

represent him in that PCR action.

Your Honor, based on Ms. Blanchette's filing for the PCR action, it's the State's contention that in March of 2000 -- in February 2 of 2011, an article was published in the *New York Times* that discussed shaken baby syndrome and some of the experts that are now trying to cap down onto shaken baby syndrome and have been doing that for some time. Specifically, the article referenced Dr. Patrick Barnes.

Ms. Blanchette put -- filed a motion to hold PCR in abeyance and that was filed in -- on January 23 of 2012. In that motion Ms. Blanchette said that she had -- she'd learned of the article in March of 2011, and at that time, March, 2011, she provided the article to Brian Petrano, Assistant Attorney General, and Lee Coggiola, trial counsel. She also was successful in reaching Dr. Patrick Barnes, and he assisted in contacting -- counsel contacting several of his colleagues, according to her motion that occurred in March of 2011.

She also says that, unfortunately, she couldn't move forward with Dr. Barnes because she didn't have access to the discovery or to the public defender's file at that time.

So Your Honor, she filed this motion to hold PCR in abeyance, to file a motion for after discovered evidence,

on January 23 of 2012. The State responded on February 29, 2012, saying that PCR doesn't need to be held in abeyance for this motion to go forward and asking the Court to deny that.

Your Honor, I was told -- I don't recall by whom -- that Judge Barber did hold PCR in abeyance. There's no order reflecting that; and in fact, when Ms. Pringle and I went on the record to have this case scheduled, towards the end of 2014, it was in front of Judge Barber and he denied ever holding it in abeyance.

So I don't know how -- I don't know how -- what else to say about that, Your Honor. But there is no order in the Clerk's office holding this matter in abeyance.

Chris Hines filed this motion on April 4 of 2012, and the basis of the after discovered evidence that Ms. Hines alleged in her April 4 of 2012 motion were that (as read): "The advancements in the scientific theories and expert testimony on the issue of shaken baby syndrome needs to be fully investigated and presented in support of a new trial."

Your Honor, she again talks about Dr. Barnes expressed interest in reviewing the defendant's case and providing information on colleagues. She also said that Dr. Barnes's shift from a prosecution to a defense expert is a (as read): "... fundamental shift at the conclusions drawn

from medical findings; and therefore, the defendant should get a new trial."

Your Honor, this -- after the motion was filed in April of 2012, it was put on the motions docket. Judge G. Thomas Cooper was the chief administrative judge at that time, and it was placed on the motion list -- docket, both for the weeks of June the 4 of 2012 and June the 11 of 2012; and it was continued in both instances.

Your Honor, in August 15 of 2012, Ms. Pringle wrote a letter to Judge Barber asking to be appointed in this matter, saying that she was taking over from Ms. Hines due to the illness that Ms. Hines had and was -- Ms. Hines was -- would be on medical leave and said that Ms. Pringle was taking over. And Ms. Pringle was appointed on August 17 of 2012.

THE COURT: When?

MS. MCDUFFIE: August 17 of 2012.

THE COURT: Okay.

MS. MCDUFFIE: Your Honor, the letter, where she asked Judge Barber to appoint her, says August 15 of 2011, but I -- I think that's probably a typo.

MS. PRINGLE: He -- he didn't appoint me. It was actually Judge Benjamin who appointed me. I'll be happy to provide that at the appropriate time.

MS. MCDUFFIE: Regardless of that, Your Honor -- and I

apologize if I misspoke, saying Judge Barber instead of Benjamin --

MS. PRINGLE: Well, he -- he appointed the office. I was not aware of that at that time. And so it wasn't me specifically. I subsequently requested to be specifically appointed, and Judge Benjamin appointed me at that time.

THE COURT: Okay.

MS. PRINGLE: The office was appointed in August of 2012.

MS. MCDUFFIE: Your Honor, I don't think that that's correct. Here's an order signed by Judge Barber, August -- well, actually, there are two orders.

(Ms. McDuffie and Ms. Pringle confer.)

MS. MCDUFFIE: Your Honor, Ms. Pringle just said that Judge Barber refused to appoint her, that the office was appointed in August of 2012.

MS. PRINGLE: I wasn't aware of this order, and I actually went to Judge Barber and asked him to do that. The response I got was by telephone and he refused to do it, said it needed to go to Judge Benjamin. Subsequently was appointed by Judge Benjamin on January 30 of 2013.

MS. MCDUFFIE: Your Honor, if I may approach and hand up what's been filed in the Clerk's office on August 17 or 2012 and the letter that accompanied it to the Clerk's office.

(Ms. McDuffied hands a document to the Court.)

(Brief pause.)

THE COURT: Okay. All right.

(Ms. Pringle and Ms. McDuffie confer.)

MS. MCDUFFIE: And Your Honor, for the record, I've never seen a copy of the order she has from Judge Benjamin, nor is it stamped that it's filed in the Clerk's office of --

(Ms. Pringle confers with Ms. McDuffie.)

MS. MCDUFFIE: Regardless, Your Honor, there was no further action taken by defense counsel to have this matter heard or scheduled that I'm aware of until the latter part of 2014.

I believe Ms. Pringle emailed Dan Goldberg and asked who from our office was handling this. I had been the one handling it since it was filed in April of 2012, and he referred her to me.

There was quite a bit of discussion back and forth about -- towards the October/November/December of 2014. Ms. Pringle, at that time, notified me that John Plunkett had been retained and would be coming in. She wanted to set a hearing date.

Your Honor, we didn't object to having a hearing date set. My objection was that I had no idea what the after-discovered evidence was in this case, and asked that the

Court require Ms. Pringle to provide that to me.

I think ultimately we came before Your Honor. This matter was set for February the 9 of 2015, and the Court wrote that Ms. Pringle had to have that information to me by January the 16 of 2015.

Your Honor, then Dr. Plunkett came down and testified on February the 9, 2015. At that point in time Your Honor asked defense counsel whether they intended to call any more witnesses. She said she did not think Dr. Plunkett was her sole witness, and then we were given the opportunity to get the transcript and decide if we wanted to call additional witnesses in this matter based on the motion that was filed and the testimony of Dr. Plunkett.

The State did not feel that we needed to call any additional witnesses because the defense hadn't met their burden in proving that there was after discovered evidence in this matter. Your Honor, I believe that that's what we're here to argue today.

Your Honor, we have two arguments: One about procedural defect -- defects, and then substantively about whether or not they have presented after discovered evidence. Your Honor, at the time that this occurred in -- or the time the trial occurred in May of 2002, the Defense was aware of John Plunkett, the expert who testified in this case. Your Honor, they, in fact, cross-examined

multiple States's witnesses about the article written about Dr. Plunkett about shortfalls leading to infant death.

Your Honor, the other basis for their motion, I believe, Dr. Barnes, was also consulted by the defense team in the year 2000, and they chose not to call him or not -- I don't know what the communication was with Dr. Barnes, but he was consulted with them at that time.

Further, at the time that they consulted with Dr. Barnes, he was testifying solely as a defense expert. That shift occurred in 1997, after testimony in the Audrey Woodward case; and he was not testifying as a State's expert at that time. So -- and as Dr. Plunkett testified, his opinion would not have changed from that time as well, Your Honor.

Your Honor, further, defense counsel, in the documents the Court ordered them to provide to us about the experts and what they knew at the time of the trial in the year 2000, there are multiple emails between Beattie Butler, Lee Coggiola, Mr. Strickler, and various experts that were consulted with or retained by the Defense, where they talk about "we need an expert on our side of the shaken baby debate," things of that nature.

Your Honor, they acknowledge that there was a debate in the medical community at that time.

Your Honor, and so I don't know -- again, still today,

I'm not quite sure what Ms. Pringle and the defense is alleging is after discovered evidence. Dr. Plunkett testified that everything he testified to he could have testified to at the time of trial. His ultimate conclusions were that shaking did not cause the death of this child; that the child was walking down the hallway and tripped and hit her head on the carpet and that's what killed her. And that's what he would have testified to in the year 2000 as well.

Your Honor, at the time of the trial, defense counsel did present expert witnesses, and they also thoroughly cross-examined the State's experts, again asking them could this child's death have been caused by a short-distance fall and things of that nature. So they were aware of Dr. Plunkett, they were aware that short-distance falls could cause that -- could cause death; and -- and they chose not to go forward with Dr. Plunkett or to pursue that avenue.

Instead, they called on Dr. Ross, who testified that you could not shake a baby hard enough to inflict this injury, that he did not believe shaken baby existed. He went through the bio-mechanics of it and why you could not shake an infant, his opinion, hard enough to cause these injuries. He further talked about how retinal hemorrhages can be caused from subdural hematomas, which is exactly what Dr. Plunkett testified to.

Dr. Plunkett further testified that he agreed with most of what Dr. Ross said. I think he pointed out that the one thing he didn't agree with Dr. Ross about was the misinterpretation of radiology findings, that the -- that the subdural hematomas were both chronic and acute; and that he believes that Dr. Ross misinterpreted the radiological findings.

And Dr. Plunkett even pointed out that there was no evidence to support that conclusion. In fact, the evidence says by direct observation by the neurosurgeon for the State and the pathologist from the State testified that those were both acute. And so he believes that Dr. Ross misinterpreted those findings; and he actually agreed with the State's expert -- experts that those were acute when they actually looked at those findings, during the neurosurgery and then at the time of death autopsy.

Your Honor, so again, not quite sure what the after discovered evidence is in this matter that could not have been presented at the time of trial that the defense was not aware of because they were aware of everything that Dr. Plunkett presented at the hearing on February 9 of this year.

Further, Your Honor, on April 28 of 2011, Rule 29 -- or prior to April 28 of 2011, Rule 29 stated that a motion for a new trial, based on after-discovered evidence, had to

be filed within a reasonable time after discovery of the evidence. On April 28 of 2011, that Rule was amended. The Rule, as it was on April 28 of 2011 and as it stands today, is that within one year of actual discovery of the evidence or after the evidence could have been discovered by the exercise of due diligence.

Your Honor, this -- what they presented from Dr. Plunkett was not filed -- no motion for after discovered evidence was filed within a year after it could have been discovered by due diligence. Our first argument, Your Honor, is that it was known at the time of trial, so it can't be after discovered evidence at all.

Secondly, Your Honor, this information was out there, it was available, it was public. Dr. Plunkett has testified in South Carolina, that I personally know of, as early as 2005 in this very courthouse, Your Honor. All of this was out there and they could have discovered it by the exercise of reasonable diligence.

Further, Your Honor, Ms. Blanchette said that she became aware of this in March of 2011; however, a motion in this case was not filed until April 4 of 2012.

Further, Your Honor, there's no mention of Dr. Plunkett nor any of the theories that he testified to in this courtroom in their original motion. The original motion purely talks about Dr. Barnes and shaken-baby

syndrome.

They first contacted -- I believe Dr. Plunkett testified that he was contacted by the defense in July of 2013. There was no subsequent motion for a new trial based on after discovered evidence; there was no -- nothing was filed to tell the State what the after discovered evidence would be. There's no amendment to the original motion, Your Honor.

So we contend that all of this information was known to the defense at the time of trial, there is no after discovered evidence in this case; and further, Your Honor, that they can't -- even if somehow they manage to get through the procedural obstacles that I don't think that they can overcome, they have not shown that this evidence has been discovered since the time of trial as required by -- by *State v Spann;* that it would probably changed the outcome of the trial if a new trial were granted.

Your Honor, I -- the testimony of Dr. Plunkett was unbelievable most of the time. His testimony that a child, walking down a hallway and tripping and not hitting her head on an object or falling down stairs, but just falling, can cause lethal force and he believes that -- or can cause deadly injury and that's what he believes happened in this case is absurd at best.

Your Honor, the -- the theory of natural disease that

they presented at trial I believe is much more reasonable than what Dr. Plunkett presented in the courtroom on February 9.

Further, Your Honor, they have not shown that this evidence is material, nor have they shown that it's not merely cumulative or impeaching. And so for those reasons, Your Honor, I would ask that you deny their motion.

And further, Your Honor, Dr. Plunkett's testimony and his theory of the death of this child was in -- was not even supported by the defendant's testimony at trial. He does not allege that the child fell; he did not allege that anything happened to the child in any way. He alleges that he found the child in the hallway unresponsive. There was no sharp object as Ms. Pringle seemed to imply on -- you know, the corner of a door or you know, the corner of stairs or anything like that.

None of that was testified to that at trial, Your Honor, and I believe that not only is it incredible testimony, Your Honor, but they do not meet the standard as laid out by Rule 29(b) and in *State vs. Spann*.

THE COURT: At the original hearing, you told me that the appeal was affirmed on June the 10 of 2005. Today you said the appeal was affirmed on -- in October of 2006. Do you know which one's accurate?

MS. MCDUFFIE: Beg the Court's indulgence. I believe

that -- I believe that the Court of Appeals issued their opinion in 2005, and then that was appealed to the Supreme Court. They denied it October 19 of 2006, and then the -- it was sent back down October 24 of '06.

THE COURT: Okay. Thank you. All right. Ms. Pringle?

MS. PRINGLE: Thank you, Your Honor. May it please the Court. As an initial matter, I had asked to go back on the record to take care of housekeeping matters at the conclusion of the last hearing. It came to my attention that there were a few exhibits that I had not moved into evidence. I intended to move all of them into evidence, and I would ask to do that at this point in time.

THE COURT: Any objection?

MS. MCDUFFIE: Your Honor, I do object. I don't know what Ms. Pringle is referring to as the exhibit she intended to introduce but did not introduce at the time of trial.

Further, Your Honor, Ms. Pringle said that that was the only witness she intended to call and didn't have anything further, and our decision not to call any additional witnesses was based on that. So I would object to the introduction of any further evidence, Your Honor.

THE COURT: What do you think you didn't introduce?

MS. PRINGLE: The exhibits that I'm talking about --

of course, we don't have the same court reporter today so I can't access her list.

But there were -- when I spoke with her afterwards, there were a few that were not entered, and everything that was introduced during the hearing was provided to Ms. McDuffie for her review in advance of the hearing. There's nothing outside of the articles, the studies that I put in through Dr. Plunkett that was different or new.

THE COURT: So you don't know what's not in.

MS. PRINGLE: No. I can find out when I can speak with Ms. Ambroziak.

THE COURT: Okay. We'll cross that bridge when she's back. What else?

MS. PRINGLE: Your Honor, I'm going to attempt to respond as best I can today. As I have indicated to you in multiple email exchanges leading up to today, this response from the State -- which I would ask to mark and enter in as a Court's Exhibit --

MS. MCDUFFIE: If it's filed in the Clerk's office, I have no objection.

THE COURT: Okay.

(Marked Court's, Exhibit No. 1, Procedural Objection document, 6 pages.)

MS. PRINGLE: The procedural objection ---

THE COURT: Hold on one second.

(Brief pause.)

THE COURT: Okay. Go ahead.

MS. PRINGLE: My understanding was that the State was going to be given a certain amount of time to determine if they wanted to call witnesses, and that they were -- if they had procedural objections, to let me know in advance, so that we could schedule a date and a time to have those heard.

The first that I heard of that or of any procedural objections from the State was on Tuesday of this week, at 1:35 p.m.

I had asked the Court for additional time. I have prepared as best I can today, and I'm going to argue as thoroughly as I can. But I would just ask the Court permit me, as I requested in the email, the opportunity -- if I'm not able to answer your questions today, if there was material that I cannot access today, that I be given the opportunity to respond in writing after this hearing as I have not had the opportunity or the time to do that.

My understanding of the State's argument is really twofold --

(Cell phone rings.)

THE COURT: Get out of my courtroom now. Out. Walk your body out the door.

(Brief pause as unknown person exits the courtroom.)

THE COURT: Go ahead, Ms. Pringle.

MS. PRINGLE: It's twofold: One, it's not that -- the evidence that's been produced is not after discovered; and two, that if it is, even if it is, it's barred -- there's a time bar, procedural bar.

The procedural objection -- really, the only procedural objection in the State's memo is the time bar. The rest of it is substantive response to the entire hearing ---

THE COURT: Right.

MS. PRINGLE: --- my entire motion.

On the issue of it not being after discovered, Ms. McDuffie notes that the *New York Times* article -- I'm just breaking this down as best I can to organize it. But the *New York Times* article simply does not support my motion for a new trial.

I -- I'm not relying solely on the *New York Times* article. That is why I provided a 33-page brief that I produced to the Court and to them January 14 of this year; that is why I brought Dr. Plunkett here.

Dr. Plunkett's testimony follows -- literally, the outline of his testimony was drawn from the memo. That's what I'm relying on, and relying on post-hearing briefing and post-hearing argument, which I was not anticipating today. But I'm gonna do my best today and would ask,

again, to be able to do in writing. That's what's being relied on.

The second argument that they make is that basically shaken baby syndrome is irrelevant because Dr. Hubbard's finding -- in 2002, Dr. Hubbard's finding is (as read): "Intercranial pressure, secondary to close-head injury due to non-accidental trauma, which equals child abuse."

And Judge, I think you really have to go to the transcript to see what Hubbard really said, and what all of the State's witnesses really said.

Dr. Hubbard, on page 175 of the transcript, when asked -- and this is just -- these are just a few of those excerpts -- when asked (as read): "What type of trauma could cause these injuries," "This is -- those three things together virtually is diagnostic, meaning it tells us what it is. They used to call it -- and a lot of people still call it -- shaken baby syndrome."

He goes onto explain in great detail what shaken baby syndrome is. He says on page 176 (as read): "When you have these three things -- the swelling of the brain, the subdural hematoma, and the retinal hemorrhages -- a light goes on. That's shaken baby syndrome."

177, he goes on and on and on to describe what shaken baby syndrome is.

On page 179, again, Dr. Hubbard says (as read): "This

was child abuse, and it was basically shaken baby-type syndrome or shaken baby syndrome."

But it's not just Dr. Hubbard. It's every witness in this trial. This is the State's theory. It's the State's theory that they argue through their witnesses; it's the State's theory that they argue in opening and closing; it's the State's theory through all of these witnesses.

Dr. Christman, on page 232 (as read): "Shaken baby is a constellation of both historical facts and facts about the findings of the baby. They include: bleeding around the brain, retinal hemorrhages, possibly other injuries to the baby; and more importantly, an absence of history of significant trauma or injury."

She told Ms. Campbell that (as read): "Retinal hemorrhages occur much more frequently in babies who are shaken or intentionally injured, as compared to those who are injured accidentally." That's page 234.

246, she, like every other witness, says (as read): "There's absolutely no way that this could have been caused by any kind of a fall. Only by very violent shaking, with a pendulum to-and-fro movement."

On 248 (as read): "Dr. Christman, was there anything in your findings that this child -- that would indicate anything but shaken baby syndrome?" Answer: "No."

260 (as read): "Dr. Christman, in this case, did the

subdural hematoma or shaking cause these hemorrhages?" "In this case, it was shaken baby." "And in your opinion, there's not a question about that?" Answer: "No. There's not a question in my mind."

Page 261, again, asked if she -- if " ... there's any question in your mind that this is shaken baby?" "No, there is not."

Dr. Abel, on page 298 (as read): "... and because of her horrible medical condition when I first saw her was related to the acute subdural hematoma related to shaking, because the eye findings were fresh, and they could not be attributed to shaking, three weeks ago."

Same page (as read): "Based on your opinion of looking at everything, is there any doubt in your mind that this child was a shaken baby?" "There is no doubt in my mind."

Dr. Nichols, page 909 (as read): "This is a classic case of shaken baby syndrome. We have an individual, two-year-old, that has subdural hematomas. You have the cerebral edema caused by -- you have the retinal hemorrhages. And this case is not just retinal hemorrhage, but all the way back to the brain. It doesn't get any more classic as far as the definition for shaken baby." Reiterates the same thing on page 19 -- 919.

So to suggest that because the cause of death doesn't

say shaken baby syndrome is -- does simply not reflect what when on at this trial. Nathaniel Mitchell was convicted on the theory of shaken baby syndrome. The reason that shaken baby syndrome is such a dangerous diagnosis, or whatever you want to call it, is it presents a *fait accompli*. If you have these things -- these doctors all testified if you have the triad, it's shaken baby, and that last person with that child is guilty. And that is almost impossible to overcome, and it certainly was impossible to overcome at that time.

Thirdly, their argument is simply that the Defense did a good job. And while I would agree that Mr. Strickler was probably ahead of the curve on this and did the best that he could with what he had, the problem is he didn't have the foundation to support this testimony that Dr. Plunkett offered on February 9. It didn't exist. He couldn't have gone anywhere and gotten it. It didn't exist.

At that time, Dr. Plunkett, and the handful of other people with him, were total outliers. People thought they were crazy; they thought they were wrong. They don't think that now, but at that time, that's what they thought.

Fourth, the filing states that -- and she relied on this heavily, that what I -- I believe is really a serious oversimplification, that Dr. Plunkett has said everything -- everything presented on February 9 could have been

presented in 2002.

That's not what he said. What he said is what he believes the cause of death is, what he believes happened to that child is the same. He would have still thought that shaken baby was junk and not true in 2002, because he was coming -- he had come to that conclusion at that time.

He didn't have all of this support. He didn't have the studies that had come before. And what that ignores is, you know, a number of things. But he wrote that 2001 article to challenge that entrenched belief because no one believed that you could fall, that a child could fall and that there would be lethality from those falls, which we now know short falls can kill. We know it. Those witnesses would acknowledge that now, and that's undisputed in -- in this proceeding.

That argument and oversimplification also ignores all of the articles and the studies that he referenced post-2002: The Prand article from the -- '03; Prand from '04; Bandak from '05.

THE COURT REPORTER: I'm sorry. Bandak?

MS. PRINGLE: B-a-n-d-a-k.

Chadwick from '08; Steinbach, which I believe is '05.

It ignores the idea of evidence-based medicine and the evolution of that, from the time of the Donoho article forward. It ignores that this was something that was

moving and changing. And what he came in here and talked about, he had a belief, he had -- he thought he was right -- you know, knows he's right. And there were a few people that thought they were right, but that doesn't mean that anyone bought it at that time. They didn't. And that's why these studies have been conducted, and that's why people are trying to, you know, prove -- establish it, and that's why we have this body of information now.

But that's -- he testified that's why he did that 2001 study, because no one believed that.

I would also say to you if it was so widely known in 2002 that shaken baby was really based on unsound science, which is what Dr. Plunkett testified to and which has not been challenged or disputed in this courtroom during these proceedings -- no -- no witness has come in here, expert's come in here, and said, "That's not true. It's still sound science. Everything's still the same. We still say the triad. We still say, you know, these three things mean shaken baby." No one came in here to say that. That's because they don't do that any more.

But if it was so widely known in 2002, then -- then where are those experts to come in and say, "Everybody knew that. That's right"?

Well, obviously, that's not what happened because in 2002, their whole case -- they don't believe that. Their

whole case was shaken baby. They believed that, at that time, that it was sound.

That position ignores the fact that we now know that if you had a shaking, sufficient to cause this kind of injury, we'd have neck injuries. Now what we know, as Dr. Plunkett testified, difference between toddlers and infants. What we now know, as I test -- as I talked about a few moments ago, about the lethality of short falls. It ignores that that -- that position ignores all of that science and basically says, "Well, he could have come in and said what his belief as cause of death was."

That's not the same thing as what he came in here and presented. That's not the same thing as what our -- our position is, which is that this has changed and now there's support for what he and a few others knew in 2002.

But nobody else did and ---

THE COURT: Where in the rule does it say that it has to be widely medical accepted practice? I mean, he testified that there would be nothing different in his testimony from 2002 to 2015, period.

MS. PRINGLE: As to ---

THE COURT: And the defense talked to him and used his article to cross-examine the individual. And -- and --

MS. PRINGLE: There's two things: As to cause of death, he couldn't testify in 2002 about all the studies

and the science and the shift and the evolution that he talked about ---

THE COURT: He said none of his testimony would have been different. He would have testified to the same exact thing in 2002 that he testified to in February of 2015.

MS. PRINGLE: Judge, the -- the -- not -- 90 percent of what he testified to didn't exist at that time. What he was talking ---

THE COURT: His medical opinion would be the same.

MS. PRINGLE: His medical opinion about cause of death would be the same --

THE COURT: Right.

MS. PRINGLE: -- which no one accepted. And it matters ---

THE COURT: Well, where does it say it has to be accepted?

MS. PRINGLE: Because that's what -- that's ---

THE COURT: No, no. It doesn't say that anywhere in the rule. It doesn't say that this newly discovered evidence that you're relying on has to be accepted by some medical authority before you have a right to use it.

MS. PRINGLE: What makes it after discovered is the shift. It is the shift in the science, and it is the expectation that you could bring a witness in to testify to something that he had -- did not have the foundation for or

the support for. That's the change. The change is what's happened since, what's happened in the last 12/13 years.

THE COURT: And so why wasn't it filed until April of 2012?

MS. PRINGLE: I'll get -- if I may -- get to the time bar in a moment. I'll get the time bar now.

THE COURT: Here's the procedural issue: The procedural issue is at best, defense counsel, or somebody representing the defendant, knew about the article in 2011, which didn't come from a periodical, didn't come from some kind of medical journal. It was just a news article, and the motion for after discovered evidence wasn't filed til 13 months later. And the rule says it's gotta be a year.

MS. PRINGLE: Correct. Actually, it was -- four-day time bar would be the lapse because it was -- it was filed on April 4. And the allegation is that the discovery was Ms. Blanchette reading this article in the *New York Times*.

As an initial matter, frankly, Your Honor, I would argue that whether it is *Laches* or a waiver, that for this to come up two days ago, 48 hours ago, when this has been pending since April of 2012, three years they've been aware of this. Nothing in that document changed. Nothing.

MS. MCDUFFIE: I -- I object to that. At the beginning of the hearing on February the 9, the Court asked the question (as read): "Are there any procedural

challenges?" My response (as read): "Yes, Your Honor. I do have procedural challenges, if you'd like to hear them."

"The Court: Where's Dr. Plunkett from?

"Ms. Pringle: Minnesota.

"The Court: All right. Let's go ahead and get him out of the way. Then we can circle back around.

"Ms. Pringle: There's been no notice of procedural challenges, and I haven't been informed of any motion's issues.

"THE COURT: I mean, I saw three in just the factual scenario you gave me. All right. Let's get started with Dr. Plunkett."

So that -- I mean, that's completely disingenuous that two days ago is the first time she's heard about this.

MS. PRINGLE: To be aware -- that was raised by the Court ---

THE COURT: Right. I saw the ---

MS. PRINGLE: --- on February ---

THE COURT: --- procedural issues as soon as I heard the facts.

MS. PRINGLE: And so you would think that when you read the motion in 2012, when they first received the motion -- it -- even if it was February 9 of this year when they first gave me notice of it or when they first raised it, I'll give them that. That's three years. That is

three years, and I notified them that I was going to put up Dr. Plunkett. They know who Dr. Plunkett is. I provided a 33-page brief to them January 14. We never had to have this hearing.

If that was a legitimate argument, a legitimate basis that a four-day time lapse, that if -- if this is true that the discovery is March of 2011, and the filing was April 4, and that is the hard and fast discovery to time -- first of all, the rule, when the -- if that's the discovery -- when the discovery was made, which is March 11, then it wasn't even the rule. The rule is within a reasonable time, due diligence. Wasn't this one year. That came later.

THE COURT: It came in April of 2011.

MS. PRINGLE: April 28 of 2011. This would have been March of 2011.

THE COURT: Okay.

MS. PRINGLE: Reading from *Eldridge vs. Eldridge*, which is a Supreme Court case -- 728 SE 2d 24, 2012 -- (as read): "*Laches* is defined as neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, due in law -- to do what in law should have been done. If a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change

his position, equity will ordinarily refuse to enforce those rights."

So whether it's *Laches* or whether it's waiver, this could have been made long ago. We could have avoided the entire hearing, if it's a legitimate argument. We could have not put Dr. Plunkett up. It could have been made any time prior to two days ago.

For the record, as you're aware -- I'm sure they're aware -- there were a great deal of expenses incurred in bringing Dr. Plunkett here for an entire day of testimony. And -- and that is referred to in the prejudice that *Laches* talks about.

Beg the Court's indulgence.

(Ms. Pringle and Mr. Strickler confer.)

MS. PRINGLE: Mr. Strickler raises a good point, that it's not clear that, given the status of where shaken -- where Dr. Plunkett's theory about shaken baby in 2002, the lack of science to support that at that time, that that may not have even been admissible under -- but that may not have even risen to that level.

But I think, more importantly, much of what he's saying is what he believes is now supported. It just wasn't then. And so ---

THE COURT REPORTER: I'm sorry, is what?

MS. PRINGLE: It just wasn't then. The way that this

came to me, this was initially filed by Ms. Hines, Chris Hines, who is here today. But as the Court knows -- and I have Ms. Tricia Blanchette present as well -- Ms. Blanchette was appointed to this case in 2008; and it was in 2011 that she first essentially read an article. Whether the reading of an article, in March of 2011, would constitute discovery of evidence -- after discovered evidence that you have a legitimate basis to go forward on, I -- I would contend it doesn't.

THE COURT: Well, I mean, that's what she based her motion for an abeyance on.

MS. PRINGLE: She -- she based her ---

THE COURT: She -- she -- she filed a motion with this Court and said, as an officer of the Court, I think this whole PCR should stop because of an article I read.

MS. PRINGLE: But that's not the same thing as motion for -- I'm talking about is it after discovered evidence. Is that the discovery ---

THE COURT: I mean, it was obviously important enough for her to ask a judge to stop an entire PCR that's now been pending for seven or eight years, that no -- he's never had his day in court on.

MS. PRINGLE: And she's here to speak to that. That motion for abeyance -- maybe I should just put her on the stand to talk about how this all came about.

THE COURT: Sure. That's fine.

MS. PRINGLE: All right. Ms. Blanchette.

TRICIA BLANCHETTE, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MS. PRINGLE:

Q State you full name for the record.

A My name is Tricia, T-r-i-c-i-a; Blanchette, "B" - as in "boy" - l-a-n-c-h-e-t-te.

Q Good afternoon, Ms. Blanchette. Ms. Blanchette, how are you employed?

A I am -- I am presently an attorney.

Q And where did you go to law school?

A I went to the University of South Carolina.

Q And what year did you graduate?

A I graduated in May of 2005.

Q And in May of 2005, where did you go to work?

A I worked for Tommy Thomas. His office is in Irmo, South Carolina.

Q And how long did -- did you at some point leave his office?

A I did. In late June of 2008, I left his office to start my own practice, which I opened in July of 2008.

Q And at some point, were you -- well, let me ask you this: At that point, had you ever done any criminal cases at the trial level?

A No. All I had done at that point -- I actually started out as a law clerk for Mr. Thomas, and he specialized in parole and post-conviction relief. So I went to parole hearings with him, and I did a lot of his legal research and assisted him with preparing for his PCR hearings.

Q Okay. And at some point, were you appointed to represent Mr. Mitchell on his PCR case?

A Yeah. There was actually a hearing held at Broad River -- I wasn't part of that hearing -- where Judge Childs went out to the prison, held a hearing on April 15 of 2008; issued an order appointing myself, and that order was issued on September 11 of 2008. So I found out about the appointment shortly thereafter.

Q Okay. And tell the Court in March 2011 what happened.

A Well, in March of 2011, which is the date that we keep hearing over and over again today, based upon the reading of the *New York Times* article, I saw the name "Patrick Barnes."

And just to put a little context, I need to go back as to what was happening at the time for PCR appointments, as I stated, I started my own practice in July 2008. I received numerous appointments from Richland County Clerk of Court. Thereafter, the funds were suspended for all appointed attorneys in the state.

That was in December, I believe, of 2008, and the judges here were kind enough to put a majority of my PCRs essentially on hold. I had just started my own practice, I made a motion to Judge Manning, which he didn't grant, to relieve me of the cases, but essentially they were put on hold to see what would happen with the funding. So that is why I had this case. At that time, all of this was going on.

So I finally got the transcript and reviewed it in December of 2010, but was still kind of holding out to see what the money situation was.

So I read this article, now having read the transcript and knowing the whole case boiled down to shaken baby syndrome, I read an article and saw that the name "Patrick Barnes" was in it. So being a young attorney that didn't know any better, I decided I would email Dr. Patrick Barnes, and I actually have the email in front of me that I sent him on March 14, 2011.

I explained to him that I'm a young attorney; I saw his name in an article; I have no funds. Right now, the State -- I had talked to Hugh Ryan, had pretty much told me I couldn't get any funds for an expert; did he know anybody that could do this case pro bono, if there was anything to the case.

So I'd like to first clarify, in my opinion, there is

no discovery March of 2011. I know that that was put in the motion that I made in PCR court, and I can put that into context later; but all I did at that point was reach out to Dr. Patrick Barnes because of seeing his name in an article.

He then responded later in the week and gave me the name of a couple of people that worked with indigent projects in the country and a couple experts. And then I sent out emails, and one of those was not even responded to until September of that year. And I'm sure I've gone beyond your original question. I apologize.

Q That's okay. At -- in March of 2011, had you had access or the opportunity to review trial counsel's file?

A No. I did not get access to the public defender's file until August of 2011.

Q And at that point or at some point -- you filed a motion to hold the PCR in abeyance in January 2012, correct?

A That is correct.

Q Okay. And can you just explain to the Court what got you to that point -- so you reviewed the trial counsel's file August of 2011, how does it end up that you are asking the Court to hold the PCR in abeyance, and I guess you were asking -- if you were asking that -- him to appoint our office, how did y'all get there?

A What happened is in August of 2011, after repeated requests, I finally got access to the public defender's file. The way that I got access to that is Brian Petrano, who was the assistant attorney general handling the Fifth Circuit at that time, went with me and we reviewed it together. On that day I didn't get any copies of the file. We just merely flipped through it together.

I brought the article with me that I had read, and I told Brian about it as we are flipping through it -- flipping through the file. At that point, we both agreed that this appeared to be a shaken baby case and potentially this evidence should be looked into further. But I explained to Brian I didn't know how to do it, my hands were essentially tied.

We went back and forth drafting the motion that was ultimately filed. I've numerous emails where I'm sending it to Brian and asking him to look at this draft and think if that is acceptable language.

On December 1 of 2011, I met with Mr. Mitchell at McCormick, and I reviewed the motion with him and I obtained his signature on it and his agreement to go forward in that fashion. And then it was ultimately filed in January of 2012.

Q And did something happen in January of 2012 that prompted you to actually go forward and file it?

A Yeah. During that time I had been trying to communicate with Lee Coggiola. She's at the Office of Disciplinary Counsel at this time, so it's not a place that you typically want to call to have a conversation. But I was able to talk with her after a continuing legal education class.

And she just really confirmed for me that she too, in fact, believed that my client was innocent, and that I needed every -- needed to do everything that I could think of to pursue that for him. And so that did, in fact, encourage me to go forward with the motion.

Q And you filed that on January 23 of 2012?

A That is correct.

Q And subsequently, was there a meeting with Judge Barber in chambers?

A There was. Everything essentially fell apart once I filed the motion. Brian Petrano moved positions in the Attorney General's Office. So where we had been in agreement in working on this for a number of years, Robert Corney took over his place.

And let me just refer to my notes here so I get this correct. On February 10 of 2012, I had a call with Judge Barber, and he'd asked me if all the parties were on board, and if so, he would sign an order of dismissal without prejudice on the PCR proceeding.

I drafted that order, I sent it over to the Attorney General's Office, and I sent it to Mr. Strickler. I found out that the Public Defender's Office was on board, and that's when I first learned that the Attorney General's Office was no longer on board. So after several years of working together closely on it, their position had changed.

We ended up having a chambers meeting on February 28, 2012. It was a lengthy chambers meeting and Judge Barber actually brought up Mr. Strickler. He was working on a death penalty case and said he couldn't be disturbed; and he told him he had to get up there. And he had us all in chambers. Rob Corney was there; myself was there; Brian Petrano was there, even though he was no longer in that position.

And he essentially instructed the following: I was to amend the PCR application, which I did shortly thereafter; the State was to keep the case off the roster; and if needed, he said he would sign a order to keep it in abeyance. But he simply instructed the State not to put it on the roster, and then he instructed Mr. Strickler that the Public Defender's Office was to begin working on a Rule 29 motion.

Q Did you, during that process, at any point, ask Judge Barber if you could file the Rule 29?

A That came up. That came up on the phone with Judge

Barber, and that came up in chambers. And what's interesting is all of the case law surrounding Rule 29 deals with the exercise of due diligence. And I think in -- in examining that, you have to keep in mind that I was an appointed PCR attorney, and he had previously had appointed counsel.

So if I had been privately retained in this case, I could easily go get experts and file the motion. But here, I was being funded by the State, and I'd only been ordered to do the PCR.

So I had no means by which I could go file the 29 motion, unless I was to do it pro bono. But then I would still not have the money to get the experts to discover this evidence that I thought could be out there.

Q And so just to wrap up, what was the sum total of what you knew about this issue that you read in the *New York Times* article in 2011 -- on March 11 until, I guess, the end of February, 2012?

A What I understood was that there was this triad of -- I'm going to call it "symptoms," which is probably the wrong word -- that if it was present, it was shaken baby syndrome. And there had been a number of doctors and specialists who had been trying to refute that for a number of years, and it finally had become successful, accepted science, to the place that it could be testified to in

court; and that cases were being overturned because of it.

I had no idea if Mr. Mitchell's case could be one of those at this point. One of the main things that came up with Dr. Barnes is he told me I'd have to have original scans for these experts to look over. It was already a problem I didn't have money, but I didn't have access to those scans and I put that in my motion.

And I think a part of my motion has been just grossly misinterpreted. There's a sentence that I see has shown up in the pleadings and been said over and over again. In my motion, I was trying to explain that the Public Defender's Office was much better situated to handle this than myself. That -- that was the total intent of my motion.

So at that time, all I knew is that I didn't have the resources to properly look into this, investigate it, and to determine if it was in fact newly discovered evidence. But I didn't know if it was, and if it was, what it was. So I was just trying to put the Court on notice that there was an issue there that I couldn't fully investigate and look into, and I thought in the exercise of due diligence, I needed to bring it to someone's attention.

Q Thank you.

CROSS-EXAMINATION BY MS. MCDUFFIE:

Q In your motion, you say in or around March of 2011, you reviewed and discussed the article regarding shaken

baby syndrome with Brian Petrano, Assistant Attorney General, you provided a copy to Lee Coggiola, and you made repeated attempts to meet with and/or discuss it with Doug Strickler but you were unable to; is that correct?

A Is -- is that a question or are you just asking -- were you reading from the motion itself?

Q I'm asking if the statement that you put in this motion on November 23 of 2012 is correct.

A Yes. But I think it needs to be explained in the context of everything that I just explained to the Court.

Q And you also said, in March of 2011, you were successful in reaching Patrick Barnes, and he gave you several of his colleagues that take cases on an indigent basis.

A Yes. I have the emails in front of me where he gave me some email addresses of people that I could contact to get more information.

Q And you chose not to contact them because you didn't have the case file and the medical records, things of that nature.

A No, that's incorrect. I contacted every one of them. I heard back from one of them two weeks later, and she said I'm sorry; I cannot help you. I heard back from a Dr. Sheckler in September of that year. And those are the responses that I received.

I essentially -- and what's not in the motion and what I think is being taken out of context is I wrote Dr. Patrick Barnes saying, "Do you know anybody that will do this pro bono and help me out because I don't have resources."

I wasn't going after this case as if I -- if I was a retained attorney or if I had resources to be investigating this.

Q And in 2011, you reviewed defense counsel's file.

A In August of 2011.

Q And yet the discovery order was signed on September 11 of 2008?

A The PCR discovery order? Is that what you're referring to?

Q Correct. Yes.

A I don't have it immediately in front of me. So I would just defer to you as an officer of the Court.

Q In your motion on January 23 of 2012, did you put(as read): "On September 11 of 2008, the Honorable J. Michelle Childs issued an order granting applicant's motion to appoint counsel and applicant's motion for disclosure of discovery; that would be correct?

A That was not a case that I was involved in. That is when I was appointed. I guess I should explain.

I -- I see where it is in here. On April 15 of 2008,

a hearing was held at Broad River Correctional Institution in front of the Honorable J. Michelle Childs, on the applicant's motion to appoint counsel and motion for discovery. I was not present.

Q Right. But on September 11 of 2008, Judge Childs actually issued that order granting that.

A That was not an order I had requested. That was an order that the applicant had drafted on his own.

Q But on September 11 of 2008, you were appointed to represent the defendant.

A That is correct.

Q And you -- discovery was also granted for the PCR.

A I will have to check back to see exactly what her order said. It would be whatever he had requested.

I had not filed a motion for discovery that was then granted.

Q In your motion, on January 23 of 2012, you say (as read): "On September 11 of 2008, Judge Childs issued an order granting applicant's motion to appoint counsel and applicant's motion for disclosure of discovery."

A Correct. Applicant's motion, not my motion. I did not draft nor was I involved in that motion or that hearing. So I did not ask Judge Childs for access to the public defender's file or anything else I would typically need in a motion for discovery.

Q But Nathaniel Mitchell or you, as his counsel, had an order granting you access to the public defender's file from September 11 of 2008 forward.

A I will have to check my file to see if I have that order to say specifically if it was the public defender's file or not before I could answer that question.

Q And you don't review that file where you state in your motion the first time you reviewed the public defender's file was in August of 2011?

A Just one moment. I'm still trying to answer your last question, please.

(Brief pause.)

A This order that was issued on September 11 of 2008, from a hearing at which I was not present, simply states that (as read): "In non-capital cases, discovery is available if and to the extent that the judge, in the exercise of discretion and for good cause shown, grants leave to do so. South Carolina Code Annotated Section 17-27-150(A), 1976.

"In capital cases, discovery is available. South Carolina Code Annotated Section 17-27-150(B), 1976.

"This Court finds that applicant is entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure. Therefore, applicant's motion for disclosure of discovery is hereby granted."

It in -- nowhere says that I can give -- just what -- how I write them now, because I would be the one drafting it in a PCR case, is that I can have a complete copy of the public defender's file; and that order did not state that.

Q But discovery was granted.

A Discovery was granted, at a proceeding at which I was not involved.

Q And so from 2008 to August of 2011, you never inquired about the public defender's file or tried to gain access to it?

A Oh. I repeatedly did. As I explained on direct, I -- I repeatedly tried to get access to it.

One other thing though was I did wait until I had the trial transcript, which took a little while to get that from the Attorney General's Office, and read it -- and as you know, it's a very lengthy transcript -- because I'm not going to go look at a file if I don't know anything about the case.

Q And when you reviewed that file, you saw that at the time, in preparation for trial, defense counsel had learned about shaken baby syndrome, had numerous articles about shaken baby syndrome, and had also consulted with multiple experts.

A I don't think that would be fair. We flipped through it one time, and I noticed that, just as the transcript

portrayed, the entire case seemed to be about shaken baby syndrome.

Q And at any point in time, what prevented Mr. Mitchell from filing a new motion based on after-discovered evidence himself, not you, but he, himself, filing that motion?

A I think only he could answer that.

MS. MCDUFFIE: No further questions, Your Honor.

THE COURT: Okay. Anything else, Ms. Pringle?

RE-DIRECT EXAMINATION BY MS. PRINGLE:

Q How did you eventually see the public defender's file in August of 2011?

A I was accompanied by the Attorney General.

Q And was that the only access that you were granted was with him?

A That is correct.

Q Thank you. No further questions.

MS. PRINGLE: I would like to mark the motion for abeyance since it's been referred to numerous times.

THE COURT: Okay.

MS. MCDUFFIE: No objection.

(Brief pause.)

(Marked Court's Exhibit No. 2, Motion for Abeyance document.)

THE COURT: Have a good day. See you around.

THE WITNESS: Thank you.

(The witness exits the stand.)

THE COURT: All right. Anything else?

MS. PRINGLE: Bet the Court's indulgence.

(Brief pause.)

MS. PRINGLE: I'll call Nathaniel Mitchell at this point, Your Honor, solely on that single issue.

THE COURT: Okay.

NATHANIEL MITCHELL, having been first duly sworn, testifies as follows:

THE WITNESS: My name's Nathaniel Mitchell; N-a-t-h-a-n-i-e-l; M-i-t-c-h-e-l-l-.

DIRECT EXAMINATION BY MS. PRINGLE:

Q Good afternoon, Mr. Mitchell. Just one question for you: Mr. Mitchell, you recall your trial was in 2002?

A Yes.

Q From 2002 until -- before we started this process in 2011, did you know anything about a shift in the evolution or science of shaken baby syndrome?

A No, I didn't.

Q Did you know anything at all?

A No.

Q Did you have any information that you could have filed a motion for a new trial on your own?

A No.

(Brief pause.)

MS. MCDUFFIE: Beg the Court's indulgence, Your Honor.

(Brief pause.)

MS. MCDUFFIE: Your Honor, no questions for the witness at this time.

THE COURT: Okay. Have a seat.

(The witness exits the stand.)

THE COURT: Anything else?

MS. PRINGLE: I may have just -- arguments as I continue to look into the procedural objection that was filed on Tuesday. Again, asked to be permitted to respond to those.

I do not think that -- I'll ask you this -- just ask you, Judge, if you read this transcript, you will see he was convicted on the theory of shaken baby syndrome. And I beg of you and implore you to read those articles and those studies, and to consider whether or not that theory is still sound. And I submit to you that it simply is not.

And I think to come here, three years later, and to ask this Court to procedurally bar this entire argument and everything that has been done, after it wasn't ever raised for three years, is just simply not fair.

THE COURT: Anything else, Ms. McDuffie?

MS. MCDUFFIE: Your Honor, again, at trial, in 2002, it was testified, both on direct and cross-examination, and through the Defense's own experts that they called, that

there was a debate. The defense said that you could not shake a child to cause injury as was presented here. The doctors not only testified that they believe that she was shaken -- that she was shaken, but impact also occurred.

Your Honor, in fact, there own expert, Dr. Plunkett, who they put on the stand, who we had no notice of, testified that he could not say that the baby wasn't shaken. All he could say was that there was impact, and that he believed that the child fell from walking down the hall and falling on a carpet, which we believe to be absolutely incredible, Your Honor, and just flat out ridiculous.

Further, Your Honor, the defense has not shown that they exercised due diligence, and at minimum, Your Honor, they were appointed -- or they became aware of this in 2011. Dr. Plunkett was not contacted until 2013, although Dr. Plunkett was -- I mean, their office was very aware of him. In fact, Your Honor, 2012, when this motion was originally scheduled to be heard, I had another motion on the docket, on the same week, for homicide by child abuse case, in which they had retained Dr. Plunkett in that matter, Your Honor.

They don't contact him until 2000 -- July 2013. There's no subsequent motion for after-discovered evidence, and there's nothing that's done -- or notice given to the

State or the Court until January 14 of 2015.

Further, they have not met the standards as been laid out by this Court that it would change the result of the trial. There's been no evidence that this evidence has been discovered since trial. There's been no evidence that it could not have been discovered prior to the trial because it, in fact, was discovered prior to the trial.

They have not shown that it's material, and they have not shown that it is not merely cumulative or for impeaching. I believe in her argument just a minute ago Ms. -- when the Court questioned Ms. Pringle about the doctor said he would have testified the exact same way in 2002, her rebuttal to that was "but he could have talked about the shaken baby debate," Your Honor. And I don't know how that's not impeachment because that's exactly what I believe that she was intending to argue to the Court at that point.

So I don't know how that they have met the procedural steps as outlined in Rule 29(b), nor what is required under case law in this state; and we would ask that the Court respectfully deny their motion.

THE COURT: Okay. All right. You both have 60 days to submit proposed orders so I have time to read all this stuff. I don't want anything in -- in any order about any procedural bar. I'm not going down that road. I'm not

going to muddy the waters with that issue.

But -- so nothing in your proposed order about any procedural bar. Leave it to the merits of the 29(b). On the substantive issues, 60 days, so I can read the transcript and the medical reports.

MS. PRINGLE: Your Honor, the only other issue would be this issue of the exhibits ---

THE COURT: Well, you need to get Ms. Ambroziak back, which I don't know when that's going to be. She's in the middle of a family situation.

And once she gets back, see what's actually missing. I mean, my memory of everything that you introduced was they didn't care about any of it. So as long as it's not something brand new that they've never seen before, I doubt it's going to be an issue. It's just probably a -- she didn't type it in exactly -- or somebody didn't say it.

MS. MCDUFFIE: Your Honor, my objection would be I believe that she marked quite a few articles before the trial, but Dr. Plunkett didn't testify to all those articles.

We have a copy of the transcript --

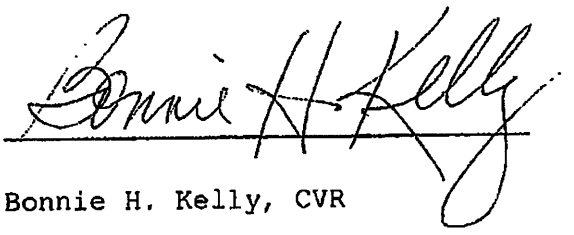
THE COURT: Well, y'all sort that out amongst yourselves and Ms. Ambroziak. Okay.

-- END OF TRANSCRIPT RECORD --

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fifth Circuit Court for Richland County, South Carolina, on the 16th day of April, 2015.

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



Bonnie H. Kelly, CVR

Official Court Reporter

Columbia, South Carolina

July 5, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF GENERAL SESSIONS FOR THE FIFTH JUDICIAL CIRCUIT
State of South Carolina vs. Nathaniel Mitchell, Defendant	Indictment No.: 2000-GS-40-50660 **STATE'S PROPOSED ORDER**

RICHLAND COUNTY
FILED
2015 JUL 30 AM 11:
CLERK OF COURT

This matter comes before the Court pursuant to the "Defendant's Motion for New Trial based on After Discovered Evidence" dated April 4, 2012. On January 14, 2015, the Defendant, through counsel, filed a "Memorandum of Law in Support for a New Trial." In addition to Defendant's written motions and memorandums, a hearing was held February 9, 2015, so that the Defense could present testimony and evidence on the issue. Defendant's counsel called Dr. John Plunkett to testify at the hearing on this matter and he was questioned by the defense, the State, and the Court. The Court heard further arguments on this matter on April 16, 2015.

RULE 29 MOTION

Rule 29 of the South Carolina Rules of Criminal Procedure allows a defendant to move for a new trial based on after-discovered evidence. Rule 29 requires that "[a] motion based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence."

"To obtain a new trial based on after-discovered evidence," the Defendant must file a motion pursuant to South Carolina Rule of Criminal Procedure 29(b), "[s]howing that the evidence: 1) would probably change the result if a new trial is had; 2) has been discovered since the trial; 3) could not have been discovered before trial; 4) is material to the issue of guilt or

innocence; and 5) is not merely cumulative or impeaching." State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999); State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993). The Defendant has failed to present any evidence that would constitute or qualify as "after-discovered evidence" in this matter and thus, does not meet the requirements for Rule 29 that would warrant the Court to grant the Defendant's Motion for a New Trial.

After-Discovered Evidence

As a threshold issue, there is no "after-discovered evidence" presented that would merit a motion in this matter pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure. Defendant argued in his motion dated April 4, 2012, motion, that trial counsel were limited by the "accepted scientific theories regarding shaken baby syndrome." The implication is that if trial counsel had access to the alleged new accepted scientific theories contained in the New York Times article ("The Article") referenced by the Defendant, the result in his case may have been different. However, Defendant misunderstands the article and his reliance on the article is misplaced because there are no such accepted scientific theories contained in the article. The article upon which the Defendant relies was contained in a popular periodical, rather than a scientific journal, and merely provides anecdotal evidence that does not provide sufficient basis for a new trial pursuant to Rule 29.

The discussion of the triad of shaken baby syndrome symptoms contained in The Article and of the alternative causes for those symptoms focuses almost exclusively on subdural hematomas and retinal hemorrhaging. However, Dr. Robert Hubbird concluded at the trial in this case that the victim's death was the result of "increased intracranial pressure, increased pressure of the brain; secondary to closed head injury, injury to the head; and that was secondary to non-accidental trauma, which is our term for child abuse." (Trial transcript, p. 173). The

Article offers no alternative explanations for extensive brain swelling such as that displayed by the victim in this case when she was brought to the emergency room.

In addition, it is clear in reading the entire trial transcript that trial counsel fully explored other possible causes of the victim's brain injuries at trial. The defense not only cross-examined the State's medical witnesses, but also called Dr. Wayne Ross, an expert in forensic pathology, neuropathology, and biomechanics (Trial transcript, p. 551). Dr. Ross testified at length about other possible causes for the victim's injuries. Specifically, trial counsel asked if there were natural bases for subdural hematomas and retinal hemorrhages, to which Mr. Ross replied yes. Trial counsel further questioned whether these opinions were shared in the medical community by other professionals. Again, Dr. Ross responded in the affirmative. (Trial transcript, p. 582). Importantly, Dr. Ross testified that shaking alone could not have caused the victims injuries and that his opinion was shared by the majority of experts in the forensic pathology and biomechanical communities.

Any evidence that the Defendant seeks to utilize from Dr. Plunkett and/or theories mentioned in The Article was already examined by trial counsel and presented to the court and jury for its consideration. Since the evidence has already been examined and discussed it is not "after-discovered evidence" and thus, Defendant is not entitled to a new trial.

Defendant also filed a Motion to Hold PCR in Abeyance and/or Dismissal without Prejudice on January 23, 2012, in which he claims that, "[u]pon review, it was clear that significant time and financial resources were invested in pursuing a defense expert on shaken baby syndrome for trial." Clearly, trial counsel *did* invest time and resources to hiring that expert, who subsequently *did* testify, and who *did* present testimony startlingly similar to the "revolutionary" anecdotes that Defendant wrongly claims as "after-discovered evidence". On

February 9, 2015, a hearing was held in response to Defendant's Motion for New Trial. At that hearing, the defense called Dr. John Jerome Plunkett to testify. He testified that in his opinion, he believed that the victim died while walking down the hallway and falling; a theory which is both unsupported by the evidence presented at trial and directly contradicted by the Defendant's own testimony and confession in this case. More importantly, however, Dr. Plunkett testified that *all* the information presented to the Court at the trial could have been presented to the jury in 2002.

Dr. Plunkett testified that he was consulted by the defense regarding this matter in July, 2013. Most importantly, the Defendant was aware not only of the existence of Dr. Plunkett but also the subject matter of his testimony during Defendant's trial in 2002, which is evidenced by trial counsel's cross examination of State witnesses with Dr. Plunkett's 2001 study. Further, Dr. Plunkett could not identify for the court a single case study or article that supported or documented his theory of a two year old child walking down a hallway and dying from a fall.

The article in question was published on February 2, 2011, and the Defendant specifically refers to the theories of Dr. Patrick Barnes, who is mentioned in the article. Dr. Barnes was consulted by Defendant's attorneys in 2002. There is no evidence before this Court that Dr. Barnes' opinion in this case has changed in any way. In fact, the defense's own evidence presented at the hearing on this matter is to the contrary. Specifically, Dr. John Plunkett testified at the hearing that Dr. Barnes' opinion as to the issue has been consistent from the year 2002 to the present.

Given the length with which defense counsel explored the issues claimed by Defendant as after-discovered evidence, any additional evidence would be cumulative and purely for impeachment purposes. Moreover, even if allowed, it would not likely have change the result of

the trial that included to the testimony of approximately 23 witnesses and 38 exhibits over a period of four days.

CONCLUSION

For the reasons stated above, the Defendant's Motion for a New Trial based on After Discovered Evidence is **Denied**

Re Hood

The Honorable Robert E. Hood
Fifth Judicial Circuit

Columbia, South Carolina
July 29, 2015

RICHLAND COUNTY
2015 JUL 30 AM 11:07
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Nathaniel Mitchell, #284407,	)	2007-CP-40-6693
	)	
v.	)	AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF
	)	
State of South Carolina, Respondent.	)	

RICHLAND COUNTY FILED
2016 FEB 17 PM 1:19
JEANNETTE W. McBRIDE C.C.P. & G.S.

The Applicant, by and through appointed counsel, Tricia A. Blanchette, would amend his Application for Post Conviction Relief filed on October 8, 2007 and revise his Amendment to Application for Post Conviction Relief filed March 5, 2012, as follows[1]:

1. Ineffective assistance of trial counsel for failure to raise the statutory indictment issue at the beginning of trial and failure to advise Applicant accordingly. Transcript pp. 680-691. Ineffective assistance of appellate counsel for failure to raise trial counsel's argument regarding the indictment on appeal.

2. Ineffective assistance of trial counsel for failure to make contemporaneous objections during the trial testimony of Dr. Defelice regarding the forensic interview, treatment and opinions regarding the child witness, which amounted to inadmissible bolstering of the child witness.

3. Ineffective assistance of trial counsel for failure to move to remove the juror that wrote the court about his/her reaction to the allegations of child abuse and/or move for a mistrial. Transcript p. 135.

4. Ineffective assistance of trial counsel for failure to object to the Solicitor's comments during closing argument about what Applicant's deceased wife knew and her reasons for taking certain actions. Transcript p. 1019.

5. Ineffective assistance of trial counsel for failure to utilize Dr. John Plunkett or a similarly qualified expert to refute the State's theory of shaken baby syndrome.

6. Ineffective assistance of appellate counsel for failure to properly raise all meritorious issues on appeal, specifically but not limited to the following issues: 1) Failure to address the Jackson v. Denno hearing, 2) Failure to

[1] Applicant requests that this Amendment supersede the Amendment filed on March 5, 2012 to forego the confusion of multiple Amendments in the record of the case.

address defense counsel's motion regarding the use of the child witness's video testimony, 3) Failure to address defense counsel's objection to the utilization of pictures during the testimony of Dr. Anne Abel, 4) Failure to address defense counsel's objections to the introduction of testimony regarding prior signs of abuse reported by childcare worker, 5) Failure to address defense counsel's motion for a mistrial due to juror misconduct, and 6) Failure to address the court's ruling to limit the defense's reply witnesses.

Respectfully submitted,

Tricia A. Blanchette
Attorney for Applicant
Post Office Box 12725
Columbia, South Carolina 29211

February 17, 2016
Columbia, SC

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Nathaniel Mitchell, #284407,)	2007-CP-40-6693
Applicant,)	
v.)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
Respondent.)	

RICHLAND COUNTY FILED
2016 FEB 17 PM 2:19
JEANNETTE W. GRIDE C.C.P. & G.S.

I, Jacqueline Venezia, Law Clerk to Tricia A. Blanchette, Esq., hereby certify that I that placed in the mail this 17th day of February, 2016, a copy of an Amendment to Application for Post Conviction Relief to Clay Mitchell of the Attorney General's Office, at:

Office of the Attorney General
ATTN: Clay Mitchell
PCR Division
PO Box 11549
Columbia, SC 29211

Jacqueline Venezia

Jacqueline Venezia
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Law Clerk

February 17, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Nathaniel Mitchell, #284407,	)	2007-CP-40-6693
	)	
v.	)	AMENDMENT TO APPLICATION
	)	FOR POST CONVICTION RELIEF
State of South Carolina,	)	
Respondent.	)	

RICHLAND COUNTY
FILED
2016 JUN -6 AM 9:16
JEANNETTE G. MCBRIDE
C.C.P. & G.S.

The Applicant, by and through appointed counsel, Tricia A. Blanchette, would amend his Application for Post Conviction Relief filed on October 8, 2007 by adding the following allegation:

1. Ineffective assistance of trial counsel for failure to consult with prior to trial and/or utilize at trial an expert in the area of counseling and treatment related to child abuse and trauma.

Respectfully submitted,

Tricia A. Blanchette
Bar #74904
Attorney for Applicant
Post Office Box 12725
Columbia, South Carolina 29211

June 2, 2016
Columbia, SC

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Nathaniel Mitchell, #284407,)	2007-CP-40-6693
Applicant,)	
v.)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
Respondent.)	

RICHLAND COUNTY
FILED
2016 JUN -6 AM 9:16
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I that I hand delivered this 6th day of June 2016, a copy of an Amendment to Application for Post Conviction Relief to Jessica Kinard, Assistant Attorney General, at the Richland County Courthouse.

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Applicant

June 6, 2016

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2007-CP-40-6693
	)	
NATHANIEL MITCHELL, PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA, DEFENDANT.	)	

July 12, 2016
Columbia, South Carolina

B E F O R E:

THE HONORABLE D. CRAIG BROWN, JUDGE.

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

TRICIA BLANCHETTE, ESQ.
Attorney for the Plaintiff

JESSICA KINARD, ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Circuit Court Reporter

I N D E X

(PW) - Denotes Plaintiff's Witness
(DW) - Denotes Defense Witness

	Page No.
(PW) NATHANIEL MITCHELL:	
Direct Examination by Ms. Blanchette.....	8
Cross-Examination by Ms. Kinard.....	24
Redirect Examination by Ms. Blanchette.....	27
(PW) PATRICIA BROCKINGTON:	
Direct Examination by Ms. Blanchette.....	28
(PW) DOUG STRICKLER:	
Direct Examination by Ms. Blanchette.....	33
Cross-Examination by Ms. Kinard.....	51
Redirect Examination by Ms. Blanchette.....	55
Recross-Examination by Ms. Kinard.....	56
(PW) LESLEY COGGIOLA:	
Direct Examination by Ms. Blanchette.....	57
Cross-Examination by Ms. Kinard.....	80

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.
	(Applicant's Exhibits)		
1	Jury Note from trial		43

All Exhibits were retained by the Clerk of Court for Richland County.

PROCEEDINGS

THE COURT: All right. Call your next case, please, ma'am.

MS. KINARD: Thank you, Your Honor. May it please the Court. This is the matter of Nathaniel Mitchell v. The State of South Carolina. It's case number 2007-CP-40-6693. Here before the Court on an application for Post-Conviction Relief filed October 8th, 2007. The Applicant was indicted at the June 2000 term of the Richland County Grand Jury for homicide by child abuse. Doug Strickler and Lesley Coggiola represented him. On May 17th, 2002, the Applicant was convicted by jury trial of homicide by child abuse. He was sentenced by the Honorable Henry Floyd to confinement for a period of 25 years. The South Carolina Court of Appeals affirmed his conviction.

This application, as I stated, was filed October 8th, 2007. Part of the reason it's been hanging around so long is there was a Rule 29 hearing, Rule 29(b) hearing regarding newly discovered evidence that put the PCR in abeyance for a while. I believe all of those filings are in the Judge's packet. The State is present and ready to proceed. The Applicant is present and represented by Tricia Blanchette.

THE COURT: Ms. Blanchette.

MS. BLANCHETTE: Good morning, Your Honor. Tricia Blanchette here on behalf of Nathaniel Mitchell. As the State alluded to, I think this is the oldest Richland County case. I was appointed back in 2008, the very beginning of my private practice to represent Mr. Mitchell. We've been together for a number of years. As a result, we have multiple amendments in this case, so I was just going to do some housekeeping at the beginning to narrow down the issues that we will be going forward on today.

THE COURT: Have you discussed this with Ms. Kinard?

MS. KINARD: Yes, Your Honor, we have.

MS. BLANCHETTE: Yes, we have talked in great detail about this case and tried to get it as simple as we can before we came in here today.

THE COURT: All right.

MS. BLANCHETTE: Your Honor, there have been three amendments filed in this case, so we double checked your packet this morning to make sure they were all in there. The only amendment that we will be proceeding on is the amendment that has six issues listed that was filed on February 17th of 2016.

THE COURT: All right. Let me get there, please, ma'am.

(Pause.)

THE COURT: Okay. I got it.

MS. BLANCHETTE: Your Honor, there are six listed allegations on that amendment. It states in footnote one there that it does supersede the amendment filed on March 5th of 2012. I filed an amendment in 2012, all those allegations are incorporated in the amendment that you have there in your hand.

THE COURT: Okay.

MS. BLANCHETTE: In just a moment, I'm going to come back and strike or abandon some of the issues in that amendment. But, Your Honor, recently on June 6th of 2016, I had filed an amendment with the following allegation, ineffective assistance of trial counsel for failure to consult with prior to trial and/or utilize at trial an expert in the area of counseling and the treatment related to child abuse and trauma.

That allegation was a result of a court order that I had gotten for funding for Gaye Allen-Cook. She's an expert in the area of child abuse and assessment. Previously, she was an expert I believe in your home circuit of Florence in the area of forensic interviewing. I consulted with Gaye Allen-Cook on the case and I don't intend to call her today. And we will be abandoning the issue that was raised in the June 6th amendment because it will cut against our other allegations regarding the use

of forensic interviewers and experts in her area under our current case law.

So we will be abandoning the issue raised in the June 6th amendment, but I just wanted to put that on the record since I did get indigent funding for her to review the file and consult with me on the case, but I will not be calling her as an expert.

THE COURT: All right.

MS. BLANCHETTE: Now, Your Honor, going back to the six -- the amendment with the six allegations on it, we will also be striking under issue six ineffective assistance of appellate counsel. We will not be going forward today on failure to address the Jackson v. Denno hearing, which is subpart one. We will also not be going forward on subpart three, failure to address defense counsel's objection to the utilization of pictures during the testimony of Dr. Anne Abel.

We will not be going forward on subpart four, failure to address defense counsel's objection to the introduction of testimony regarding prior signs of abuse reported by childcare worker. And we will not be going forward on subpart six, failure to address the Court's ruling to limit the defense's reply witnesses.

So in summary, Your Honor, we are abandoning issue six, subpart one, three, four and six.

THE COURT: All right.

MS. BLANCHETTE: Prior to today, I did speak with Ms. Kinard. We do have one additional verbal amendment if the Court would allow. In rereading through the transcript for countless times, I did discover an issue that I think we need to address today and put on the record. That is ineffective assistance of trial counsel for failure to object to the opinion testimony of Dr. Nichols when it appears from the record he was not qualified as an expert. And that can be found in the trial transcript Pages 894 to 895.

THE COURT: All right. What says the State on that amendment?

MS. KINARD: That's by consent, Your Honor.

THE COURT: All right. Very well, thank you.

MS. BLANCHETTE: Your Honor, unless the Court would like further introduction from myself, I'm prepared to call my first witness.

THE COURT: Please do so.

MS. BLANCHETTE: Your Honor, I'd call Nathaniel Mitchell to the stand.

THE COURT: Sir, come around and be sworn, please.

NATHANIEL MITCHELL, after being duly sworn, testified as follows:

THE COURT: All right. If you'll come around, be

seated. State your name for the record, Mr. Mitchell, spelling your last name. Yes, sir.

THE WITNESS: My name is Nathaniel Mitchell.

THE COURT: Thank you, sir.

MS. BLANCHETTE: Your Honor, may I approach the witness stand? I have a copy of the transcripts.

THE COURT: Yes, ma'am.

Mr. Mitchell, is that mic too high?

THE WITNESS: A little.

THE COURT: Can you put the -- thank you, Ms. Blanchette?

Is that better?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Mitchell, you've already stated your name for the record. Where are you currently incarcerated?

A Kershaw.

Q Okay. And you're doing a great job. You're a quiet talker, so keep your voice up for us.

A All right.

Q You were indicted back in 2000 for homicide by child abuse; is that correct?

A That's correct.

Q And who represented you once you got those charges?
A Ms. Lee Coggiola and Doug Strickler.
Q Do you recall going to trial back in May of 2002?
A Yes.
Q And that was in front of Judge Henry Floyd?
A Floyd.
Q All right. And what was the sentence that you received?
A Twenty-five years.
Q Okay. And you had an appeal. Do you recall if the office of appellate defense handled that for you?
A I think so, yes.
Q Now, more recently, we took a break from your PCR and the public defender's office here handled a Rule 29 motion. Were you involved in that action?
A Yes.
Q Okay. And you were present for several days of testimony on that?
A Yes, I was.
Q And you're aware of Judge Hood's ruling on that that's in the Judge's packet here today?
A Yes.
Q And that is something we discussed and have gone over in preparing your PCR action for today?
A Correct.

Q Now, I'm just going to dive right into the issues. And you've heard me explain to the Judge and I've explained to you, there's several issues we're not going forward on today because this has been a very long work in progress.

A All right.

Q So we've narrowed it down to just a number of issues. I'm going to go through those one-by-one with you. If you have any testimony to offer, please do so and then we'll move on to the next one, okay?

A Yes.

Q The first issue is you're alleging that your attorneys were ineffective for failure to raise the statutory indictment issue at the beginning of trial and failing to advise you accordingly. This shows up if you want to look on Pages 680 through 691 of your transcript.

Now, at the directed verdict stage, your attorney started to argue about issues with your indictment. Is that something you would have wanted them to raise before your trial started?

A Yeah.

Q Do you remember ever discussing that issue with them, that there was a change in the statute and possibly a problem with your indictment before you went to trial?

A It's been so long, I can't remember it all.

Q And Mr. Mitchell, what was your relationship like with your attorneys? Did you meet with them and have a good relationship with them?
A Yes.
Q So were you deferring to their expertise in the area of the law?
A Yes.
Q Do you remember about how many times you got to meet with your attorneys?
A She came down to the county pretty regular.
Q Okay. When you say she, who are you referring to?
A Excuse me, Ms. Coggiola.
Q Okay. So she visited with you on a regular basis?
A Yeah.
Q But that isn't something you ever discussed was the validity of your indictment or statutory issues related to your indictment?
A Not that I can think of.
Q Okay. But you're alleging today that that's an issue your attorney should have raised before your trial?
A Yes.
Q Are you also alleging today that it's an issue since your attorneys raised it at some point in your trial, would you have wanted that raised on your appeal?
A Yeah, I would.

Q Do you have anything else to offer on that first issue, Mr. Mitchell?

A No.

Q Okay. The next issue is that you're alleging that your attorneys were ineffective when they didn't object to the testimony of Dr. Defelice regarding the forensic interview of the child, N.G. , that was in your home. She testified regarding her treatment and opinions about N.G. . And are you alleging today that that's something your attorney should have objected to was her trial testimony?

A Yes.

Q Did you have any discussions with your attorneys pretrial about Dr. Defelice and how she was going to testify about her treatment and opinions regarding N.G. ?

A No.

Q But you were present in the courtroom when she testified during a motion hearing?

A Yes.

Q And then you were present in the courtroom when she testified during trial; is that correct?

A Yes.

Q Okay. Now, just referencing the transcript for the record, on Page 488, Line 7, she was qualified as an

expert in the area of child psychology and forensic interviewing. Thereafter, right away, the State asked her a question, Let's talk about the case, on Page 491. And your attorneys objected based upon hearsay. But at that point, they didn't object to any potential bolstering or adding to the credibility of N.G. . Is that something you would have wanted them to do?

A Yes.

Q Okay. Let me just give you a couple of cites from the transcript. On Page 491, Lines 22 through 25, she says that there's no signs in N.G. of any coaching or deception. And that's told to the jury who's hearing what little N.G. has to say. Would you have wanted your attorneys to object to that?

A Yes.

Q Now, on Page 492, looking at Lines 1 through 4, she testifies to the jury that what N.G. has been telling her has been consistent. Would you have wanted your attorneys to object to that testimony?

A Yes.

Q On Page 493, Lines 21 through 25, she says that in her expert opinion, N.G. , the little girl, is able to remember the events surrounding her sister's death. Would you have wanted your attorneys to object to that testimony?

A Yes.
Q And on Page 495, Lines 4 through 6, she says that from the most recent interview, she tells the jury that little N.G. still has an independent memory of what happened. Would you have wanted your attorneys to object to that testimony?
A Yes, I would have.
Q Okay. And Mr. Mitchell, essentially, at your trial, was it the testimony of N.G. who was an eyewitness to these alleged events and then the medical testimony? Is that what they used at your trial?
A Yes, it is.
Q So was the testimony of N.G. , did it seem important to you?
A All of it did.
Q Okay. I'm going to move on to the next issue, okay, Mr. Mitchell?
A Okay.
Q You are alleging today that your attorney was ineffective for failing to remove the juror that wrote the court about his or her reactions to the allegations of child abuse and/or move for a mistrial.
MS. BLANCHETTE: Your Honor, just as a side note, I have requested the juror note and Jim Truitt's supposed to be bringing that to us today. I haven't been able to make

contact with him in his office this morning, but he has pulled it. So I will at some point introduce into the record the juror note so that you can review that.

THE COURT: Thank you.

BY MS. BLANCHETTE:

Q Now, going back to my question. There was a juror that wrote a note -- and this appears on Page 135 of your transcript. And the Judge addresses concerns that he has about gore and that he may not be able to handle that. And on Page 135 and 136, the Judge kind of gives his summary of the testimony. Let me turn there real quick before I ask you this question. The Judge says on Line 17 of Page 135, I don't know a lot about the evidence. I do know that there will be some evidence of some bruise marks from spanking or something like that, in response to the juror's concerns about gore.

What the Judge describes here, was that what they presented or was the evidence much more shocking than what he describes?

A Much more.

Q And after that discussion, then the jurors left in the jury panel -- in the jury that heard your case, would you have wanted your attorneys to move to have that juror removed?

A Yes.

Q Okay. Is that something that you were able to discuss with them as this was going on here on Page 135?
A We -- I'm not sure if we talked about it or not, but it should have been raised.
Q Okay. Because on 136, the Judge says, Do you feel like you can get through it? And he says, Yes. But it concerns you that that juror stayed on your jury; is that correct?
A Yes.
Q And nothing was said by your defense counsel at that point about that juror remaining with your jury?
A Not that I know of. I'm not sure.
Q Okay. Now, later in your case, there was another juror issue. Do you recall that?
A I think so. One of them was talking about the case.
Q And he was actually removed from the jury; is that right?
A Yeah, that's the one that went online, pulled up a case.
Q Okay. Just for the record, on Pages 636 through 667, a juror is actually later removed and your attorneys moved for a mistrial, so they took those actions with that juror. And you would have wanted them to do that with the first juror, as well?
A They should have.

Q Okay. Now, if you can turn to the transcript there in front of you -- you can't read it for us?

A Yeah.

Q I'll read for you.

MS. BLANCHETTE: Is that okay, Your Honor?

THE COURT: What page?

MS. BLANCHETTE: If we can turn to 1019, beginning on Line 2.

BY MS. BLANCHETTE:

Q Beginning on Line 2 in closings, Solicitor Campbell states, What was Sonya Mitchell's reaction? Sonya Mitchell had wanted these children, think about it, in a normal relationship without an abuser in the household. If someone calls up their wife and says so and so stiffens up, your reaction is I'm coming right away. Get a blanket and meet me. Because Sonya Mitchell knew, she had seen those bruises and she knew where they came from. She rushed home and that part of his story alone says it all. He took her to the hospital, but, unfortunately, for him, he picked the wrong hospital.

Nathaniel, at the time of your trial, was your wife living?

A No.

Q What had happened to your wife?

A She had a stroke.

Q And was that while your case was pending?
A Yes.
Q So these comments that the solicitor makes here, had your wife testified or had any part in your trial?
A None.
Q All right. And here, does it appear to you that the solicitor is saying that your wife knew that you were abusing these children?
A Yes.
Q Would you have wanted your attorney to object --
A Yes.
Q -- to this -- let me just finish my question real quick. To the solicitor making these statements about what your wife knew and felt in closing arguments?
A Yes.
Q Was your wife's, what she knew and what she felt, was that anywhere in the record of your trial? Was she present to say those things?
A No, she was not.
Q Okay. Now, Nathaniel, I already brought up briefly that you had the Rule 29 motion that Fielding Pringle handled for you in criminal court recently. And that resulted in a decision by Judge Hood denying the 29 motion. But as part of that, Ms. Pringle called and had a full day testimony from a Dr. John Plunkett?

A Yes.
Q Would you have wanted your attorneys to utilize John Plunkett as part of your original trial?
A If he would have been available.
Q Okay. Did you ever discuss with them what experts they were going to utilize or how they were going to proceed on the medical testimony in this case?
A No, I don't think I have. I might have, but I'm not sure.
Q Okay. That's good enough. Is there anything else regarding the 29 that the public defender's office recently handled for you and the testimony and the result of that that you would like to tell the Court about today here at your PCR?
A No.
MS. BLANCHETTE: And just to be clear for the record, we are not raising any issues regarding ineffective assistance related to the 29 motion.
BY MS. BLANCHETTE:
Q Now, you heard me tell the Judge that we had an additional issue we were raising today. And that is -- if you look at Page 894, I can explain it to you in your transcript. The State calls Dr. Nichols as a reply witness. So what that means is the State had put up their case. You had put up your case with the expert that your

attorneys called and then they called Dr. Nichols to respond.

On Page 894, the State is attempting to qualify Mr. Nichols as an expert. If you read through the bottom of Page 894 to 895, it doesn't specifically state that the Court finds him qualified in the title they find him qualified under. Would you have wanted your attorneys to make sure he was properly qualified as an expert?

A Yes.

Q Okay. Then he went on for a number of pages and gave, at least -- there's, at least, 20 examples from Page 898 through 909 of opinion testimony he gives in this case. If he was not properly qualified as an expert, would you have wanted your attorneys to object to all the opinion testimony he gives after that point?

A Yes.

Q Okay. Now, Mr. Mitchell, we're kind of flying through this, so please tell me if I've gone too quickly. I've gone through each of the allegations that you've asked me to put in your amendments that we have discussed regarding the representation by your trial attorneys. Is there anything else you'd like to tell the Court today regarding your representation by your trial attorneys?

A No.

Q Okay. And Mr. Mitchell, I usually do this at the

beginning, so forgive me, what is the relief you're asking the Court for today?

A Overturn, throw it out.

Q Okay. So in your application, you're asking for a new trial? Is that you're asking him to do today?

A Yes.

Q And on this issue of ineffective assistance of trial counsel, if he finds that your attorneys were ineffective and that you were prejudiced or the outcome of your trial was affected, the Court can grant you a new trial. That doesn't mean a time cut and we've talked about that. That simply means you face the original charges all over again with no guarantee of less time. Knowing that, that is the relief you're asking the Court for today?

A Yes.

Q Now, Mr. Mitchell, I'm going to turn just very briefly to the issues of ineffective assistance of appellate counsel. You're not an attorney, so I'm not going to really ask you a lot of detailed questions on this. I'm just going to bring up some objections or motions your attorney made and then ask you if you'd want those raised, okay?

A All right.

Q So as to your appellate counsel, on Pages 13 through 49 of your transcript, your attorneys very strongly object

to video testimony being used for N.G. so she didn't have to come in the courtroom and testify. Would you have wanted their objections and their motions regarding that raised on your appeal? Would you have wanted your attorney to raise that on appeal?

A Yes.

Q Okay. The second issue, which is actually listed as the fifth issue in the original amendment, is you're alleging that your appellate attorney, so the attorney that handled your direct appeal, that he failed to address defense counsel's motion regarding a mistrial due to juror misconduct.

You know how we've already talked about on Page 632 through 668 where the juror admitted to doing research and sharing his feelings and thoughts about the case and then the Judge actually served him with contempt paperwork. Your attorneys made an extensive argument on that, asked for a mistrial. Would you have wanted your direct appeal attorney to raise that to the appellate court?

A Yes.

Q Okay.

THE COURT: What page was that, Ms. Blanchette?

MS. BLANCHETTE: That's found on 632 through 668.

THE COURT: Thank you.

BY MS. BLANCHETTE:

Q Mr. Mitchell, the next witness I intend to call is your sister, Patricia. Was your sister, Patricia, actively involved in your case leading up to trial?
A Yes, she was.
Q And was she actively involved with your wife during that time?
A Yes.
Q All right. Was she regularly a part of your family and your family functions?
A Yes, she was.
Q And she was actually called at trial; is that correct?
A That's correct.
Q Okay. You've asked me to call her today to address some of the information that she has firsthand knowledge of; is that correct?
A Yes.
Q Now, Mr. Mitchell, I've already mentioned it once. We've prepared extensively. We've been doing this together for a number of years. Is there anything else you'd like to tell the Court in support of your allegations before I call the other witnesses?
A No.
MS. BLANCHETTE: Your Honor, I have nothing further from this witness.

THE COURT: Cross-examination.

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q Good morning, Mr. Mitchell.

A Good morning.

Q So you stated that you met with Ms. Coggiola many times prior to trial; is that correct?

A Yes.

Q Did you feel you had a comfortable relationship with her?

A Yes, I did.

Q Did you feel like you could ask her any questions that you may have had?

A Yeah.

Q Did you ask her questions that you had?

A The ones that I can think of, yes, I did.

Q I understand that. Did you feel prepared heading into trial?

A Really, I can't say because I didn't know nothing about the law.

Q I can rephrase that a little bit maybe. Had you gone over a strategy with her about how -- did you understand how she was going to defend you in court?

A We might have talked about it, but I'm not sure.

Q Okay. Did you review -- I'm sorry, did you finish that answer?
A Yes.
Q Okay. Did you review your discovery with her? Anything that the State had turned over?
A I think we did.
Q Did you feel like you could mention any issues that came up to you at trial to Ms. Coggiola or Mr. Strickler during the trial?
A Yes.
Q Did you have conversations with them throughout the course of the trial?
A Maybe once, twice.
Q And you were present in the courtroom --
A Yes.
Q -- for the entire trial? Now, some of these issues that Ms. Blanchette raised, are these things that y'all developed together while you were working on this PCR?
A Yes.
Q And you stated, I believe, that I think regarding Dr. Defelice you never discussed her potential testimony before you got to the courtroom --
A No.
Q -- is that correct? Okay. Did you realize that the State was going to proceed on a shaken baby syndrome

argument?

A Excuse me? Can you explain that a little bit?

Q The term shaking baby -- or shaken baby syndrome was used during your trial; is that correct?

A Yes.

Q Did you realize that that's what the State was going to proceed on?

A Yes, it was mentioned.

Q And you realized that that's what you had to defend against?

A Yes.

Q And that part of your defense strategy was that your attorneys had hired a doctor to come and testify on your behalf?

A Yes.

Q Did you agree with that decision?

A Yes, ma'am.

Q And you felt that they acted in your best interest regarding the presentation of that doctor?

A Yes.

Q All right. And you believe they acted in your best interest regarding the presentation of all the other evidence at trial?

A Yes, I do.

MS. KINARD: I have no further questions at this

time.

THE COURT: Ms. Blanchette, any redirect?

MS. BLANCHETTE: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Mitchell, what level of education do you have?

A Twelfth grade.

Q And have you had any learning issues or any special requirements as you were going through school as far as learning or anything like that?

A I was slow on reading.

Q Okay.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: All right. Ms. Kinard?

MS. KINARD: Nothing, Your Honor.

THE COURT: Mr. Mitchell, you may step down, sir.

THE WITNESS: All right.

THE COURT: Call your next witness, please.

MS. BLANCHETTE: Yes, Your Honor.

Patricia Brockington, Your Honor. Thank you.

THE COURT: Ms. Brockington, if you'd come around to be sworn, please, ma'am.

PATRICIA BROCKINGTON, after being duly sworn, testified as follows:

THE COURT: If you'd come around and be seated in that witness chair, state your name for the record, spelling your last for my court reporter, please, ma'am.

THE WITNESS: Patricia Brockington, B-R-O-C-K-I-N-G-T-O-N.

THE COURT: Thank you.

Ms. Blanchette, you may proceed.

MS. BLANCHETTE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Ms. Brockington, how is it that you know Nathaniel Mitchell?

A He's my brother.

Q And being that he's your brother, you understand that you're here today under oath to tell the truth and only the truth?

A Yes.

Q Did you testify at his original trial?

A Yes, ma'am.

Q And were you in communication with his attorneys leading up to his trial?

A Yes.

Q Okay. And at one point, was there some specific information you conveyed to them about the children that had been in the home?

A Yes, ma'am.
Q Prior to this happening?
A Yes, ma'am.
Q And what did you tell the attorneys? What did you raise to them?
A After he had gotten out on bond, we went -- we were at K-Mart on Two Notch Road and the children was there with the new foster parents, and they ran up to Nay and they clung to him for dear life.

When the foster parents finally caught up to them, when they were removing one hand, they were grasping with the other hand to stay with him. And who was at K-Mart with us that day was me, Nathaniel, and my older sister, Rebecca, who has passed away.

Q And you told his trial attorney -- you told his public defenders about that; is that correct?
A Yes, ma'am.
Q Did they ask you about that when you were on the stand as far as you know?
A No, ma'am.
Q Now, we've already mentioned today that Nathaniel's wife passed away prior to his case being called to trial?
A Yes, ma'am, December 2001.
Q And were you regularly with her from the time that he was charged up until the time she passed away?

A Yes, ma'am.
Q Did you assist her in efforts to try to get up money for his bond or involved in any ways like that with her?
A Yes, ma'am.
Q All right. Can you tell us about that, please?
A One of the avenues that we sought was there was a community store where we grew up at. It was called H & J's Food Mart on Hard Scrabble Road. And there was a club connected to it. So every Friday and Saturday night, we would stand outside with a poster and on the poster, it stated, If you believe in Nay's innocence, please donate and give. We did that in the rain, you know, whatever the situation was because we believed in Nay.
Q Did you regularly discuss that with his wife?
A Oh, yes.
Q Prior to today, I asked you to review the transcript. There's a copy there in front of you?
A Uh-huh.
Q You were sitting through the trial; is that correct?
A Yes, ma'am.
Q It's reflected on Page 1019 of the transcript and I've read it into the record. You were in the courtroom, so I won't read it again. But the solicitor goes into what Sonya Mitchell's reaction was. She alludes to the fact that Sonya Mitchell knew that he was an abuser and he

was abusing these children. Based upon your firsthand knowledge of the situation, was that a concern that she had?

A No, ma'am.

MS. KINARD: Your Honor, I'm going to object to this. Calls for speculation.

THE COURT: Objection sustained.

BY MS. BLANCHETTE:

Q Ms. Brockington, just to be clear, she was standing beside you attempting to raise money to get him out on bond; is that correct?

A Correct. That was just one avenue. We did yard sales, car washes, bake sales. We did several things.

Q Did she ever convey to you prior to her death that she thought that her husband was abusing the children that they had in their home that they were in the process of adopting?

A Nothing.

MS. KINARD: Objection, calls for hearsay.

THE COURT: I'm going to allow it.

Go ahead, Ms. Blanchette.

BY MS. BLANCHETTE:

Q You can go ahead and answer.

A No.

Q When you heard the solicitor's comments and when I

asked you to review those comments, did you agree with those comments?

A No.

Q And do you recall hearing those during the trial?

A Yes.

Q And was that testimony? Was Sonya ever called to testify to those facts during the trial?

A No, ma'am, she had passed away six months prior to his court hearing beginning.

MS. BLANCHETTE: Your Honor, if I can beg the Court's indulgence one moment.

THE COURT: Yes, ma'am.

(Pause.)

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

MS. KINARD: No cross.

THE COURT: Ma'am, you may step down. Thank you.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MS. BLANCHETTE: Your Honor, I'd call Doug Strickler to the stand.

DOUG STRICKLER, after being duly sworn, testified as follows:

THE COURT: You can be seated. State your name for the record, spell your last.

THE WITNESS: My name is Douglas Stephen Strickler, S-T-R-I-C-K-L-E-R.

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q And Mr. Strickler, what is your current occupation and job title?

A I am an attorney, who is currently employed as a circuit public defender for the Fifth Judicial Circuit.

Q And how long have you been with the Fifth Circuit Public Defender's Office?

A Since the inception of that position in January 2008.

Q And how long have you been practicing law?

A Since November 1981.

Q Okay. And how many criminal cases do you think you've handled?

A Thousands.

Q Okay. Do you recall representing Mr. Nathaniel Mitchell at his -- leading up to and at his trial back in 2002 with Judge Floyd?

A Yes.

Q And prior to today, we've had a number of years we've been going over this. You've been aware of some of the allegations that he has made by way of his amendments; is that correct?

A Yes, ma'am.

Q Okay. I'm just going to go through each of those with you, ask you a couple of questions.
A Okay.
Q The first allegation he has made is ineffective assistance of counsel, trial counsel for failure to raise the statutory indictment issue at the beginning of trial and failure to advise applicant accordingly. Do you have the transcript there in front of you?
A Yes, ma'am.
MS. BLANCHETTE: Your Honor, may I approach the witness?
THE COURT: Yes, ma'am.
BY MS. BLANCHETTE:
Q I've also printed out the two statutes that you're referencing in your argument?
A Yeah.
Q On Page 680, if you could turn there, beginning at Line 8.
A Okay.
Q You inform the Court that you have an additional motion to make on directed verdict?
A Right.
Q And I'm just going to summarize you here, so please correct me. From 680, Line 8, through 681, what I take away is you essentially tell the Court that the statute

refers to a definition that should be found in another statute for abuse and neglect, but at that time there was no definition. So, essentially, based upon how the indictment is read, it lacked a definition of abuse and neglect.

On Page 681, if you look at Lines 5 through 8, you say there, The basis for the motion for directed verdict is the State has alleged an offense which does not contain any definition as to the elements of the offense. You explained to the Judge regarding enactment dates with the statute. And on Page 683, Lines 19 through 23, the Judge specifically asked you why you did not raise this matter prior to the swearing of the jury.

Do you recall why you waited until directed verdict to raise this issue regarding the sufficiency of the indictment?

A No. I don't know that it relates to the sufficiency of the indictment, but I don't know why I didn't raise it earlier.

Q And to be fair, on Page 693, if you look at 19 through 23?

A Yes.

Q You tell the Court that you believe it goes to -- on Lines 22 and 23, it's as to subject matter jurisdiction?

A I see that's what I said. Of course, that was my

understanding of the law at that point in time. It's no longer the law. It's subject matter jurisdiction argument, I would think.

Q Okay. And the Judge denies your motion. You continued to argue on 689 through 690. The Judge gives you another opportunity to argue. Then on 691, he denies the directed verdict motion, specifically, this argument regarding the change in the statutes, the sufficiency of the indictment.

Is that an issue you would have expected to see raised on appeal?

A Yes.

Q And at that time, based upon the case law at that time, you were making that argument because you thought that was a valid basis for granting of a directed verdict motion; is that correct?

A Correct.

Q Is there anything else you recall regarding the argument you made there as to why you would not have raised that at the beginning of trial you would like to offer?

A I'm sorry, no.

Q Okay. I will move on to the next issue then. By way of the amendment, Mr. Mitchell has alleged ineffective assistant of trial counsel, and I'll just summarize,

regarding a failure to object during the testimony of Dr. Defelice. At the very beginning of her testimony, you all objected on Page 491. I'll give you a second to turn there.

You all objected to her testimony on the basis of hearsay once she starts testifying. Is there any reason you did not enter contemporaneous objections to her testimony due to bolstering or -- I'm sorry. I didn't give you a second to turn there.

A In all candor, I don't remember what her testimony was.

Q All right. Okay.

A As I understand it from discussing this with you, she testified as to opinions regarding the testimony of a witness. If that, indeed, is the case, the transcript will reflect it. If it is, then we should have objected.

Q Okay. And I'll give you some specific instances. If you look at Page 491, Lines 22 through 25, she's asked if she saw any signs of coaching or deception?

A Right.

Q And she says no. Is there any reason you did not object to that?

A Not that I'm aware of. Now, this is Ms. Coggiola's witness, so she may have a better understanding as to whether or not -- why she may not have objected. But

certainly, I was trying the case with her, and I don't have any reason why if she didn't object, I didn't bring that to her attention.

Q Well, then I will reverse going through each of the instances to do that with her. You don't recall you all discussing needing to object to bolstering testimony -- that she was bolstering essentially the credibility of N.G. , the child witness?

A I don't remember a conversation such as that taking place.

Q Were you aware of the cases with the names of Dawkins, Jolly or Dempsey that would have been decided at that time addressing this type of bolstering of child witness testimony?

A I'm sure I've read them. This is quite some time ago.

Q Okay. And are you aware of our current line of cases, Kromah, McKerley, and we had a couple this year that essentially now, based upon our Supreme Court and Court of Appeals' rulings, experts cannot be qualified in her capacity anymore that have actually treated the child. Are you aware of that line of cases?

A Yes, I am aware of those cases.

Q Do you have any reason as a lawyer that you don't think you could have made that objection back in 2003?

A In 2002, 2003, I certainly was aware of the concept of an objection for bolstering and that being a basis to move for a mistrial in a particular case. If, indeed, the testimony appears to be such that that's what she was engaged in, we should have objected in that regard.

Q Thank you. I'll move on to the next issue. Mr. Mitchell has alleged that you all were ineffective for failing to ask to remove the juror that wrote about his or her reaction to the allegations of child abuse and/or move for a mistrial.

MS. BLANCHETTE: Your Honor, may I approach the witness?

THE COURT: Yes, ma'am.

BY MS. BLANCHETTE:

Q I have here what's marked as Court's Exhibit 3 from the original trial, and will give you a chance to review that to see if it jogs your memory.

THE COURT: Is that the document you were asking --

MS. BLANCHETTE: It is, Your Honor.

THE COURT: -- of Mr. Truitt?

MS. BLANCHETTE: Yes, he brought it.

THE WITNESS: Okay.

BY MS. BLANCHETTE:

Q On Pages 135 through 136, this issue arises in the transcript. And after, I guess, the juror has given this

note -- and this is the Court addressing it here on Page 135, the Judge essentially says the evidence is going to be bruise marks from spanking or something like that, and he says, That won't bother me. Is there any reason you didn't address that matter further?

A I mean, I'd have to take a guess. It appears the note indicates he's got a phobia about gory pictures. And the Judge's statement to him was that there would be bruise marks, which is not gory, and he says he's fine with that. So that would be the reason for not making the motion then I would theorize. I have no independent recollection of that.

Q Do you recall making an objection to the pictures that were introduced in this case during the testimony of Dr. Ann Able making the argument that they were so prejudicial they should have been kept out, seeing an infant or a child in that state was unduly prejudicial?

A I don't recall, though, you can direct my attention to the record. It would surprise me if we didn't object to them on that basis.

Q Okay. Would you agree that the pictures that were admitted weren't simple pictures of bruises in this case?

A I have no independent recollection of the pictures in this case.

Q Okay.

A It wouldn't surprise me if there were more than just bruises.

Q Now, as far as experts, you all utilized Dr. Ross, who we were discussing this morning was out of Pennsylvania. He was a coroner there in Pennsylvania.

Do you have any memory of how you reached the decision to utilize Dr. Ross as the expert in this case?

A No.

Q And as was brought up at the Rule 29 hearings and, essentially, was addressed in the order, Dr. John Plunkett was called as part of the newly discovered evidence hearings and the Judge ultimately found that a lot of his articles and the information that he had was available at the time of the trial. Is there any reason you didn't utilize Dr. John Plunkett as he was utilized at the Rule 29 motion?

A I was aware -- and I think I handled a good deal of the scientific evidence in the case. I was aware of Dr. Plunkett at that time. I can't remember whether I spoke with him myself at that point in time. This was not the only homicide by child abuse case that we had been involved with, certainly, wasn't the only shaken baby case. I was aware of the controversy surrounding it at that point in time, which may or may not still exist, that there were separate schools of thought regarding what was

necessary in order to cause the kind of trauma that could lead to a child's death in this fashion.

I can't tell you why we would call Ross. I can't even tell you whether I spoke with Dr. Plunkett or not. It seems to me from speaking with Ms. Pringle that I did, but I can't remember.

Q Okay. So you don't have an independent memory of why you chose the experts that you called at trial?

A No, ma'am.

Q Okay. The final issue of ineffective assistance of counsel --

MS. BLANCHETTE: I'm sorry, Your Honor, at this time, I'd move to admit the trial exhibit, Court Exhibit 3 into the record in this case without objection.

THE COURT: Without objection, so admitted.

THE COURT REPORTER: So mark this as Court's Exhibit 1 in this case?

THE COURT: Yes.

MS. BLANCHETTE: Your Honor, I actually had moved that as Applicant's 1. I think she stated Court's 1. I wasn't sure --

THE COURT: Did you say Court's?

THE COURT REPORTER: I think I said Court's because that's what I --

THE COURT: It was Court's in the first trial. It's

Applicant's in this motion.

THE COURT REPORTER: Okay. One moment.

(WHEREUPON, Applicant's Exhibit No. 1 was admitted into evidence.)

THE COURT REPORTER: I don't have Applicant's stickers, I have Plaintiff's, so I wrote Applicant next to that.

THE COURT: It's designated as Plaintiff's Exhibit, written on here Applicant.

MS. BLANCHETTE: Thank you, Your Honor.

BY MS. BLANCHETTE:

Q Mr. Strickler, finally, if you would look at Pages 894 through 895 of the transcript.

A 894?

Q Yeah, 894. I apologize, I talk a little too fast.

A Yes, ma'am.

Q All right. And I had you review that this morning. That's where the State had called Dr. Nichols in reply?

A Correct.

Q And it appears on page at the bottom of 894 you're asked if you want to question him before he's qualified as an expert. Your response is you haven't seen his CV. And then if you flip over to 895, the Judge says you may proceed. Do you see on the record where he was duly qualified as an expert?

A No.
Q And then --
A Now, I do see in the record a series of questions beginning on Page 892 running through 893 and down to the point on 894 that you referenced in which Ms. Campbell asked the questions which should be asked, not extensively, but asked some covering his qualifications in order to qualify him as an expert. She never asked the ultimate question or submits the ultimate issue and ask the Court to qualify him as an expert.
Q And at that time, as far as you knew, had he been qualified as an expert? Had he been utilized in that capacity?
A To my knowledge, that was the first time Dr. Nichols appeared in court in Richland County to testify. He was not the pathologist on this case. He was not one of the pathologists that I was used to examining. I believe Dr. Burns had testified as a pathologist in this case and I was well aware of Dr. Burns. I dealt with him, oh, 1982 was the first murder trial I had and he testified in that case, I believe. So I've dealt with Dr. Burns on many occasions. So to my knowledge, he had never been qualified as an expert in Richland County.
Q And the State was using him in reply, correct?
A Yes.

Q Okay.
A Surprise reply, as a matter of fact.
Q I was going to ask if you could go into that a little, your memory of how it came to be that he was utilized in reply?
A I got along very well with Dr. Burns. As I said, we have an extensive background. I felt that his testimony from a defense -- I had always thought Dr. Burns was a very straightforward and neutral expert witness in the field of forensic pathology. I think his testimony in that regard was unbiased. When it occurred in this case, I felt fairly good about his testimony. And Ms. Campbell brought in Dr. Nichols, who testifies in a different fashion.
Q Now, I'm going to take you through -- and this is going to be a little lengthy, I apologize. I'll give you transcript cites and summarize his testimony on each page. But after this point where the Judge says you may proceed with Dr. Nichols, he essentially replies to every good point that your expert brought up. Is that what you recall?
A Yes.
Q Okay.
A He's very much a State's witness. Not only in this case, but in every case he testified in.

Q Now, on Page 898, he testified as to his opinion about how rebleeding can't occur spontaneously in a toddler?

A Right.

Q If he had not been qualified as an expert, is there any reason you did not object to that testimony?

A No, I have no idea why I did not object to -- well, I have no idea why I did not take the opportunity to examine him as to his qualifications as an expert. Having heard him testify and had the opportunity to examine him in such fashion in the past, he would have been qualified as an expert. He was on multiple occasions when I've had the opportunity to qualify. But no, there is no reason he shouldn't have been able to testify absent being qualified as an expert.

Q Okay. And, for instance, on Page 898 through 899, he speaks about rebleeds and he essentially refutes the theory you put up about this being a rebleed. Was that detrimental to your case?

A Yes.

Q On Pages 899 through 900, he gives his opinion and refutes the defense theory that there were other diseases present in this victim. Was that detrimental to your case?

A Yes. And just -- anytime Dr. Nichols testifies,

every bit of his testimony will be detrimental to the defense case. That's the reason he's on the stand. He is a State's witness. He never was, not in this case, not in the, I don't know, dozen other homicides that I had the pleasure of listening to his testimony has he been anything remotely resembling a neutral and detached witness.

MS. BLANCHETTE: And, Your Honor, I don't want to waste anyone's time here today, but I do need to make a complete record for my client.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: I can go through the 10 or so cites and then ask him one combined question.

THE COURT: Please do whatever you feel like you need to do to protect the record.

BY MS. BLANCHETTE:

Q Mr. Strickler, I'm just going to go through these citations from his testimony and then ask you if those were issues that were detrimental to your case.

A Yes, ma'am.

Q The next one would be Pages 901 through 902. He talks about hematomas and hemorrhages. And he gives his opinion ultimately on Page 901, Lines 1 through 3, that this was clearly child abuse?

A Yes.

Q On Page 903 through 904, he refutes your expert's opinion regarding the older hematoma. On 903 through 904, he gets the triad question that if you have one, plus two, plus three, the triad is always shaken baby syndrome and he says, Absolutely in this case. On Pages 904 through 905, he goes through and dispels other causes testified to by your expert. On Page 905, Lines 12 through 15, he gives his opinion that this was a shaken baby, plus a blow to the head. On Page 906, he refutes the defense theory of accidental trauma or forced trauma. On Page 907, he refutes the defense expert's testimony about dating the clot or the hematoma. And then again, on 908 through 909, he reiterates his opinion that this is classic shaken baby syndrome.

Now, all of those opinions, I know you said he always testifies in favor of the State and it hurts the defense, but would you agree that his testimony -- specifically the references that I gave to you, his testimony was used to directly refute your expert and it was detrimental to your defense?

A Yes as to all of them.

Q Now, Mr. Strickler, I just want to turn to a couple of issues that you all had preserved on the record that weren't raised on direct appeal. The first is you all made an extensive motion to preclude the State from being

able to use video testimony. You wanted the child witness to be live in the courtroom. Did you think you had traction with that issue and that was a strong argument in this case?

A Yes, I did.

Q Is that an issue you would have expected to be seen raised on appeal?

A I certainly would hope it would have been raised on appeal.

Q Okay. Were you aware of case law and arguments that were in your favor at that time for that to be favorable on appeal?

A Probably more favorable at that point in time than now, yes.

Q And the second issue is the mistrial that you all raised on Pages 632 through 668. I'll just summarize those 30 pages. Essentially, a juror comes forward that he has the opinion that the case should be decided by medical doctors and not by laymen. After the Judge questions the jurors, it's determined that he didn't keep that opinion to himself as he had previously stated. He is removed. He is given notice to appear for contempt proceedings. You all moved for a mistrial. Is that an issue you would have expected to see raised on Mr. Mitchell's direct appeal?

A Yes.
Q Did you think that was an issue that could have been favorable for him on appeal?
A Yes. I need to take a look at what other actions Judge Floyd took in following up on that.
Q Okay.
A I don't know whether he questioned all the jurors as to their ability to be fair and impartial.
Q He did. During those 30 pages, he held, you know, the proper hearing in this case and questioned the jurors.
A Probably wouldn't have been successful on appeal.
MS. BLANCHETTE: Your Honor, if I could just beg the Court's indulgence one moment.
(Pause.)
THE COURT: Mr. Blanchette, the 30 pages you read, give the pages numbers again, please.
MS. BLANCHETTE: Yes, Your Honor. Those are 632 through 668.
THE COURT: Okay.
MS. BLANCHETTE: Let me double check those. Yes, that is correct, Your Honor.
THE COURT: Okay.
BY MS. BLANCHETTE:
Q Mr. Strickler, I know that you and I have talked about this case for a number of years. You were involved

in some of the matters regarding the 29 when this was held in abeyance. Is there anything else regarding the allegations that have been made in this case or any representation in this case that you would like to offer that I failed to ask you?

A I don't think so.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Cross-examination?

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q Good morning, Mr. Strickler.

A Good morning.

Q I'm going to try to start back at the beginning of Ms. Blanchette's questions for you. First of all, regarding the indictment, is it your understanding that indictment is a notice document?

A Now. It was not -- that was not the state of the law at the time of this trial.

Q So it was important that you raised this issue. And do you believe it was raised in a timely manner that would have been effective?

A I don't know what my thoughts were at that point in time. I'm unsure -- I'd have to think about it more at

this point in time, frankly. I don't know that my objection -- I understand the Applicant's contention. I'm not sure that the objection goes to the validity of the indictment, goes to the ability of the jury. I'm not sure.

Q Thank you.

A I raised the objection as a directed verdict motion as opposed to a motion to quash the indictment.

Q At the time of this trial with facts such as these, what was the current overwhelming scientific belief?

A There were two schools of thought as far as what's termed shaken baby syndrome at that point in time. One was that you could shake a child sufficiently to cause subdural hematomas, cause diffuse axonal injury, to cause any one of a number of medical conditions which would lead to swelling of the brain, which would lead to retinal trauma, hemorrhaging, which would lead to compression of the spinal column and the central nervous system, resulting in extreme injury to the child and, ultimately, possibly death. The other school was that the -- no one could shake a child sufficiently to go ahead and cause that absent impact to the child.

So there was shaken -- shaking in and of itself could cause the injury, and the other school would be shaking plus impact was required to cause injuries such as were

present in this case.
Q And which of those was the defense's theory of the case?
A I actually think the defense's theory of the case ended up coming down to something else entirely, though, I was then and still am of the opinion that shaking in and of itself could not cause the kind of injuries that you observed in this case.
Q Regardless of those theories, you understood the State's theory that they were going to present and --
A I think so, yes.
Q And in working to defend against that, you certainly interviewed and explored potential expert witnesses to present on Mr. Mitchell's behalf?
A Yes. I'm not sure where in the sequence of events this comes, but I interviewed and talked with many pathologists, medical doctors, biomechanical engineers on this subject over the course of a number of cases.
Q Is it safe to say that Dr. Ross was the best choice in this case for your opinion?
A It's safe to say that Dr. Ross was the choice we made to present the opinion in this case.
Q Stepping back a bit to the juror reaction issue that the note was admitted on, do you recall how that came to the Court's attention other than via the note?

A No.
Q Do you recall the Court questioning that juror?
A I see from the transcript that the Court questioned the juror.
Q And if you wouldn't mind looking at that. It's page 135 to 6. Do you see anything in the transcript that would possibly bring up an issue, such as tainting the rest of the jury panel?
A Such as what?
Q Tainting the rest of the jury panel?
A No.
Q So in other words, this juror was questioned outside of the jury panel?
A Best of my knowledge, yes, ma'am.
Q Moving on to Dr. Nichols' reply testimony, you talked about potentially having needed to question him further. However, was everyone running under the assumption that Dr. Nichols was qualified on the basis of these questions?
A I feel comfortable in saying I was under the assumption he had been asked the necessary questions to qualify him. I, frankly, was surprised that I didn't take the opportunity to put him on voir dire as to his qualifications myself, having never encountered him before. It wasn't like he was a pathologist who I had dealt with on numerous occasions in the past.

Q Regardless, could your actions or your lack of objections that Ms. Blanchette pointed out be explained by the fact that you were questioning him as an expert witness that had been qualified?

A That could be explained by that. I'm surprised that I did not object to him proceeding without her formally having him qualified. That's just a dotting of an I and crossing of a T that I normally did.

Q One last thing. You heard Ms. Brockington testify. Do you remember speaking to her about the issues that she brought up?

A No. It's very possible that Ms. Coggiola spoke with her. I'm not sure.

MS. KINARD: Thank you, Your Honor. No further questions.

THE COURT: Anything further, Ms. Blanchette?

MR. ATTY2: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:

Q On page 135 where the State directed you to about the juror issue and the juror note.

A Yes, ma'am.

Q There, the juror is actually listed as a prospective juror, but if the record reflects that the jury was selected and sat from about Pages 74 to -- I was trying to

find where it was completed. I believe in the mid-90's, you have selected a jury. At that point, he wouldn't have been a prospective juror, he was actually on your jury?

A That was my understanding, yes, ma'am.

Q So the title given to him as prospective juror, this issue is raised after the jury has actually been sat in your case?

A That was my reading of it, yes, ma'am.

MS. BLANCHETTE: Your Honor, I have no further questions.

RECROSS-EXAMINATION

BY MS. KINARD:

Q Regardless of that, was he questioned in front of a jury panel or jury pool or just strictly by the Judge?

A I believe it was in the courtroom by the Judge without the other jurors present.

MS. KINARD: Thank you very much.

THE WITNESS: I'm sure that Judge Floyd would have proceeded in that fashion. There's no question in my mind.

THE COURT: You may step down.

THE WITNESS: Thank you, sir.

MS. BLANCHETTE: Your Honor, Lee Coggiola will be my last witness. She's my lengthiest witness. I don't know if you want to proceed or stand down.

THE COURT: We'll stand down just a minute.

(WHEREUPON, a short break was taken.)

THE COURT: All right. Ms. Blanchette.

MS. BLANCHETTE: Yes, Your Honor. I would call Lee Coggiola to the stand.

THE COURT: If you'll be sworn, please. Raise your right hand.

LEE COGGIOLA, after being duly sworn, testified as follows:

THE COURT: State your full name for the record, spell your last, please.

THE WITNESS: My name is Lesley, L-E-S-L-E-Y, initial M, Coggiola, C-O-G-G-I-O-L-A.

THE COURT: Ms. Blanchette.

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q All right. Ms. Blanchette, what is your current occupation and how are you employed?

A I'm currently disciplinary counsel for the South Carolina Supreme Court.

Q Okay. And how long have you been an attorney?

A I have been an attorney since 1988.

Q All right. When you handled this case, you were with the Fifth Circuit Public Defender's Office; is that correct?

A I was.
Q How long were you with the Fifth Circuit Public Defender's Office?
A I went to the public defender's office in 1989 and was there both as a trial lawyer and then at Appellate Defense off and on until 2003.
Q Okay. During the course of your career with the public defender's office and working as a criminal defense attorney, do you know approximately how many cases you handled?
A Oh, gosh. I don't know. 500, 700.
Q Okay.
A I was -- after 1999, I was chief public defender until I left in 2003.
Q Okay. So you left -- this case was in 2002, so you were with the public defender's office for about a year after that; is that correct?
A Yes, that's correct.
Q And do you remember representing Nathaniel Mitchell in this case?
A I do.
Q All right. And do you recall any of your interactions or your meetings with him? Is that something you did regularly?
A We met pretty often. I met with Nathaniel and met

with his family. Yeah, we met quite frequently.
Q Okay. And what was discussed? I mean, I'm not asking you to go back through each meeting, but did you have a chance to go over the discovery, talk with him about case strategy? Kind of what was the point of those meetings?
A The point of the meetings, we were -- Nathaniel had definitely decided to go to trial. I supported him in that. And we would go over the discovery and the things that we were receiving from the solicitor's office and the possible defenses.
Q Okay. And during that time, were you able to discovery that Nathaniel was a man of few words?
A Yes. I was just going to say I probably did more talking than Nathaniel. A very gentle man, but it was hard to get him to talk sometimes, but that was why we met more often, was I wanted to hear what he had to say about this case. I think eventually we were able to have some substantial conversations.
Q And you already mentioned that you had interactions with his family. Specifically, do you recall discussions or communications with his wife, Sonya, in this case?
A I do. And I can't recall exactly where they were, but his wife and his two sisters at the time would come to our office and we would just talk about Nathaniel and

about the children. They were very, very supportive of Nathaniel, very involved. There was actually the -- you know, I can't recall specific instances, except there was one very significant one where -- they would call me at home sometimes, which was fine. This was a significant and a very difficult case, and that isn't true of all the clients I had, but in this case, it was.

One evening -- and I don't remember whether it was Patricia or Sonia, but they were calling me fairly frequently and I did not take the calls. It was quite late. At 6:30 in the morning maybe, I think Patricia called and said -- and I kind of got on the phone and said, you know, enough is enough. You need to respect my time at home. She said, They let Nathaniel out last night by mistake and we don't know what to do. He wants to go back, but he doesn't know how to do it.

What had happened, there had been a mistake at the detention center and they accidentally let him out and he had called his sisters. And, quite honestly, it was either Sonya or Patricia I think said, What should we do? I said, Give him a nice breakfast and I'll call you back as soon as I can. And then they drove him down -- I believe they drove him down and he turned himself in. And then I met with them afterwards. That was quite an event.

Q So you vividly remember having interactions with his

sisters and his wife throughout the course of this case?
A Absolutely, yes.
Q And do you recall that his wife unfortunately died prior to you all going to trial?
A I do. In fact, Nathaniel was on his way to the courthouse that day when it happened, to see us.
Q And that happened, essentially, en route to your office?
A Yes.
Q So she wasn't utilized as a witness or in any capacity during his trial?
A No, no.
Q Okay.
A That was probably, I don't know, less than a year, but it was almost a year until the trial from the time that she died. We almost took a break for a little while after she died. It was sort of a difficult time for Nathaniel and his family. We sort of -- I don't remember whether we had a scheduled trial and had to continue it, but in any case, we kind of all took a break for a little while and then resumed in getting ready for the trial.
Q One of the issues that he has raised, and I'm not going to read it verbatim, is that yourself and Mr. Strickler were ineffective for not objecting during the solicitor's closing argument. I can refer you to Page

1019 of the transcript. You've been in the courtroom all day. You've heard me read that previously. Is there any reason you didn't --

Well, let me ask you this first. Did you have a good understanding of Sonya's position in the case and her -- had you discussed the facts of the case with her?

A What I can say is I don't remember any specific conversations with Sonya, you know, word for word, but she was absolutely supportive of Nathaniel from the time I met her shortly after his arrest until she died.

Q Okay. And the solicitor's closing comments, I'm on Page 1019, Lines 2 through 13, where she essentially says that Sonya knew he was an abuser, based upon your own personal knowledge and interactions with Sonya, was that ever conveyed to you that she knew that he was an abuser?

A No, it was not.

Q Was testimony or any information relating to these -- this argument given by the solicitor, was that ever elicited or put into the record at trial?

A It was not.

Q Based upon your experience in preparing this case and your interaction with Sonya and the family, do you agree with the statements made on Lines 2 through 13?

A I do not.

Q Do you find those statements to be objectionable?

A I do.
Q And is there any reason that as his counsel there was no objection made?
A I can't give you a reason. I know that we're all very cautious during closing arguments and try to be respectful of opposing counsel when they're getting up and making closings. It doesn't mean that we can't make an objection. Truthfully, I cannot remember. I should have objected.
Q And would you agree that she's arguing facts that were not in the record before the jury?
A I would agree.
Q And would you agree that the information that she's arguing here was prejudicial to Mr. Mitchell?
A I believe it's prejudicial.
Q And why do you believe it's prejudicial?
A Because it's giving certainly the impression that the person closest to Nathaniel and living with him with these children was indicating that he was an abuser. And there was nothing -- she couldn't be put on the stand. It was not a part of the record. There was no evidence to support that. And of all people, Sonya Mitchell would have been the one to know, and the jury could have assumed that it was therefore truthful.
Q And was part of your defense to show that they were

in the process of adopting these children and there hadn't been any reports of any type of abuse or neglect in the children or family services department?

A Absolutely. They were, I believe, more than halfway through the process of adopting MINOR .

Q And so her comments here would cut against how you were trying to demonstrate that in defense of this trial?

A That's correct.

Q Is there anything else regarding your knowledge of Sonya Mitchell and your interactions with her and the solicitor's comments here that you would like to testify to further today?

A No. I feel badly that I didn't object to that, and I -- you know, sometimes we let things go by, particularly in closings, out of, I don't know, courtesy or whatever our reasons are at the time, but, you know, there are some things that should be objected to and this was one of them.

Q Okay. I'm going to touch back on the first issue that came up in our amendment, and that was the statutory indictment issue that Mr. Strickler raised in directed verdict. It appears he handled that directed verdict. Do you have any information on that or were part of any of that argument in any way?

A I really don't. Even reviewing the transcript, I

don't have a recollection of it. And Doug was the -- Doug was sort of the legal guru for us in this matter. I think he handled that.

Q And he referenced in his testimony that you handled the testimony of Dr. Defelice. Would you agree to that?

A I did.

Q There was actually a pretrial motion where they were trying to determine how the testimony of N.G. , the child witness, would be handled. And during that testimony -- I'd essentially say you all got a preview of her testimony, would you agree? You got a preview of what she was going to testify during that pretrial motion?

A Yes.

Q And during that testimony, she was qualified first -- and this is on Page 17 if you'd like to reference it.

A Yes, I have it.

Q She was qualified without objection as an expert in forensic interviewing and child psychology. Is there any reason you all did not object to her expert qualifications in that area?

A No, she had been a director at ARC, as I recall, for a period of time, and I think we agreed that she could be qualified as an expert.

Q And would you further agree that there is now case law that's favorable where you could have made an argument

that she should not be qualified as such an expert?
A I'm aware of now.
Q She went on to testify on Pages 21 through 22 that N.G. was 100 percent proficient on the truth and lying testing in the moral imperative to tell the truth test, that she had an independent memory of what happened to her sister and she had told a consistent story. So you essentially had a preview of what she intended to say about N.G. ; is that correct?
A That's correct.
Q Okay. And then if you turn to Page 488 of the transcript. And please let me know if I need to slow down at any point.
THE COURT: What page was that again?
MS. BLANCHETTE: 488.
THE COURT: Thank you.
THE WITNESS: Okay.
BY MS. BLANCHETTE:
Q Right about in the middle of the page, there about Line 7, she's qualified as an expert in child psychology and forensic interviewing. Is there any reason again why you didn't object or is it the same reason why you didn't object there?
A I think it's the same reason.
Q Okay. Now, in her testimony on Page 491, if you look

at that, the State begins to ask her just kind of a general question, you all objected on the basis of hearsay. Would you agree you made that objection?

A Correct.

Q Now, then she continues on with her testimony. I'm going to give you several specific cites. And on Page 492, looking at Lines 1 through 4?

A Yes.

Q She's asked if the testimony was consistent -- I'm sorry, the account was consistent and she says yes. Is there any reason you did not object to that on the basis that it was bolstering the testimony of the child witness?

A I don't know why I didn't.

Q Okay. And I apologize, this may be redundant, but I'm going to go through a couple of cites with you.

A That's fine.

Q If you could turn to Page 493, look at Lines 21 through 25.

A I have that.

Q And she's asked if she -- in her expert opinion, the child was able to independently remember the events surrounding the sister's death, and she said, Yes. Is there any reason you did not object to that testimony?

A No, I should have.

Q If you could look at Page 495 and look at Lines 4

through 6. She's asked about the most recent interview and asked if the child still has an independent memory of what happened, and she says, Oh, absolutely, yes. Is there any reason you didn't enter an objection to that testimony?

A No, I should have on bolstering.

Q And at that time, there were three cases, Dawkins, Jolly and Dempsey that essentially had said this type of testimony is bolstering. Those were all sexual abuse cases involving child victims. Would it be your position, though, that that argument could be made in this case involving physical abuse, not sexual abuse, that the same argument could be made?

A I think the same legal argument could be made, yes.

Q And in your experience, these experts that for a number of years were repeatedly qualified as forensic interviewers or as Dr. Defelice was qualified here in child psychology and forensic interviewing, they were known to treat children for both physical and sexual abuse; is that correct?

A That's correct.

Q Okay.

A I think that was the purpose of the center, the ARC Center.

Q So it wouldn't just -- when we have cases that are

just talking sexual abuse, you would have argued those cases, saying they're on point for this victim that dealt with physical abuse as well; is that correct?

A I hope so.

Q Just specifically, we recently had a case, State vs. Taylor, that was decided in our Court of Appeals February 11th of 2015.

MS. BLANCHETTE: I'll have a copy of this for Your Honor.

Q And it summarized all the cases that have been recently decided, Kromah, McKerley. It cites Jennings. And it says essentially that the Court finds that the assessment of witness credibility is within the exclusive province of the jury. Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. Similarly, witnesses may not improperly bolster the testimony of other witnesses. And then it goes into talking about these type of experts and forensic interviewing experts, how that has no place in the courts any longer when they've actually treated the victim.

But would you agree with that law that's cited there and agree that those arguments could have been made at the time of Nathaniel's trial?

A Yes. I'm not familiar with that specific case, but in the theory of the law, I would definitely agree with.

Q Okay. Let me just maybe cut to the chase and not give you such a long-winded question. The argument was available at that time to you based upon your professional experience to object to this on the basis of bolstering?

A Yes, it was.

Q Okay. And, again, did you have any basis for your reason for not objecting to that testimony?

A No, I did not.

Q Now, what part do you think her testimony played in this case?

A N.G. was present at the house on the day of the incident for which he was charged, and I think that to have an expert in forensic interviewing with a child present to the jury that her testimony was sound, consistent, unchanging was very strong and the jury would not be able to discern the way lawyers would how her input into that could affect the testimony.

Q Would you agree in this case that the evidence against Mr. Mitchell essentially boiled down to the scientific or medical evidence and then the testimony of N.G. ?

A Yes.

Q So the bolstering, if it can be deemed that or if the Court found it to be that based upon a proper objection, would you say that that was prejudicial in this case?

A I would say it was prejudicial and I would say that if we had pointed it out that the jury would have heard that. You know, by objecting and saying Dr. Defelice is bolstering, we would object on the bolstering, that the jury would have heard that and that would have been input for them to make a determination as to how to assess that particular form of evidence.

Q And if you would have been successful in making an objection and essentially shutting down her testimony, how do you think that would have impacted the case?

A It would have had a huge impact on the case as that was the -- you know, I mean to have the scientific evidence being sort of the battle of the scientists, which you're going to have in these kinds of cases, the jury would have to make their own determination on that, but for the other evidence to be the witness of one child, it would make a huge impact.

Q Okay. I'll move on to our next issue. We've discussed today this juror note that was brought up on Page 135. Would you like to review the juror note?

MS. BLANCHETTE: Thank you, Your Honor.

THE COURT: Applicant's Exhibit 1.

BY MS. BLANCHETTE:

Q As the Court stated, we've marked this as Applicant's Exhibit 1. At Page 135 of the transcript, it appears this

note has been provided to the Court. The juror is titled a prospective juror, but based upon the transcript, the jury had already been sat or selected at that point. It appears the juror gives this note. And then the Judge gives a summary of the testimony in addressing this note as, I don't know a lot about the evidence. I do know that there will be some evidence of some bruise marks from spanking or something like that. Does that properly summarize what the evidence was in this case?

A No.

Q And do you recall that you all made an objection during the testimony on Page 322 through 323 during the testimony of Dr. Anne Abel to the pictures that the State was introducing in this case?

A Yes, I recall that.

Q Okay. And there in the note I believe the juror is indicating that he has an issue with gore. Is there any reason you or Mr. Strickler did not further address this issue with the Court regarding the juror's concerns and then the Judge's summary of what he's likely going to see?

A I don't know why we would not have objected in as much as we were very aware that there was going to be a lot of medical evidence in the trial. Everything from discussion of autopsies to graphic descriptions of shaken baby matters. And so we would have known that there was

more than just bruising that was going to be testified to in the trial. I have no explanation for why we did not object to this juror not being excused from the jury.

Q Or further address the issue in any way?

A No.

Q And later in the transcript, kind of towards the end, 636, a juror is excused because he essentially has a problem with this case being all about medical evidence and goes and does his own research, and there you all moved for a mistrial. So you're aware of what steps could be taken to have a juror removed?

A Yes. Yes. And we have had other situations, other trials where we've asked to have jurors removed. And the -- you know, in the note when he says he has a habit of passing out with gory pictures, it seems that that would have been enough for anybody, the Judge or us, to have seen that this juror was excused at the start of this particular trial, which was going to have a lot of medical evidence.

Q And, specifically, they went through lengthy testimony about the different layers of the brain?

A Yes.

Q I mean, it involved a lot of evidence involving this child's brain and skull, which is something -- would you describe as gory when you were there in the courtroom?

A Well, I think it's very, very difficult graphic testimony. And for a layperson to say that they have a phobia about gory pictures and have a habit of passing out, I think there would be enough of an inference there that they may have a difficult time looking at pictures of a brain, even graphic.

Q I think we've already addressed the point or issue that you all did not raise any type of concern or objection or move for a mistrial in the record, but looking back at this issue now, does it raise a concern to you based upon the evidence that was presented to this jury?

A Yes, I think there should have been an objection as soon as the note came out and a request by us to have this juror removed from the jury.

Q Because at this point in the trial, is there any indication there aren't alternates available?

A I'm sure there probably were. I don't have specific recollection, but in Richland County, there are always alternates picked. Particularly on a difficult trial that may go for a few days, you're going to have two or three alternates.

Q And since I've touched on that, I'll just jump ahead. Mr. Mitchell has alleged ineffective assistance of appellate counsel for not raising on appeal the issue that

comes up on Page 636 regarding the juror that had done his own research and, essentially, I believe, shared that with other jurors and then was served with contempt paperwork. I'll give you a chance to flip there if you'd like.

A This is Page 636?

Q Yeah, I think that's approximately where it starts.

A Okay.

Q It goes on through the 660s?

A Oh, on the juror issue?

Q Yeah.

A Oh, I'm sorry. I'm sorry.

Q Is that an issue when you were raising it that you would have been expected to see on appeal when you lost your motion for a mistrial?

A Yes.

Q Did you think that was a strong issue and a strong argument that you were making on Mr. Mitchell's behalf?

A Yes.

Q Now, we've talked some today about the Rule 29 motion that's been filed in this case. You've had the opportunity to review the order in that; is that correct?

A I have.

Q And in that order -- and this is just kind of my summary. You know, the issue comes up about how defense counsel could have utilized an expert like Dr. John

Plunkett at the time of trial if that information had been known at the time of trial. Do you recall the specific reasons why you all used the expert that you did and why you didn't utilize Dr. John Plunkett?

A I don't.

Q Do you ever recall talking with Nathaniel about what experts were going to be used or did he have any input or any interactions with you about who was going to be used and why they were going to be used?

A Probably at the most, we would have simply acquainted him with the names of the witnesses and what they were going to testify to. And as Mr. Strickler said, he handled most of the scientific evidence in this trial, so I don't recall exactly how Dr. Ross was selected. And I doubt that we would have asked Nathaniel for input on that, but we would have made him aware of what witnesses we were going to be putting up on his behalf.

Q From the testimony today, it's my understanding that Mr. Strickler also was the primary one handling Dr. Nichols' testimony?

A That's correct.

Q So do you have anything further to offer as to why the issue wasn't raised that he wasn't properly qualified on the record as an expert before offering opinion testimony?

A I don't.
Q And then just jumping back to the child witness, N.G. , in this case, you all made an objection or made a motion and made arguments on Pages 13 through 49. And I've already referenced some of the testimony of Dr. Defelice during that motion as to whether or not she'd have to testify in the presence of Mr. Mitchell. If you can remember, was that -- how did that issue kind of play out in this case?
A I don't recall. I'm afraid I might be mixing it up with another case.
Q Then I'll ask you a more specific question.
A Yeah.
Q You all made a lengthy argument about her being able to not have to testify in the presence of Mr. Mitchell. And you've had an opportunity to recently review the transcript; is that correct?
A Yes.
Q Or the portions of the transcript related to these issues?
A Correct.
Q And is that an issue that you were attempting to preserve for appellate review?
A Yes.
THE COURT: What are the specific pages,

Ms. Blanchette?

MS. BLANCHETTE: Thirteen through 49, Your Honor.

THE COURT: Thank you.

BY MS. BLANCHETTE:

Q If you don't remember -- it's just been such a long time, so I'm going to be fair in my questions --

A Yes.

Q -- if you don't remember, that's fine, but in your opinion, did you believe it affected the trial that the child did not have to testify in the presence of Mr. Mitchell? Did that in any way kind of affect your strategy and the trial in this case?

A That's a very hard question to answer. Obviously, I'm representing Mr. Mitchell. We believe that -- or anybody, you know, that they should be able to be in the courtroom and see the testimony that's being presented against them. It's always difficult for the child under any circumstances. What effect that would have had on the trial or on the jury, I think that could go both ways, frankly.

Q Okay. And if his appellate defender had contacted you, would that be an issue that you would have recommended to him to include on the appeal?

A Yes.

Q How to handle the case?

A Yes, I think that's something that we were preserving the issue and it was a legal issue and it would be something that could be put before our appellate courts to see how they would rule on it.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.

THE COURT: All right.

(Pause.)

BY MS. BLANCHETTE:

Q Ms. Coggiola, you have been very candid with me in the preparation of this case. You and your prior office have made the file available, I think, to both sides. Is there anything else in response to these allegations or anything regarding your representation of Mr. Mitchell that you'd like to further testify to today?

A I can't think of anything in regard to the allegations. Very difficult case and we did our best, but, you know, like anything, every time you try one of these long cases and hard cases, you go back and you say, you know, why didn't I object to that or why didn't I put that up. I certainly have done that on a number of occasions with Mr. Mitchell's case.

Q Just because I see this come up so much in PCR, are you saying that you should have made these objections just in hindsight or actually at the time of trial, you should

have made those objections contemporaneously?
A At the time of trial, I should have made them. You know, hindsight is just when you -- you know, it's almost as if when you finish your closing argument and go and sit down and say oh, you know, you forgot that one thing you wanted to say, which is very common with lawyers, I think. But no, these were objections that should have been made at the time of trial, some of which were quite prejudicial.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Cross-examination?

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q Just a few questions, Ms. Coggiola. Thank you for being here.

A Sure.

Q You said that you spoke often to Ms. Mitchell, as well as to Mr. Mitchell's two sisters?

A I wouldn't say I spoke often to Ms. Mitchell. I would say that from the time Nathaniel Mitchell was arrested, his family was in close touch with me. Sometimes it was -- I think Patricia was the one I spoke to the most, but I met both sisters and his wife. I

just -- I can't, you know, recall the number of visits that we had.

Q Going to the questioning Ms. Blanchette entered into regarding Dr. Defelice, as far as the ability to qualify a witness of this type, I think she mentioned Kromah and its progeny, just to clarify, were you aware of those cases existing then or did they exist at that time?

A I don't recall being aware of them.

Q So it would have been more of the bolstering issue rather than an issue regarding clarification?

A Yes.

Q Thank you. The first issue involving the juror note that you spoke to, did you feel that there was a need to remove that juror before any reason involving the rest of the jury pool?

A Regarding the rest of the jury pool?

Q Correct. Was there a possibility of any tainting or any issue of that nature?

A Probably no more than always if you have a juror that gets upset during a trial. And we've -- you know, certainly, with some of the very difficult trials we've had, we've had jurors that become very upset by the evidence and it has an effect on the other. I think in this case, the critical thing was that this juror was saying that it would be hard for him to sit and we knew

what some of the evidence was going to be and should have asked to have this juror removed. But I think that was the concern.

You know, a couple of things can happen, if they end up getting dismissed -- if they end up sort of imploding in the middle of the trial, yes, they can taint the jury, although I don't know that was the first thing on our mind or should have been the first thing on our mind. And the other thing is that you then have to do a replacement with an alternative -- with an alternate juror and that can be a little bit disruptive. So it just seemed very basic to me that when we were aware of this note that it would have been better for that juror to be removed.

Q Okay. Compared to the later case of that juror issue when you did move for a mistrial, would you say that the effect of that juror's behavior was more demonstratively affective to the jury pool than the note issue?

A You mean the second juror?

Q Yes.

A That did the research and shared with the jury?

Q Yes.

A Yes.

Q I'm going to go back and ask some basic questions about your basic relationship and representation of Mr. Mitchell. You stated earlier you met with him often,

tried to speak with him and get his version of the story; is that correct?

A Yes.

Q You discussed the indictment and the elements of that offense?

A I feel sure I did. I don't recall specifically, but we would have gone over all the elements of what he had been charged with.

Q Is it fair to say that was your practice in your representation of your clients?

A Yes.

Q Similarly, was it your practice to review possible punishments for any and all charges with your clients?

A Yes.

Q Did you inform him of his constitutional rights, including not to a jury trial, to confront accusers, to remain silent and so forth?

A It certainly would have been my practice. I can't remember specifically, but I feel that I probably did.

Q Did you discuss the State's burden that they would have to meet when going to trial?

A Yes, I feel certain I did.

Q Do you ever feel that he did not understand your discussions about anything?

A No, he's a very quiet person, but I felt that he

understood our conversations.
Q Do you believe he felt comfortable in asking you questions about your representation of him or about any procedure or process you were going through?
A I think eventually, yes.
Q In this case, do you believe you received all discovery that the State had to provide?
A Yes.
Q And you reviewed all of that with Mr. Mitchell?
A Yes.
Q And similarly, you discussed any potential fact witnesses? I realize there may not have been many, but discussed the possibility?
A I feel sure we would have discussed them, probably some of the scientific witnesses that Mr. Strickler handled. I -- you know, our practice would be to, at least, tell him who they were and, in essence, what they were going to be testifying to, but not details.
Q Understood. Did you ask Mr. Mitchell to provide any names to you of people he thought would be beneficial to presenting his case?
A That would have been my practice, to be sure that he had shared with me anything he wanted me to do.
Q And, certainly, you discussed any possible defenses and defense strategies with Mr. Mitchell?

A Yes.
Q And you felt he understood all of these?
A Yes.
Q Did you enter into any plea negotiations on Mr. Mitchell's behalf to your memory?
A No plea negotiations. I can't recall whether a plea offer was ever made on behalf of the State, but there probably was, you know, that would be their practice. But from the moment I met Mr. Mitchell, he was going to -- he was going to plead not guilty to this charge and go to trial.
Q And that was the --
A So I don't remember any -- if I had been given a plea offer by the State, I certainly would have brought it to him. I'm required to do that. But from the very beginning, he was going to go to trial.

MS. KINARD: I believe you testified thoroughly to pretty much all of the issues, so I don't have any further questions at this time.

THE COURT: Ms. Blanchette, anything?

MS. BLANCHETTE: No, Your Honor.

THE COURT: Ma'am, you may step down. Thank you.

THE WITNESS: Thank you.

THE COURT: Ms. Blanchette, anything further?

MS. BLANCHETTE: No, Your Honor. I do have several

cases to hand up that I've referenced or touched on throughout the course of the day. I can just briefly explain why I'm handing these up to Your Honor.

The first thing I'll be handing up is a copy of the statutes that I provided to Mr. Strickler when I was questioning him on that issue involving the indictment. The second packet that I'll be handing up is State vs. Dawkins was the first case -- well, a case decided in 1989 dealing with the bolstering of the child witness testimony, and then I just have provided Your Honor a copy of the -- up to what I could find to be the current cases, including the Taylor case that I referenced today.

The next packet of cases are Burke vs. Stevenson and United States vs. Lighty. And I apologize, the Lighty decision, I tried to print it three times and the exact portion I need Your Honor to read, it just doesn't come out correctly, but you'll be able to get the citation off of it. I even printed it again this morning, it did the same exact thing, so I apologize. The portion you need to reference there regarding juror issues is really not able to be read.

And then I have a copy of -- I'm sorry, those two dealt with the solicitor's comments. Just a second. Let me make sure I'm clear on the record here. Burke v. Stevenson and Lighty deal with the solicitor's comments in