

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Circuit Court Judge

Antwan Gaddist, # 297546,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RECEIVED

DEC 08 2020

S.C. SUPREME COURT

NOTICE OF APPEAL

Antwan Gaddist, # 297546, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 16, 2020, issued by the Honorable G. Thomas Cooper, Presiding Judge, Fifth Judicial Circuit.



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December 4, 2020

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4006736

Antwan Lydell #297546 Gaddist

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment to the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 16 November 2020 to attorneys of record or to parties (when appearing pro se) as follows:

Jonathan D Waller

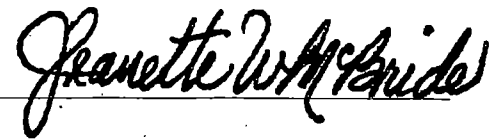
Lindsey Ann McCallister

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Antwan Lydell Gaddist, #297546,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-6736

ORDER OF DISMISSAL

2020 NOV 16 PM 1:14
JEANETTE W. MOSENFELDER
C.C.P., G.S., & F.C.

RICHLAND COUNTY
FILED

This matter comes before this Court by a *pro se* Application for Post-Conviction Relief (PCR) filed October 28, 2014. The Respondent made a Return to the application on June 5, 2015. An evidentiary hearing was convened on July 20, 2017. The Applicant was present and represented by his court-appointed counsel, Jonathan Waller. The Respondent was represented by Assistant Attorney General Jessica Kinard.

Testimony was presented from the Applicant, Public Defender Douglas Strickler, Eric Staggs, and Tracy Pinnock. At the conclusion of the hearing, the Court requested proposed orders from both sides and took the matter under advisement. The Respondent, through Deputy Attorney General Donald Zelenka provided this Court and opposing counsel a proposed order due to the fact Ms. Kinard was no longer a member of the Attorney General's Office. This Court makes an Order of Dismissal denying the application in its entirety.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the August 2011 term of the Court of General Sessions for Richland County for Homicide by Child Abuse (2010-GS-40-3916). The case was called to trial before the Honorable James R.

Barber. On January 31, 2014, pretrial motions were heard. An interlocutory appeal was made to the Court of Appeals concerning whether the trial judge had jurisdiction concerning a wiretapping issue dealing with the recordings made on a Sheriff's Department telephone. The matter was dismissed. Trial Tr. p. 131-132. The trial began on February 3, 2014. The Applicant was present and represented by Public Defender Douglas S. Strickler, Assistant Public Defender Tracy Pinnock and Assistant Public Defender Eric Staggs. The State was represented by Deputy Solicitor K. Luck Campbell, Assistant Solicitor JoAnna McDuffie, and Assistant Solicitor Nicole M. Simpson of the Fifth Circuit Solicitor's Office. The case proceeded to trial through the conclusion of the state's case. A motion for directed verdict was made and denied. On February 7, 2014, the Applicant appeared before the Honorable James R. Barber, III, and pled guilty as indicted to Homicide by Child Abuse. Trial Tr. 998-1006. Judge Barber sentenced Applicant to twenty-three (23) years' imprisonment. Trial Tr. 1020.

A timely Notice of Appeal was filed on Applicant's behalf from the guilty plea on February 10, 2014, through defense counsel Tracy Pinnock. Pursuant to SCACR, Rule 203(d)(1)(B), counsel Pinnock advised the appellate court that the arguable basis for appeal was that "the Defendant was dissatisfied with his sentence and insisted on appealing." Counsel stated "I am of the opinion that if the client insists on appealing, I am constrained to file an appeal," citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). On April 2, 2014, the South Carolina Court of Appeals dismissed the action, concluding that Appellant had failed to provide a sufficient explanation as required under SCACR Rule 203(d)(1)(B)(iv). State v. Gaddist, No. 2014-000239 (S.C. Ct. App. filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

II. ALLEGATIONS



In his *pro se* Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance Counsel, in that;
 - a. Counsel "failed to investigate and call witness."
2. Due Process Violation, in that;
 - a. "The applicant was denied effective assistance of counsel [pursuant] to 6th, 14th Amendments",
 - b. Counsels "performance fell below the objective standard of reasonableness."

During the PCR hearing, it appeared that the allegations were clarified as follows:

I. Ineffective Assistance of Counsel.

- a. RECORDED CALLS: Counsel erred in failing to move before the Court of Appeals to suppress the recorded telephone calls from the Sheriff's Department to his mother and the child's mother as a violation of the wiretapping law, asserting that he did not consent to the taping.
- b. TEDDY BEAR DEMONSTRATION EVIDENCE: Counsel erred in failing to adequately object to the demonstration by a law enforcement officer about the actual demonstration the Applicant performed with a teddy bear during his statement describing the way he held and shook the child.
- c. LIMITATION OF EVIDENCE OF VICTIM'S WOUNDS: Counsel erred in failing to have a clear understanding of the limits of Judge Barber's ruling concerning the admission of evidence of the victim's wounds.
- d. EVIDENCE OF PRIOR INJURIES: Counsel erred in failing to adequately object to the evidence of prior injuries to the child as evidence of prior bad acts of the Applicant.
- e. THIRD PARTY GUILT EVIDENCE LIMITATION: Counsel erred in failing to get a ruling on the record concerning the exclusion of his evidence of third party guilt, including evidence of injuries to another minor child in the household.
- f. COERCED CHOICE: Counsel erred in creating a situation where he was forced to choose between a challenge to the admission of evidence of his recorded telephone statements or his use of expert witnesses.

II. Involuntary Guilty Plea.



- a. The Applicant asserts his mid-trial guilty plea was not freely and voluntarily entered because his counsel's mistakes set forth above required him to enter the plea with an understanding from the trial judge that he would receive a sentence of 20 and 25 years rather than risk a life sentence if he was convicted.

III.

Antwan Gaddist - Guilty Plea Summary

The Entry of the Guilty Plea

On February 7, 2014, the motion for direct verdict and motion for mistrial were denied concerning the admission of evidence of bruising, a recess was held. (Trial Tr. 984-998). The Applicant then returned to court and entered a guilty plea. In particular, Judge Barber advised Gaddist that he had been at trial all week and the State had put up their case and Gaddist had the opportunity to offer any evidence. (Trial Tr. 999). Judge Barber stated Gaddist had the opportunity to have the matter go to a jury to decide. (Trial Tr. 999). Gaddist then confirmed to Judge Barber his wish is to enter a guilty plea. (Trial Tr. 999)

Gaddist acknowledged that he had adequate access to his three counsel. He affirmed that he had told them everything he knew about the matter, that they had answered all his questions, that they had done everything he has asked them to do, and that he was satisfied with their services. (Trial Tr. 999-1000).

Importantly, the following colloquy with the Court occurred describing what he was giving up by ending the trial:

THE COURT: You understand that in the course of this trial your lawyers have, in attempting to represent you, have made certain objections to rulings that I've made, and they've attempted to do certain things with respect to strategy in this case, and sometimes they were successful and sometimes they weren't. **And those ones that you, or they, believe wouldn't be successful, by entering the guilty plea you're gonna give your rights up to have those matters heard on appeal. Do you understand that?**



THE DEFENDANT: Yes, Sir.

(Trial Tr. 1000, l. 9-20) (emphasis added).

Gaddist admitted that he did not have to plead guilty. (Trial Tr. p.1000-01). Judge Barber pointed out that he had advised him and the jury that Gaddist was presumed innocent and that the State would have to prove him guilty beyond a reasonable doubt. Further, Judge Barber pointed out that by pleading guilty, he was giving up his right to have a jury decide his case. (Trial Tr. p.1001). Judge Barber restated that Gaddist was giving up his constitutional right to a jury trial and have this jury determine the verdict by pleading guilty. (Trial Tr. p.1001).

Judge Barber stated that Gaddist had been through the State's entire case-in-chief and seen the State's witnesses. Judge Barber pointed out that the Applicant's lawyers had all cross-examined and confronted the witnesses against him. (Trial Tr. p.1001-02). He stated that if the State put up reply witness, Gaddist would have been able to confront them. Gaddist confirmed that he understand that he was waiving those rights by his plea. (Trial Tr. p.1001, l.6-9).

The Applicant was advised of his right to remain silent and his right to testify. Judge Barber confirmed that had Gaddist decided not to testify if the trial proceeded, he would have instructed the jury to not consider that fact in its deliberations. Judge Barber concluded that pleading guilty he was giving up his right to remain silent. Applicant confirmed that he understood it. (Trial Tr. p.1002). The Applicant stated that he was aware that by giving up his right to go forward and complete the trial, that he was giving up his right to put up any defenses. (Trial Tr. p.1002).

Concerning issues that had already been raised at trial concerning suppression of evidence, the following occurred:



THE COURT: And you have attempted to suppress, keep out, certain evidence in this case through efforts on your attorneys part, some of which were successful, some of which were not. **You're gonna give up your right to suppress or keep out any additional evidence through motions to suppress or motions in limine, do you understand that, which mean keeping that testimony out. You understand that?**

THE DEFENDANT: Yes, Sir.

(Trial Tr. p.1003, 1.1-10).

Gaddist again confirmed that he was giving up his right to go forward with the trial and put up a defense.

Gaddist affirmed that he wanted to enter a guilty plea and that the plea was his decision. He denied that anyone had forced him to plead guilty or that he was promised anything to get him to plead. (Trial Tr. p.1003). He acknowledged that the penalty in the charge was 20 years to life. He was advised that a life sentence would be life. (Trial Tr. p.1004).

Gaddist confirmed that he had reviewed the indictment with his attorneys. He further acknowledged he had also heard the judge state the charge on a number of occasions. (Trial Tr. p.1004).

Judge Barber made further inquiry of counsel Pinnock who acknowledged she had a chance to confer with Gaddist about the plea. She stated she concurred in the entry of the plea and opined it was in Gaddist's best interests. She opined that she thought the State would prevail if they went forward. (Trial Tr. p.1004-1005).

Gaddist indicated he did not have any complaints against the Solicitor, law enforcement, or anyone at the jail.

Judge Barber noted that by pleading guilty this date, he would have 10 days to appeal the sentence. (Trial Tr. p.1006, l.20-24).

Gaddist affirmed that he had understood all the questions that had been asked and they were truthful answers. (Trial Tr. p.1007). Gaddist stated that prior being incarcerated he worked at the commissary at Fort Jackson. He stated at the time of the incident, he had been in jail for over three years for traffic offenses and drugs. (Trial Tr. p.1008).

Judge Barber then re-read the indictment for homicide by child abuse. (Trial Tr. p.1008). The Applicant then stated that he plead guilty. Judge Barber found that the guilty plea was freely and voluntarily entered with representation of competent counsel. (Trial Tr. p.1008, l.17-22).

Factual Basis of the Plea

Assistant Solicitor Joanna McDuffie advised the Court that the facts conclusively showed that on May 23, 2011 Gaddist did beat, shake and violently kill the 17 month old child victim. She stated he showed extreme indifference to the child because he failed to help or do anything for the victim which she urged was deplorable. She incorporated the medical evidence from the trial.¹

Victim impact evidence was presented by Robin Hill Davidson on behalf of the victim's father (her brother). (Trial Tr. p.1010). She noted that the victim was happy and full of energy and had a twin. She also pointed out the milestones of life. Ms. Davidson asked for life sentence. (Trial Tr. p.1012).

¹ In response to the earlier motion for directed verdict, McDuffie argued that the state had met its burden. She opined that the evidence showed that Gaddist was the only person with the child when the injuries occurred. She noted that each doctor testified that the child would have been instantly symptomatic and lost consciousness and brain function when the injury occurred. (Trial Tr. p. 986-987).

The victim's mother, Meisha Miller, described her pain with the loss of her child "at the hands of a monster!" (Trial Tr. p.1012, l.16-20). She urged that the "Gaddist" name be removed from her child. (Trial Tr. p.1014).

Counsel Pinnock made a plea in mitigation. Michiko Golston asked for mercy for the father of her four children who love their dad. (Trial Tr. p. 1015). Gaddist's brother George Gaddist stated he did not see him committing this crime even though he admitted it. He said Gaddist would sell drugs. He asked the Court to be lenient. Gaddist's aunt Sandra Gaddist stated the Applicant was a good person and had sympathy for the family and the loss of the child. She would not imagine him doing it. She asked for leniency and not the maximum sentence of life. (Trial Tr. p.1016).

Counsel Pinnock stated she had known Gaddist for two years since appointment and he was without anger or aggression throughout. (Trial Tr. p.1016). She noted that Gaddist has 5 children and everyone commented to her that he love children. She disputed that he was a monster. (Trial Tr. p.1017). She asked for lower part of the sentencing range. (Trial Tr. p.1017). The Applicant made a personal plea in mitigation requesting leniency. He stated his action was not intentional. He claimed he was never the type to hit or abuse children and claimed to be a loving father. He stated he got his GED since being incarcerated and got into no trouble. He expressed being sorry to the family. (Trial Tr. p.1018).

In sentencing, Judge Barber noted that when Gaddist decided to come clean that he understood the sadness of the thing and did care for the child. He opined that Gaddist lost control and that he believed the State's case (Trial Tr. p.1019-1020). He then sentenced the Applicant to 23 years. Id.



Summary of PCR Testimony

Applicant Antwan Gaddist

The Applicant, Antwan Gaddist, testified that he was arrested on a homicide by child abuse charge on May 22 or 23, 2011 (PCR Tr. p.5). He stated he was never bonded out of jail (PCR Tr. p.6). He stated he first met his initial lawyer, Jay Cooper, a couple days after the arrest. Cooper represented Applicant for around a year and a half before he died. (PCR Tr. p.6). At that point, he was assigned Tracy Pinnock. (PCR Tr. p.6).

Gaddist testified that Pinnock discussed the charge of homicide by child abuse, the penalties it carried and what the State would have to prove. (PCR Tr. p.7). He stated they talked about some of the evidence the State intended to use against him. (PCR Tr. p.7).

Concerning DNA evidence, he recalled the State calling a doctor at trial, but he did not recall discussing DNA with his lawyers. (PCR Tr. p.8). Although asserting that it was so long ago, Gaddist recalled going over some of the medical records. (PCR Tr. p.9).

Gaddist recalled the phone calls in his case, having heard about them about a few months before the trial started. (PCR Tr. p.9-10). He confirmed that the State contended that they were confessions. (PCR Tr. p.9-10). Gaddist claimed that he did not know he was being recorded when that calls were made. He stated that they were made in the Richland County Sheriff's Department. (PCR Tr. p.10). He claimed that there was not message or sign that he was being recorded. (PCR Tr. p.10). He stated he spoke with his lawyer about it. (PCR Tr. p.11).

Gaddist stated that in a pretrial hearing, they attempted to get the telephone calls thrown out. (PCR Tr. p.11). He claimed the judge told his lawyer that he did not have jurisdiction to do so and that they would have to go before a three-judge panel. (PCR Tr. p.11-12). Gaddist

claimed that he was not aware of the procedure other than what the judge told him (PCR Tr. p.11). This was the week before the trial. (PCR Tr. p.12).

Gaddist stated that they had hired two (2) experts from out-of-state, but they did not testify. (PCR Tr. p.12). He stated they were going to testify about the medical part and what they thought happened. (PCR Tr. p.12).

Gaddist stated at the middle of the trial, counsel Pinnock told him either they were going to have to have the expert come in and testify or they would have to challenge the telephone calls. (PCR Tr. p.13). Gaddist asserted that he wanted to do both of them. He stated that counsel told him that the judge was not going to stop the case, so he had to choose which option. (PCR Tr. p.13). He said he felt he was better a rock and a hard place with this choice. Gaddist stated that he chose the expert option. He stated that counsel told him that if he chose to challenge the phone calls, he could not get the expert and vice versa, but he could not have both. (PCR Tr. p.13-14).

Gaddist stated that the trial stopped on the date he took the plea.² He stated his counsel advised him that the judge told her to advise him that if the jury came back with a guilty verdict, he could get a life sentence, "but if I plead right now, he'll give me between 20 and 25." (PCR Tr. p.14, lines 17-20). Gaddist felt it was disturbing because how could the judge tell her to tell him that. (PCR Tr. p.14). This conversation occurred on Friday, after the trial had been going on since Monday. (PCR Tr. p.15). Gaddist stated that counsel basically told him it probably would be best, but that he was scared of what the judge said because he was supposed to be neutral. (PCR Tr. p.15).

² A review of the trial record reveals that the plea was taken after the State had completed its case-in-chief and after a directed verdict motion was denied. Trial Tr. P. 996-998.



Concerning defenses, Gaddist stated his lawyer spoke about going to the Sheriff's Department to inspect the phones to see if they had anything about the call being recorded. (PCR Tr. p.15-16). Gaddist did not think his lawyer did that. (PCR Tr. p.16). Gaddist stated he gave his lawyer names of witnesses, but he did not think they talked to them. (PCR Tr. p.16).

Gaddist stated he only met with his lawyers four to five times. (PCR Tr. p.17). He stated that he understood the State's case against him. Gaddist stated only he met with Eric Staggs the few times he was with Pinnock. He claimed he only met with Doug Strickler the day of the trial. (PCR Tr. p.17).

Gaddist stated he ultimately decided to plead guilty. He stated he did not like the decision to choose between the expert or challenging the telephone calls, because he felt he needed both of them and could not continue with just one. (PCR Tr. p.18). He said he chose to keep the expert. However, he ended up taking the plea. (PCR Tr. p.18).

He clarified that he took the plea after the judge told counsel he would give life with a jury verdict and because he had to choose between the expert or the telephone calls. (PCR Tr. p.19).

Gaddist stated his counsel never challenged the telephone calls because she never went before a three-judge panel. (PCR Tr. p.19). He confirmed that she tried to get them thrown out at pretrial hearing, but was advised by Judge Barber that he lacked jurisdiction. (PCR Tr. p.19). Gaddist claimed he wanted to challenge the telephone calls. (PCR Tr. p.20). He claimed it never happened. (PCR Tr. p.20).

Gaddist stated that he was aware that when he pled guilty he waived his rights to challenge the evidence the State had. (PCR Tr. p.20-21). Gaddist stated he changed his mind



because he could not get the phone calls challenged or get his experts. He questioned how he could go forward with the trial when he did not have everything he needed entered in the trial. (PCR Tr. p.21.)

On cross-examination from Assistant Attorney General Kinard, Gaddist claimed his lawyers made it seem that they had a good chance at trial, but no one knew how it would go. (PCR Tr. p.23).

Concerning potential witnesses, Gaddist asserted that he told counsel about the mother of another one of his children and another man that know a little bit of information. (PCR Tr. p.23). He claimed he told her about a couple of people she never contacted, but she did not know why she never did. (PCR Tr. p.23). Gaddist stated that he gave counsel the names and telephone numbers, but never heard more about it. (PCR Tr. p.24).

Gaddist stated that he was not aware that his attorneys filed a motion in the Court of Appeals trying to get them to review the telephone calls. (PCR Tr. p.24). The Applicant would not affirm that it was stated on the record by the Court that the Court of Appeals had reviewed the matter. (PCR Tr. p. 24-25).

The Applicant again described that he was given a choice between challenging the phone calls or using an expert and that he needed both. (PCR Tr. p.25). However, he claimed his counsel told him that he had to choose one. (PCR Tr. p.26).

Gaddist stated that he understood the choice he made to plead guilty, but felt he was put in a situation where he needed both to go forward. (PCR Tr. p.27). Concerning the outcome, Gaddist asserted that his counsel did not go into detail about what was going to happen, but did

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say what the judge told her about sentencing which he felt was disturbing. (PCR Tr. p.27). He stated counsel left the decision to plead up to him.

On re-direct, Gaddist stated he was not aware of anything his attorneys filed in the Court of Appeals about the phone calls. (PCR Tr. p.29).

Gaddist confirmed that he was aware of the phone calls months before the trial. He opined that he felt this could have been challenged before then. (PCR Tr. p.30).

Public Defender Doug Strickler

Public Defender Douglas Strickler testified about his limited role in the Applicant's defense. (PCR Tr. p.31-36). He stated Ms. Pinnock consulted him concerning medical issues and was present when she interviewed doctors. (PCR Tr. p.32). He also was involved with the DNA issues. (PCR Tr. p.32).

Counsel Strickler was asked about Tr. 778 where he made a motion for mistrial based upon an earlier motion to exclude evidence of bruising that he claimed the doctors could not tie to the timing. Counsel could not recall a reason for not objecting to the testimony earlier. (PCR Tr. p.34, lines 3-6).

Counsel Strickler was reminded that the defense has attempted to introduce evidence of injuries that occurred with the other twin which Judge Barber did not allow. However, he did not recall why they failed to object to Dr. Amick's testimony (Trial Tr. 814) concerning blood at the scene and DNA regarding the other child. (PCR Tr. p.34). He also stated he did not recall being present when the decision to plead guilty was discussed.

Assistant Public Defender Eric Staggs

Counsel Eric Staggs testified that he was second chair for Ms. Pinnock. It was his first case at trial. (PCR Tr. p.36). Staggs testified he handled the Jackson v. Denno hearing. He stated he had an interest on coercion and false confessions. (PCR Tr. p.37). He stated they had retained an expert in false confessions. (PCR Tr. p.37). The Applicant had given two statements and the second statement was being challenged. (PCR Tr. p.37). He was basing the motion on a 1983 7th Circuit case where investigators had told a suspect that his version was medically impossible. In this case, Staggs asserted that Investigator Isenhoward told Applicant that his story was medically impossible at least twice. (PCR Tr. p.38). Staggs confirmed that expert was from Florida and travel arrangement had been made for him to testify the next Monday. (PCR Tr. p.39).

Staggs stated he was also involved in the motion to suppress the phone calls. (PCR Tr. p.39). He further acknowledged that he objected to Sgt. Isenhoward's testimony discussing what took place without the teddy bear, after Judge Barber had granted his earlier motion to prevent a demonstration made with the teddy bear. (PCR Tr. p.39-40). See Trial Tr. 955.

Staggs opined that the trial tenor was very hostile. He suggested that it was difficult to make a record which caused him to fail to renew his objection at that point when Isenhoward made another demonstration. (PCR Tr. p. 40).

Staggs admitted that they tried to withdraw their objection to the evidence of bruising. (PCR Tr. p.41, citing Trial Tr. p.795). He did not recall the basis. (PCR Tr. p.41).

Staggs recalled being present at the guilty plea, but he was not present when the State's final offer was discussed with the Applicant. (PCR Tr. p.41).

On cross-examination, Staggs was aware of the interlocutory appeal, but that Ms. Pinnock handled it. (PCR Tr. p.41). Staggs stated it was his first trial and thought they did the best they could. (PCR Tr. p.42).

Staggs understood the likely outcome was a life sentence if convicted and less if he pled, but did not recall Judge Barber explicitly stating that. (PCR Tr. p.42).

Assistant Public Defender Tracy Pinnock

Lead counsel Tracy Pinnock testified that she was transferred to Gaddist's case after Mr. Cooper died in April 2013. (PCR Tr. p.43). She had previously discussed sitting third chair with Cooper. After the death, she went to the Public Defender and offered to have this case transferred to her since she was aware of the case. (PCR Tr. p.43.)

She testified that her notes reflected that she met with Gaddist approximately ten times prior to trial. (PCR Tr. p.44). She was sure she discussed the State's evidence leading up to the trial. She felt he had been accused by the State because he was the last one with the child. (PCR Tr. p.45). She noted after the child was taken to the hospital, he had made comments in some interviews to law enforcement which led him saying he had shaken the child, although, medically speaking, she felt "shaken baby syndrome" was not present. (PCR Tr. p.45).

Ms. Pinnock stated they retained Dr. John Plunkett³ as a consultant and arranged for him to appear at trial on the medical side. (PCR Tr. p.46). She also retained Dr. Bruce Frumkin,⁴ a

³ Dr. John Plunkett was a forensic pathologist involved in shaken baby issues as an opponent of shaken baby syndrome. See Caban v. State, 892 So. 2d 1204, 1207 (Fla. Dist. Ct. App.), cause dismissed, 909 So. 2d 861 (Fla. 2005); Com. v. Epps, 474 Mass. 743, 761, 53 N.E.3d 1247, 1261 (2016) (citing Plunkett, Fatal Pediatric Head Injuries Caused by Short-Distance Falls, 22 Am. J. Forensic Med. & Pathology 1, 7-9 (2001) (symptoms attributed to shaken baby syndrome also found in fatal short falls)).

false confession expert from Florida and made arrangement for him to appear. (PCR Tr. 46). She also believed they discussed the DNA testing at some point. (PCR Tr. 47).

Pinnock stated the defense theory in the case was that Gaddist was not the person who caused the injuries that resulted in the death. (PCR Tr. 47). She stated they reviewed the medical records of the twins and there was a history of possible inflicted injuries leading to the point when Applicant came back into the picture and living in the home. (PCR Tr. 47). The defense theory was that the abuse had existed before Gaddist was there. She asserted that he was only charged because he was in the house when the 911 case was made. Pinnock stated that there plan was a third-party guilt defense. (PCR Tr. 47).

Pinnock clarified that Gaddist was not the twins' father, although he was the father of the oldest daughter. (PCR Tr.47). She said Gaddist has only been in the picture for a few months prior to his arrest. Further, she said there were injuries on the child that had occurred prior to the date of the death. (PCR Tr. 48).

Pinnock confirmed they made a motion to suppress evidence of bruising, bite marks, and a black eye that happened prior to the date of the fatal injury. (PCR Tr. 48). She asserted the decision on the pre-trial motion was confusing. She contended there was a different understanding of what the pre-trial ruling allowed concerning what testimony could be presented, what injuries were kept out and who could testify to the injuries (PCR Tr. 48-49).

Since no written order was entered, there was no clarification about what testimony could be presented. (PCR Tr. 49). Pinnock stated that evidence was presented about bruising and

⁴ Dr. Bruce Frumkin is a forensic psychologist. See People v. Nelson, 235 Ill. 2d 386, 423, 922 N.E.2d 1056, 1076 (2009).



injuries to the child when Pinnock thought those injuries had to be tied into the injuries that occurred on that date.

She claimed that the State never tied it all to the final date at the apartment. (PCR Tr. 49). She said there was testimony about the black eye because of the testimony about the orbital fracture and bleeding under the skin. (PCR Tr. 49). However, she acknowledged that the words "black eye" was not presented to the jury. (PCR Tr. 49).

She also claimed multiple witnesses testified about the bruising on the child, but did not indicate the location. (PCR Tr. 50). Counsel stated that they did not know if these bruises the State was alleging happened occurred on the incident date or before. However, she claimed there was injury testimony throughout the trial because no one was clear about the pretrial ruling. (PCR Tr. 50).

Pinnock asserted the unclear ruling affected the way they tried the case. She contended that when the officer who observed the bruises and some of the medical staff could have been questioned about the bruises and the timing of the bruises and their inability to time them if the defense knew they were allowed to go into it. (PCR Tr. 50).

Counsel confirmed that she attempted to impeach Investigator Faust about Ms. Miller concerning her statement to law enforcement (PCR Tr. 51). Ms. Miller had given a statement that the child did not go to the daycare that morning because of the bruising, citing Trial Tr. p.925. Counsel stated that at that point (when prosecutor McDuffie objected); it revealed that there was a misunderstanding about the limiting order. ("on different pages as far as the ruling was concerned"). (PCR Tr. 51-52). There were no written orders on any of these matters.

Counsel confirmed at p.531 of the trial transcript that Judge Barber held that he would allow the investigator to describe what he observed the Applicant did in the interrogation, but not to demonstrate what he did with the teddy bear at that time. (PCR Tr. 52). Pinnock recalled that Sgt. Isenhoward later held his hands up like he was holding something, but counsel did not recall if he was making a choking or shaking motion, when he held his hands up like he was holding something under the arm pits referring to Trial Tr. p.955. (PCR Tr. 53).⁵

Counsel Pinnock stated that subsequent to the Applicant's second statement, the defense learned that there had been recorded telephone calls made from the Sheriff's Department when they received the discs during discovery. (PCR Tr. 53). Pinnock testified that they felt the phone calls should have been suppressed because they did not believe that Gaddist was on notice he was being recorded. (PCR Tr. 53). Counsel stated that they made a pretrial motion to suppress under the wiretap statute. (PCR Tr. 53). The State asserted that because there was a sticker on the phone and attempted to introduce a photograph of the telephone, but it was suppressed. (PCR Tr. 54). Counsel stated that the State could not confirm the photograph was of the same telephone. (PCR Tr. 54). (See Trial Tr. p. 110-115). Counsel stated she relied upon two cases (including State v. Whitner) to assert that the Circuit Court had the authority to suppress based upon lack of notice and violation of the wiretap statute. However, she stated she was told the Circuit Court lacked jurisdiction to entertain the motion and that it had to be presented to the Court of Appeal. (PCR Tr. 55). (See Trial Tr. p.112).

Pinnock stated that they appealed Judge Barber's decision not to hear the motion to suppress for lack of jurisdiction. However, she confirmed that the defense never filed a motion

⁵ The record reflects at Trial Tr. 955 that counsel Staggs objected during Sgt. Isenhoward's description, which Judge Barber overruled.

with the Court of Appeals asking them to suppress it, but challenged Judge Barber's ruling that he did not have jurisdiction. (PCR Tr. 55).

Counsel declared she was sure that she researched the portion of the wiretap statute that the telephone calls fell under. (PCR Tr. (55)).

Counsel described the decision not to file a motion in the Court of Appeals. She stated that the Court of Appeals issue arose for the first time the Friday before the trial. She stated the defense was told that if they challenged the admission of the calls in the Court of Appeals that they would not be granted a continuance and the judge refused to take witnesses out of order. Pinnock stated the out-of-town witnesses had arranged to be available on a day certain on the second Monday of the trial and would not be available later in the week (PCR Tr. 56-57). Because the judge refused a continuance and indicated he would not allow them to be called out of order, she felt they had to pick whether to keep their experts or challenge the telephone calls. (PCR Tr. 57). (See Trial Tr. p115).

Counsel stated that she learned of the jurisdictional issue on the Friday before the trial. She confirmed that she did not have any information in discovery that an application to authorize the wiretaps had been made to a circuit judge, or of the involvement by SLED or the Attorney General's Office in those matters. She stated that she was not aware that "homicide by child abuse" was not on a list of offenses under the state wiretap statute that was authorized to be investigated. ⁶ (PCR Tr. 57-58).

⁶ PCR counsel was apparently referring to S.C. Code Ann. § 17-30-70(1). Although the list does not include "homicide by child abuse," it does include "murder," "assault and battery with intent to kill" and "accessory before the fact".



Pinnock stated the next Monday, Judge Barber advised them that their immediate appeal to the Court of Appeals had been dismissed. (PCR Tr. 58, l. 17-22). Pinnock claimed, in hindsight, that she should have filed it in the Court of Appeals earlier, "but I didn't know". (PCR Tr. 59, l. 4-5). She confirmed that she filed objections several times throughout the trial, but did not consider filing another appeal while the case was proceeding. (PCR Tr. 59).

She stated the decision to plead guilty was made by Mr. Gaddist after the State had rested. (PCR Tr. 59). According to her, at that point they had a meeting with Judge Barber who indicated to them that if they continued going forward and if he was found guilty, that he was not necessarily going to give Gaddist a life sentence. However, he suggested to them that it would be about the same thing, but if he changed his plea, the judge would give him less. (PCR Tr. 60, l. 4-11).

Pinnock confirmed Gaddist's earlier PCR testimony that he was in the position to choose between either challenging the phone calls or having the experts testify because the experts were not available after that Monday, and the court not allowing them to take the witnesses out of order. She opined that if they had filed another challenge in the Court of Appeals, they would have to wait to have it scheduled. She stated that even if expedited to be heard within two days, it would push the case back and the experts would not have been available. (PCR Tr. 61).

She stated that the State considered the telephone calls confessions and they were made to the mother of the child and his own mother during the calls. (PCR Tr. 61).

Concerning the advice about pleading guilty, Pinnock did not recall if she specifically advised him that "he'd be waiving objections and motions and everything that had been made at



the trial” or that any of the “stuff would not be preserved for appeal”. (PCR Tr. 61, l. 16-20).⁷ She recalled going over an advice of rights however. (PCR Tr. 61).

On cross-examination by Assistant Attorney General Jessica Kinard, Pinnock claimed that the alleged hostility in the trial affected her ability to make effective arguments and objections. (PCR Tr. 62). She felt that in addition to battling the State, that she was also battling the bench. (PCR Tr. 62, l. 22-25.). Concerning the defense’s objections to the teddy bear or the demonstration, she opined that they had objected at pretrial, but could not recall if it was renewed during the trial.⁸

Concerning the evidence of injuries to the child and the alleged confusing rulings, Pinnock confirmed that the reason she wanted to keep out these being mentioned was that they could be viewed as prior bad acts on the part of Applicant. (PCR Tr. 63). She stated that they were concerned about the inference concerning those injuries that Gaddist was the person who inflicted them. She said that the cause of death was clear in the medical reports and listing the other injuries would be unnecessary. (PCR Tr. 64).

Pinnock confirmed that she met with Judge Barber after the close of the State’s case. Pinnock verified that she relayed to Gaddist the information about Judge Barber’s opinion on sentencing. (PCR Tr. 64). She stated that an offer had been made early on in her representation, but their focus was always preparing for trial. (PCR Tr. 65) She opined that they were confident in the theory of the defense, but a lot of things went extremely poorly during the trial. (PCR Tr. 65). She felt it was “almost personal” throughout which she opined affected their ability to represent him properly. (PCR Tr. 65). Pinnock noted that the defense was told off the record that

⁷ However, during the colloquy at the guilty plea, Judge Barber essentially stated the same thing. Trial Tr. p. 1000, l. 9-20; p. 1003, l. 1-10. .

⁸ See Trial Tr. pp. 530-531; 955

they were not going to be allowed to call the witnesses to testify or put up "that defense". (PCR Tr. 65-66). She clarified that they were told that they were not going to be allowed to put up a third party guilt defense. (PCR Tr. 66, l. 8-13). She stated she spoke with the Applicant about this in the hallway as they were arguing with the solicitors about their defense theory. (PCR Tr. 66).

Pinnock opined that she felt at the close of the State's case that they did not have a chance of prevailing because she felt that they were unable to present their third party guilt defense. (PCR Tr. 76).

Pinnock stated she did not advise him to plead guilty, but told Applicant where they were. Although Gaddist had seen what happened inside the courtroom, he was not present at the out-of-court communications. She opined that Gaddist felt he did not have a chance.

Pinnock opined that when Applicant entered the plea, he understood for the most part, the rights he was waiving. (PCR Tr. 68).

Pinnock stated that Applicant did not have problems communicating with them. She clarified that their confession expert, Dr. Frumkin, tested his intellectual functioning and had opined that he was in the low borderline in cognitive functioning. (PCR Tr. 69). The defense had concerns which led to the consultation with the experts. These concerns caused the defense team to explain things in as much detail as they could. (PCR Tr. 69). Pinnock clarified that competency to stand trial was not an issue. (PCR Tr. 69-70). She stated that if they had proceeded with their defense at trial, they would have presented his IQ and understanding as part of his defense. (PCR Tr. 69-70). She said that based upon the totality of the circumstances, it was her opinion that Gaddist was forced to plead guilty. (PCR Tr. 70, l. 4-11).

On re-direct, Pinnock stated that the some conversations with Judge Barber were not put on the record (or preserved for appeal). She stated it was her understanding that they would not be able to present witnesses for third-party guilt. She stated that there was never a ruling on third-party guilt and it was not able to be appealed. (PCR Tr. 70).⁹ Pinnock further agreed that the alleged confusing or inconsistent rulings were not preserved for appeal when he plead guilty. (PCR Tr. 71). Counsel stated that prior to trial they had been conflicted that they would be able to challenge the recording of the telephone calls, which the State described as confessions. (PCR Tr. 71). Pinnock further asserted that they were prepared to present an expert witness to assert that the confession made to law enforcement was involuntarily given and a false confession. (PCR Tr. 71). Pinnock stated their goal was to have any evidence of a confession excluded. (PCR Tr. 71).

Pinnock stated that they had attempted to present evidence about the other twins' injuries through Dr. Rosa, but it was denied. (PCR Tr. 72). (See Trial Tr. 754-760). (The defense proffered the evidence which the trial judge ruled not relevant. Trial Tr. 760-768). Pinnock confirmed that there had been evidence in the trial record about the other child. (PCR Tr. 73). Pinnock stated that they wanted the DNA evidence about the other child's injuries "to establish that there had been issues happening at the house prior to Mr. Gaddist ever being there". (PCR Tr. 73, l. 13-17).

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

⁹ It was never developed at the PCR hearing what witnesses would be called or the nature of the evidence of third party guilt.

Applicant's first set of claims are allegations of ineffective assistance of plea counsel. This Court concludes as a matter of law that Applicant's plea counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Specifications of the grounds will be addressed below.

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving “(1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case.” McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). In order to establish prejudice when challenging a guilty plea, a defendant must prove “there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial.” Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial.”

Because the prejudice inquiry in a case involving a guilty plea is so limited, it was not an overwhelming evidence analysis in this case. See Smalls v. State, 422 S.C. at 187–196, 810 S.E.2d at 843–47 (2018) (surveying cases that discuss overwhelming evidence -all of which involved a conviction obtained at trial). The prejudice analysis is limited to the outcome of the

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plea process - whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial. Frierson v. State, 423 S.C. 257, 815 S.E.2d 433 (2018).

Here, there is a full record before the Court which includes the pretrial motion hearing, the trial of case through the State's case in chief, the motion for directed verdict, and the eventual guilty plea proceeding. This Court has also been provided a copy of the post-conviction relief proceedings which allow a fair assessment of the full proceeding that occurred. This presents a thorough, but not unique record, record that provided the Applicant and his counsel with a knowing and intelligent decision about the full nature of the State's case against them, the defense evidence they had to contest the showing, and the effect of the decision to plead guilty. To be clear, this Court is not making an overwhelming evidence of guilt assessment which the Supreme Court in Frierson rejected. Rather it is an assessment whether the alleged deficiencies were deficient and if so whether the deficiencies in light of the entire record before the court created "a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

A. Ineffective Assistance of Counsel by Failure to Properly Advise Concerning Guilty Pleas and Waiver of Trial

In his pleadings before the Court, the Applicant asserts that his counsel was ineffective in advising him concerning his guilty plea entered after the state completed his case in chief. Some of these matters will be discussed below in parts B, C, and D which are incorporated herein. He complains that prior to the trial, he was given a choice to either delay the trial or seek to suppress inculpatory recorded telephone from the Sheriff's Department through a motion to the Court of Appeals or proceed with the availability of both of his experts. This will be essentially addressed in Part B herein related to the decision to not seek the petition before the Court of Appeals under the wiretap act. Within his testimony at trial, he complained that he was not advised that by



entering his plea, he would waive his right to challenge Judge Barber's rulings related to the evidence the state presented at trial on a direct appeal. One of the areas was his complaint about his failure to present third-party guilty evidence. He further asserted that counsel failed to get a ruling on the record about the exclusion of third-party guilt evidence and evidence related to evidence of injuries of another child. (PCR Tr. 47, 66-67, 78).

In addition, he has claimed in his pleadings that counsel claimed at the PCR hearing that she did not know or realize at the time of the trial that a guilty plea waived any challenge to the trial judge's rulings or evidence presented at trial. However, a review of the testimony of counsel Pinnock does not support that characterization. Rather, Pinnock stated that she did not recall specifically advising Gaddist prior to the plea that he'd be waiving his objections and motions and everything made at trial. PCR Tr. 61, l. 21-p.62, l. 2.

However, counsel stated that he was present during the plea and that he believed the Applicant understood the questions that were asked of him, including the right he was waiving. PCR Tr. 68. See Trial Tr. 1000, l. 9-20, p.1003, l. 1-10. Importantly, the Applicant testified that he was aware that when he pled guilty he waived his rights to challenge everything that happened at trial. PCR Tr. 20-21.

This Court must find that Applicant was aware when he pleaded guilty that he was waiving his right to challenge on appeal matters that were raised during the trial. Even though counsel could not specifically recall what he told the Applicant related to this when he went over his rights prior to the plea, the trial court also advised the Applicant specifically in the plea inquiry. Particularly the following inquiries:

THE COURT: You understand that in the course of this trial your lawyers have, in attempting to represent you, have made certain objections to rulings that I've made, and they've attempted to do certain things with respect to strategy in this case, and sometimes they were successful and sometimes they weren't. **And**

Handwritten signature or initials in the bottom left corner, possibly reading "G. 26".

those ones that you, or they, believe wouldn't be successful, by entering the guilty plea you're gonna give your rights up to have those matters heard on appeal. Do you understand that?

THE DEFENDANT: Yes, Sir.

(Trial Tr. 1000, l. 9-20) (emphasis added).

Additionally:

THE COURT: And you have attempted to suppress, keep out, certain evidence in this case through efforts on your attorneys part, some of which were successful, some of which were not. **You're gonna give up your right to suppress or keep out any additional evidence through motions to suppress or motions in limine, do you understand that, which mean keeping that testimony out. You understand that?**

THE DEFENDANT: Yes, Sir.

(Trial Tr. p.1003, l.1-10).

In view of this evidence, the Court must conclude that any alleged deficiency in plea counsel's representation was cured by the plea colloquy. See Bennett v. State, 371 S.C. 198, 205 n. 6, 638 S.E.2d 673, 676 n. 6 (2006) (reversing grant of PCR and stating that "even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range"); Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (reversing grant of PCR and holding that even if plea counsel erroneously informed defendant that his sentence would only be three years, the information conveyed at the plea hearing cured any misconception caused by counsel's alleged inaccurate advice); Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (reversing grant of PCR on the ground that there was no evidence to support the PCR judge's finding that applicant received ineffective assistance of counsel due to erroneous sentencing advice where "any misconception was cured at the plea hearing"); Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (reversing grant of PCR and recognizing that in considering an allegation on PCR that a guilty plea was

based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing); Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).¹⁰ This Court finds that the Applicant was aware of the fact that he was waiving the issues raised during the trial could not be raised in an appeal or further proceedings.¹¹

The Applicant indicated that he felt that he had no choice but to plead guilty because the trial court indicated to his lawyer that if he was convicted that he would receive a life sentence. PCR Tr. 19. However, counsel testified that after the State concluded its case, she met with the trial judge and learned from the judge that if they continued in the case and the jury came back with a jury verdict of guilt, although he may not sentence him to life he was going to hit him pretty hard and that if he pled guilty, he would give him less. PCR Tr.p. 60. He stated that he passed this information to Gaddist. PCR Tr.p. 60, 64. At the plea, he was advised by the trial judge that he was facing a sentence of 20 years to life. Trial Tr.p. 1004. He stated he understood. He also stated that he had not received any promises. Trial Tr.p. 1003. The Applicant received a sentence of 23 years with credit for time served. Trial Tr. P. 1020. This Court must find that the

¹⁰ “In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

¹¹ Consistent with this determination, though the Applicant filed a notice to appeal the plea, counsel advised the appellate court that this was based upon his client’s dissatisfaction with the sentence. See SCACR Rule 203 explanation, Feb. 14, 2014.

plea was not the product of any unkept promise and the it was entered upon advice of counsel who properly advised of the punishment he was facing.

The Applicant contends that he was forced to plead because he was given an unnecessary choice between going forward to trial with his expert witnesses or seeking a petition to the Court of Appeals on the recorded telephone calls issue. The calls issue will be more fully addressed below. However, the choice was made before the trial began, not at the time he entered his guilty plea. At the time the plea was made, the Applicant had full knowledge of the State's presentation and the offer to allow a plea at that stage with a sentence less than life. The PCR proceeding evidence a little confusing on this matter because it made it to appear the timing of the decision to proceed to plead guilty was done immediately after a strategic decision had to be made on whether to proceed with the defense experts or continue the matter and seek to exclude the evidence of the recordings. As noted more fully below, the decision was made to proceed to trial and present a defense with the expert witnesses. When the plea was entered, he noted that he was expressly waiving issues in regard to the motion to suppress. He has failed to show how that choice to proceed to trial somehow induce the later plea. To the contrary, it allowed for a more intelligent choice on whether to pled guilty. Further, he has failed to show how that advice at the time of the plea was deficient or prejudicial under Strickland where the plea was not induced improperly and the waiver of the right to proceed with their defense at that time was not knowing.

The Applicant further complains that he was coerced to plea because the trial court was not going to allow him to present a third party guilt offense and that his counsel was ineffective in failing to get an on the record order of the judge concerning third party guilt. Counsel Pinnock testified that she had an off the record discussion and was told that they would

not be allowed to put up a third party guilt defense. PCR Tr.p. 66. She stated that she advised her client of this discussion, although he had not been present during the discussion with the solicitors. Id. Pinnock stated at that point she did not feel that he had any likelihood of prevailing. PCR Tr.p. 66-67. It was at that point, the discussion began about the plea. PCR Tr.p. 67 – 68.

During the PCR hearing, the Applicant failed to present any proposed evidence of third party guilt. In State v. Burgess, 391 S.C. 15, 22, 703 S.E.2d 512, 516 (Ct. App. 2010) the Court opined that “[T]he admissibility of evidence of third[-]party guilt is governed by the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, 198 S.C. at 104, 16 S.E.2d at 534 the Court held that providing for a defendant seeking to assert third-party guilt: “[T]he evidence offered by [the] accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.” quoting 16 C.J. 560)); *id.* at 104-05, 16 S.E.2d at 535 (“But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.” (quoting 20 Am. Jur. 254)); Holmes v. South Carolina, 547 U.S.

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319, 330 (2006) (characterizing the purpose of the Gregory rule as “to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues”); State v. Brooks, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct. App. 2019) (“The Holmes court recognized that evidence of third-party guilt is appropriately managed by evidentiary rules such as Rule 403, SCRE.”), *cert. denied*, S.C. Sup. Ct. Order filed Aug. 10, 2020; Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

During the state’s case-in-chief, the Applicant had attempted to introduce evidence of prior injuries that occurred to a different child through a DSS letter. Trial Tr. P. 755-757. Counsel stated that they were presenting the evidence related to the other child to attack the integrity of the investigation since Applicant was not involved in those injuries. Trial Tr.p. 756-758. Particularly, the defense was asserting that the investigation on one person was no investigation at all. Trial Tr.p. 759-760. There was a proffer made through Dr. Rosa concerning the investigation about the victim’s brother in May 2011. Trial Tr.p. 760-767. At the conclusion, Judge Barber ruled the evidence concerning the other child and their injuries were not relevant. Trial Tr.p. 767-768.

Since the Applicant failed to introduce any other evidence concerning purported third party guilt during the PCR hearing it is difficult to assess whether any proffered evidence would have impact on the eventual guilty plea decision. See Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (holding prejudice from trial counsel's failure to procure and present evidence cannot be shown where the omitted evidence is not presented at the PCR hearing). In

Glover the Court observed that mere speculation and conjecture by the applicant is insufficient to establish the allegation that counsel's deficient performance resulted in prejudice).

In addition, the failure to get a ruling on the unknown evidence prior to the plea is equally difficult to assess. However, at the time of the guilty plea, the Applicant clearly indicated his understanding that he was waiving any defense that he could have presented. Trial Tr.p. 1002-1003. Since the Applicant's testimony reveals he was aware of the alleged defense and the trial court's action, this cogent and unequivocal statement reveals he was aware that he was foreclosing his own right to attempt to present such evidence.

This Court must concluded that he has failed to show that counsel was ineffective in failing to get an on-the-record ruling concerning third party guilt. He has not shown the counsel was deficient where the case ended prior to the start of the defense case and the ruling was not necessary to preserve the matter for appellate review. Had the case proceeded to a jury verdict, counsel's duty would have been different to make the record and offer the evidence. However, this matter ended with the plea. Counsel's advice at that time was not deficient. Further, Sixth Amendment prejudice has not be shown to a reasonable probability because he failed to show how making an on-the-record order about exclusion of third party guilt evidence, a matter that he was already aware would occur if he proceeded to his case, would have caused him to continue with the trial and risk the life sentence rather than plead guilty to a lesser sentence. He has failed in his burden of proof.

Implicit in these conclusions is the fact that the Court is finding that the guilty plea was freely and voluntarily entered. This Court incorporates its earlier summary of the guilty plea set forth above. When determining issues relating to guilty pleas, this Court will consider the entire

record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). To ensure the defendant understands the consequences of his guilty plea, the trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed. *Id.* at 434-435, 405 S.E.2d at 392. Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of the guilty plea. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). See, e.g., Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge).

This Court must find that the plea record and the evidence in this proceeding supports the conclusion that the plea was knowing and voluntary. The Applicant was aware of the consequences of the plea of being a sentence between 20 years to life and was aware that he

would likely receive a sentence less than life based upon his conversations with his counsel. Judge Barber thoroughly went through the various trial rights he was waiving, with the additional understanding that the Applicant was fully aware of the state's case against him. The Applicant has failed to assert that there were any trial right that he was unaware that he was waiving at plea or in this proceeding. His statements as well as his counsel's statements carry a presumption of verity that the Applicant and counsel have failed to present a cogent reason to reject. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea. See Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea"). Any assertion that the plea was not knowing or voluntary must be denied.

B. Ineffective Assistant of failing to move before the Court of Appeals to suppress the recorded telephone calls from the Richland County Sheriff's Department Office.

In his pleading and testimony, Applicant contends that his trial counsel was ineffective in failing to petition the South Carolina Court of Appeals pursuant to S.C. Code § 17-30-110 to suppress the admission of recorded telephone calls. These calls were made by the Applicant from an office of an investigator at the Richland County Sheriff's Department subsequent to the giving

of an inculpatory statement. Gaddist made calls to his mother and the mother of the child victim. See Trial Tr. p.202, l. 15 - p.203, l. 5. At the outset of the trial, Judge Barber inquired of defense counsel whether they were going to petition the Court of Appeals to suppress these recordings. Trial Tr. p. 131-133.¹² Counsel Pinnock indicated that the Applicant had decided not to petition the Court of Appeals pursuant to the wiretap statute. Tr. 132. Counsel indicated that she had discussed the matter with the Applicant and they had concluded not to proceed. Judge Barber specifically inquired of the Applicant who confirmed that he had freely and voluntarily elected to not proceed in the Court of Appeals on a motion to suppress. Tr. 133. Judge Barber stated that by doing this that he would not grant a motion to suppress the telephone call evidence. Tr. 133, l. 12-15. The Applicant affirmed that he understood. Tr. 133, l.16.

During the trial, evidence of the recorded telephone calls were presented. In the opening statement, Assistant Solicitor McDuffie noted that after he made his inculpatory statement, the Applicant had asked to make a telephone call which was a recorded line and that he made three calls, two to his mother and one to the victim's mother, Meisha Miller. She summarized the call to Ms. Miller when Applicant tells her "she was fussy and I just shook her" and when asked why he did it he just tell her "he shook her." Tr. 202, l. 15-21. In the call to the mother, the prosecutor summarizes how his mother questioned him as to why he would say he hurt the baby and he told her "it the truth because I shook her until she went unconscious," and that "I had to come in and tell the truth." Tr. 202-203.

¹² Applicant had moved before Judge Barber in the pretrial hearings to suppress the statements. Tr. 111-115; 127-128. During this pretrial hearing, Gaddist contended that there was no notice that the calls were being recorded. Assistant Solicitor rejected that assertion and stated it was incorrect. Trial Tr. P. 113. See Trial Tr. P. 906-912 (testimony concerning the existence of the sticker on the phones). However, no hearing on the merits of the claims was held. The trial court indicated it lacked jurisdiction under the state wiretap law and the motion had to be made before the Court of Appeals. A pretrial appeal was taken from that order on whether Judge Baber had jurisdiction to rule on the motion which was dismissed. Tr. 131-132.

Handwritten signature/initials

During Meisha Miller's testimony, she testified about the initial telephone call she received from Applicant when he told her that the child was no longer breathing and which led her to call 911. Tr. 289-290. Later at the hospital, he indicated to her that the child had been walking around, he tried to feed her and then she was no longer breathing. Tr. 295.¹³ Ms. Miller described later receiving the telephone call while the child was still on life support. Although she was not aware she was being recorded, she reviewed the recording of the call and verified that it accurately represented their conversation. The call was admitted without objections as State's Exhibit 1. Tr. 296-300.

Despite the earlier waiver at the outset of the trial, defense counsel Staggs renewed the telephone call motion based on jurisdiction. Tr. 777. Judge Barber summarized his ruling that it was his belief that the trial court did not have jurisdiction to address the wiretap issue, that he advised the defense to file a motion with the Court of Appeals and he would advise the appellate court that it was coming and that it would stay the matter pending resolution. Tr. 177. Importantly, Judge Barber stated that the defense had elected to not do so which he assumed was a tactical decision by the defense. Judge Barber declared that did not give him jurisdiction. Tr. 777.

During Investigator Faust's testimony about Applicant's May 24th Statement, he described that Applicant initially suggested she fell off the bed and climbed back and became unconscious. Tr. 890-891. Subsequently, Applicant described to Investigator Faust that he didn't mean to hurt her, that he could not get her to stop crying, and that he shook her for a few minutes until she became unconscious. Tr. 893, l. 19-25, p.895. Then the Applicant demonstrated the few

¹³ This initial version was similar to the version provided to Investigator Kevin Preston. Tr. 461-466; State Exhibit 107. At the hospital, Applicant denied that he shook, hit, or dropped her. Tr. 465.

Handwritten signature or initials, possibly "SL", in black ink.

minutes that he shook the child. Tr. 895-896, see Tr. 897-898 (“violently” shaking the teddy bear). The written statement was introduced as State Exhibit 120.

Important to this issue, Gaddist asked Investigator Faust if he could make some telephone calls which Faust agreed to. Tr. 905. Faust led Applicant to an empty office and let Applicant make phone calls from that phone. Tr. 906. Investigator Faust testified that all incoming and outgoing phone calls in the Sheriff’s Department are recorded. Tr. 906, 1.6-13. When asked if the phone had a big orange sticker on them. Faust confirmed it and that the sticker stated “all calls recorded.” Tr. 906, 17-19.

The State offered to place in evidence three photographs of telephones with stickers, State Exhibit 124, 156, and 126. Tr. 906. The Applicant objected, claiming they had been trying to get the photographs earlier. The prosecutor asserted they had not discussed this suggested request with the defense before and was not asked by the defense to arrange for the photographs to be taken by them. Tr. 908. The prosecutor stated their photographs were taken January 23, 2014 in anticipation for the pretrial hearing. Tr. 909. The trial court eventually suppressed the photographs, noting that they should have been provided to the defense prior to that date. Tr. 910. However, Judge Barber indicated that he did not think the photographs were needed by the State because your **“witness can clearly testify to it.”** Tr. 910-911.

At that point, Investigator Faust described that when the phones are assigned they have the sticker on top saying “all calls are recorded.” Tr. 911. He specifically confirmed under oath that the telephone Gaddist was allowed to use that day also had the sticker. Tr. 911, 1.15-19. Importantly, Investigator Faust testified that while Gaddist made the telephone calls, he stood at the doorway and that “I can hear what he is saying.” Tr. 912, 1.6-7. In fact, Faust recalled Gaddist

“involved” him in the first conversation. Tr. 912, l. 9-11. Investigator Faust further stated he was present and maintained security in the office at that time. Tr. 912. He confirmed that he heard Gaddist place the call to his mother on May 24, 2011. Investigator Faust confirmed State Exhibit 121 was the entirety of the call placed to the mother. Tr. 913. [Counsel Pinnock and Staggs renewed their previous objection. Tr. 912-913]. In authenticating this call, it revealed that he had heard the entirety of Gaddist’s statement during the call.

Later, testimony was presented by Investigator Isenhoward about Applicant’s statements to them. Investigator Isenhoward similarly described the oral statement made to Investigator Faust and himself leading up to the demonstration with a teddy bear and the written statement. Tr. 952-956. Isenhoward described the shaking as “violent.” The written statement, State Exhibit 12, was published through him to the jury. Tr. 959-962. Consistent with what Applicant later told his mother in Investigator Faust’s presence, the written statement included his description of shaking the child to try to stop her from crying. Tr. 960-961. Further, he denied striking the child.¹⁴ Applicant stated that he apologized and that he did not mean to do it. Tr. 962.

Issue

In his current pleadings, Gaddist contends that he received ineffective assistance of counsel because counsel was deficient in failing to move before the Court of Appeals to suppress the calls under § 17-30-110. He contends that after his counsel mistakenly attempted to suppress the recorded calls under the South Carolina Wiretap Act before Judge Barber that Judge Barber correctly concluded that he lacked jurisdiction to suppress. Applicant argues that his counsel should have made a petition to the Court of Appeals as Judge Barber suggested. See S.C. Code §

¹⁴ Further testimony concerning the actual injuries to the child are addressed in a different part of this Order.

17-30-10, et. seq. Applicant claims he would have been successful in such a motion claiming that no prior consent was given to the call under § 17-30-30 (c) and further that there was no prior order entered under § 17-30-70 by the Attorney General to authorize a wiretap.

This Court must find that this assertion does not require the grant of post-conviction relief where at the time of trial it was a strategic decision not to seek the petition and expressly waived that right to challenge the admission of the recorded telephone calls. Further, this underlying issue does not state a ground for relief because the act of entering a free and voluntary guilty plea and abandoning the trial forecloses this argument. Further, Sixth Amendment prejudice cannot be shown because the recordings were not a violation of the Wiretap law where the recordings were implicitly consented to by the Applicant through the presence of the investigator during the telephone calls and the presence of the sticker on the phone the Applicant used that calls being recorded. Further, it cannot be said that this failure to seek review by the Court of Appeals improperly coerced the guilty plea because testimony about the calls could have been presented through the victim's mother and Investigator Faust, had the motion been made excluding the recordings, but not the substance of the calls. He failed in his burden of proof.

Post-Conviction Testimony on this Issue

During the Post-Conviction Relief hearing, the Applicant testified that he was aware prior to the trial about the telephone calls being recorded. PCR Tr. 9-10. He claimed he did not know he was being recorded at the Sheriff's Department. He further claimed there was not a message or sign that he was being recorded. PCR Tr. 10. He recalled that his counsel indicated that they were going to inspect the Sheriff's Department to see if they had anything about the calls not being recorded, but did not think they did that. PCR Tr. 16. Gaddist felt prior to the start of the

trial he had a choice either to move to suppress before the Court of Appeals or have his expert witnesses. Gaddist chose the expert witness when the trial began. PCR Tr. 18, 19-20; 24-25.

Counsel Pinnock, as noted earlier, became aware that the calls were recorded when she received the discovery. PCR Tr. 53. It was her position before Judge Barber that Gaddist was not on notice of the recoding. Id. Although she filed a motion to suppress under the wiretap statute to Judge Barber, they did not file a motion before the Court of Appeals. Contrary to what Judge Barber stated on the record at trial (Trial Tr. p.777), Pinnock asserted at the PCR hearing that she would not be guaranteed a continuance if they filed in the Court of Appeals. PCR Tr. 56-57. This was an issue due to the arrangements made for the out-of-state witnesses. PCR Tr. 57.

Findings of Fact and Conclusions of Law

Contrary to her actions and statements at the trial, Counsel now claims in hindsight at the PCR hearing that she should have filed the motion to suppress with the Court of Appeals, but did not know and filed it with Judge Barber in the pretrial proceeding. The motion was based on the lack of an authorization order or consent. However, this right to seek a petition before the Court of Appeals was known by Applicant and counsel prior to the start of the trial when counsel expressly advised the trial judge that she was not going to seek review by the Court of Appeals which the Applicant expressed his agreement. Trial Tr.p. 131-133. Her statements and Applicant's statements in open court at the trial and the guilty plea carry a presumption of verity. See Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). See, e.g. United States v. Lemaster, 403 F.3d 216, 221 (4th

Cir. 2005) (“[A]llegations in a § 2255 motion that directly contradict the petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always ‘palpably incredible’ and ‘patently frivolous or false.’ ”). “[C]ourts must be able to rely on the defendant’s statements made under oath during a properly conducted [guilty plea] colloquy.” In light of Applicant’s solemn declarations in open court, indicating his understanding and willingness to enter his plea of guilty after conferring with his counsel, petitioner's contrary claims fail. Similarly, their statements about waiving the right to seek review in the Court of Appeals carry a presumption of verity that the statements during the PCR hearing do not undermine.

“ ‘When a defendant pleads guilty, he waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea.’ ” United States v. Moussaoui, 591 F.3d 263, 279 (4th Cir. 2010) (quoting United States v. Bundy, 392 F.3d 641, 644 (4th Cir. 2004)). Thus, a knowing and voluntary guilty plea “forecloses federal collateral review” of prior constitutional deprivations, including allegations of ineffective assistance of counsel that do not affect the voluntariness of the plea. See Fields v. Att’y Gen. of Md., 956 F.2d 1290, 1294-96 (4th Cir. 1992). A guilty plea is valid when it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Burket v. Angelone, 208 F.3d 172, 190 (4th Cir. 2000) (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

This Court must conclude that the Applicant has failed in his burden of proof under Strickland and Hill v. Lockhart to show deficient performance related to the plea or prejudice under Hill v. Lockhart. See Stalk v. State, 383 S.C. 559, 560, 681 S.E.2d 592, 593 (2009) (test for ineffective assistance of plea counsel under Hill). Assuming arguendo that the trial had been completed prior to entry of the plea without a defense case and the Applicant convicted, this Court could easily find that while there may be deficient performance at trial, Strickland

prejudice had not been proven since the Wiretap Act would not require suppression under these circumstances based upon the record presented in the State's case in chief.

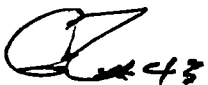
First, there was uncontradicted evidence at trial that the Sheriff Department's telephones had a sticker on them that they would record all calls, including the telephone Gaddist made his calls. Trial Tr. 906-912. Second, Applicant's calls were made in the knowing presence of Investigator Faust who overheard the calls Gaddist made. Trial Tr. 912-913. In fact, Investigator Faust authenticated that the recorded call was the complete call. Trial Tr. 913. Further, the recordings did not violate the Wiretap Act. Counsel's agreed decision to forego the motion before the Court of Appeals (after the prosecution rejected the assertion that there was no notice on the phones Trial Tr.p. 113-114) and make a strategic decision to not delay the trial and ensure the presence of the expert witnesses was a reasonable strategy. Nevertheless, later counsel's advice to plead guilty was not deficient based the knowledge of the entirety of the State's presentation of the case against him.

Applicant has not shown Sixth Amendment prejudice under Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). According to Hill, the "prejudice" requirement of the Strickland test focuses on whether counsel's ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Accord, Stalk v. State, 383 S.C. 559, 560, 681 S.E.2d 592, 593 (2009). In Stalk, the Supreme Court stated that appellate courts frequently "short-hand" the prejudice prong in a guilty plea ineffective assistance claim as "but for the deficient performance is there a reasonable probability that the defendant would not have pleaded guilty but would have insisted on going to trial," The Court opined that Hill makes clear

that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial. Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594–95 (2009).

This Court must conclude there is a reasonable probability that the appellate court would have found that the recording of the telephone calls was not in violation of the South Carolina Wiretap law for separate reasons. Applicant claims the calls were not properly recorded because there was no court order under the Act authorizing the calls to be intercepted. This Court agrees that there was no authorizing order entered under S.C. Code § 17-30-70, 80 authorizing the recordings, but that does not end the inquiry. This Court finds that recordings were likely authorized by the “law enforcement exception” and “consent exception.”¹⁵ Review of analogous caselaw supports the admission of the recordings. In United States v. Hammond, 286 F.3d 189 (4th Cir. 2002), the Fourth Circuit dealt with a challenge to the admission of recorded jail phone calls. In Hammond, the defendant sought suppression of the recorded telephone conversations, arguing that the recordings should be excluded from evidence because the government did not comply with the requirements of Title III. *Id.* at 191. Specifically, Hammond argued the FBI was required to obtain a judicial interception order to listen to the tapes. *Id.* The court first found that the recordings were admissible under the “law enforcement exception.” *Id.* at 192. The “law enforcement exception” excludes from the definition of

¹⁵ In this order, this Court must use the conditional terms of likely and others in recognition that under our wiretap law, these decisions ultimately are made by the appellate court. It is a prediction under the reasonable probability test as to how that appellate court would decide the matter if presented to it. This Court stands in similar shoes as Judge Barber concerning the jurisdictional issue, in the same way the Court would stand in making assessment of ineffective assistance of appellate counsel on how that appellate court would rule. State v. Whitner, 399 S.C. 547, 551, 732 S.E.2d 861, 863 (2012) (finding a trial court lacked subject matter jurisdiction to suppress evidence under the Act because such motions must be made before a panel of judges of the court of appeals). Stone v. State, 419 S.C. 370, 394, 798 S.E.2d 561, 574 (2017) (ineffective assistance of appellate counsel test).



“interception” recordings made by “any telephone or telegraph instrument, equipment or facility, or any component thereof . . . being used by . . . an investigative or law enforcement officer in the ordinary course of his duties.” 18 U.S.C. §2510(a)(ii). Id. See also S.C. Code § 17-30-15 4)(ii). The court found that since the Bureau of Prisons was acting pursuant to its well-known policies in the ordinary course of its duties in taping calls, the law enforcement exception applied. Id. The court also found the “consent” exception to the wiretapping statute applied. Id. 18 U.S.C. §2011(2)(c) provides: “It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.” Id. The court concluded the “consent” exception applies to prison inmates required to permit monitoring as a condition of using prison telephones. Id. Accord, State v. Martin, No. 2015-001065, 2017 WL 4641406, at *2 (S.C. Ct. App. June 21, 2017) (unpublished).

As in Hammond, the admission of the recorded phone calls are likely admissible under the “law enforcement” and “consent” exceptions. Here, there was testimony at trial that there was a notice on the telephone that Gaddist used that the call was being recorded. Further, it is undisputed by sworn testimony that Investigator Faust was knowingly present during the Applicant’s telephone calls and overheard them. “In determining the reasonableness of an expectation of privacy ..., we start from the premise that ‘[e]xpectations of privacy are established by general social norms.’” Robbins v. California, 453 U.S. 420, 428, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (plurality opinion), overruled on other grounds, United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)). Gaddist’s expectation that his conversation on a police station telephone was private was not “one that society is prepared to recognize as reasonable.” See State v. Evers, 175 N.J. 355, 369, 815 A.2d 432 (2003) (quoting



Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)).

Judge Posner observed that:

[i]t is routine, standard, hence “ordinary” for all calls to and from the police to be recorded. Such calls may constitute vital evidence or leads to evidence, and monitoring them is also necessary for evaluating the speed and adequacy of the response of the police to tips, complaints, and calls for emergency assistance.

Amati v. City of Woodstock, 176 F.3d 952, 954 (7th Cir. 1999). This “routine and almost universal” practice is “well known in the industry and in the general public” Adams v. City of Battle Creek, 250 F.3d 980, 984-85 (6th Cir. 2001); see also Walden v. City of Providence, 596 F.3d 38, 54-55 (1st Cir. 2010). Given the general knowledge that police department telephones are recorded, notice is implied. “[W]hat is ordinary is apt to be known; it imports implicit notice.” Amati, 176 F.3d at 955. Therefore, even if the Court had not found that specific notice was not on the phones, consent would be implied.

The Applicant made his telephone calls in the presence of the investigator after he had just confessed his crime to the same investigator. He was under arrest for crimes to which he confessed, about to be transported to the county jail, and in a non-public room to which investigators had ready access and were present. See e.g., State v. Legette, 227 N.J. 460, 469, 152 A.3d 887 (2017) (noting that “the privacy rights of an individual who is placed under lawful arrest are diminished”) (quoting State v. Bruzzese, 94 N.J. 210, 232, 463 A.2d 320 (1983)). Society is not prepared to accept Gaddist’s present professed expectation that this call was private, even if there was an absence of oral or written notice that the police station telephones were routinely recorded. See Siripongs v. Calderon, 35 F.3d 1308, 1319-20 (9th Cir. 1994)



(holding no reasonable expectation of privacy where police surreptitiously recorded defendant's telephone call while defendant was in custody at police station); United States v. Correa, 154 F. Supp. 2d 117, 123 (D. Mass. 2001) (“The defendant had no reasonable expectation of privacy in the phone call he made from the police station, while under the visible watch of a police officer.”). When one party makes [a] conversation available to others, such as through the use of a speaker phone or by permitting someone else to hear, ... the privacy interest does not remain the same.

The Court of Appeals was not asked to reach the question of whether the recording violated the South Carolina Homeland Security Act (the Wiretap Act), S.C. Code , § 17-30-10, et. seq or Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. This Court’s review of these provisions and the legal precedents interpreting them reveal no statutory bar to admission of the recording of the police station call.

The two statutes prohibit the interception of wire communications, including telephone calls, as well as the disclosure or use of the contents of any intercepted wire communication. Under both statutes, “ ‘[i]ntercept’ means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device.” S.C. Code § 17-30-15(3) ; 18 U.S.C. § 2510(4). “ ‘[E]lectronic, mechanical, or other device’ means any device or apparatus ... that can be used to intercept a wire, electronic or oral communication” S.C. Code § 17-30-15(4); accord 18 U.S.C. § 2510(5).

The statutes, however, exclude from the definition of “electronic, mechanical, or other device” “[a]ny telephone or telegraph instrument, equipment or facility, or any component thereof ... being used ... by an investigative or law enforcement officer in the ordinary course of



his duties” S.C. Code § 17-30-15 (4)(a); 18 U.S.C. § 2510(5)(a)(ii). This exception, known as the law-enforcement exception, “appl[ies] to telephone equipment used by law enforcement officers in the ordinary course of their duties, regardless of whether the monitoring on a particular occasion is random or is done by an officer who regularly performs that duty.” See State v. Fornino, 223 N.J. Super. 531, 545, 539 A.2d 301 (App. Div. 1988). Because an interception occurs only when an intercepting device is used, the use of an excluded device is not an interception at all under the statutes. *Id.* at 544-45, 539 A.2d 301.

Our courts have held that the routine recording of inmate conversations on telephones in prisons or jails are not interceptions under either the Wiretap Act or Title III. We have not, however, addressed the question of whether recorded conversations on a police station telephone by a detainee in police custody fall within the exceptions in the two statutes. Federal precedents, to which we look for guidance when interpreting the Wiretap Act, conclude the routine recording of police station telephone conversations fits within the “law-enforcement exception.” See Walden v. City of Providence, Rhode Island, 596 F.3d 38 at 54-55 (1st Cir. 2010); Adams v. City of Battle Creek, 250 F.3d 980, at 984-85 (6th Cir. 2001); Amati, 176 F.3d at 954. Cf., Sanders v. Robert Bosch Corp., 38 F.3d 736, 740-42 (4th Cir.1994) (Fourth Circuit held that recording all telephone conversations on certain lines after bomb threats were received by the private company, not law enforcement, was not in the ordinary course of business where the employees did not receive notice of the recording).

The plain language of the statutes unequivocally exempt the recording at issue here. It is undisputed that all of the telephone calls to and from the police station are recorded as part of the ordinary duties of an officer of the police department, an investigative and law enforcement agency. The Wiretap Act and Title III are not applicable to the recording of defendants'

conversation on the police station telephone.¹⁶ See Abraham v. Cty. of Greenville, S.C., 237 F.3d 386, 391 (4th Cir. 2001) (County's recording of the judges was not a legitimate surveillance activity because it did not occur in the ordinary course of the County's law enforcement duties).

In addition, because the recording of the police station telephone is not an interception under the Wiretap Act or Title III, neither statute restricts the police department's authority to disclose the contents of the recording to the county prosecutor, as was done here. See United States v. Lewis, 406 F.3d 11, 19-20 (1st Cir. 2005) (finding, because recordings of jail calls are not interceptions, Title III's restrictions on the use of intercepted communications does not apply). See Amati, 176 F.3d at 955-56 (law enforcement exception applies to detention center's recording of calls to and from police station which captured employees' personal calls); United States v. Van Poyck, 77 F.3d 285, 291-92 (9th Cir.1996) (law enforcement exception applies to detention center's recording of telephone calls by inmates); United States v. Paul, 614 F.2d 115, 116-17 (6th Cir.1980) (same).

¹⁶ Courts have required notice of the possibility of monitoring in cases where the quantum of the asserted business or law enforcement interest is low. See, e.g., Sanders v. Robert Bosch Corp., 38 F.3d 736, 741-42 (4th Cir.1994) ("In short, there is no business reason asserted for the decision not to notify all the Guardsmark employees of the use of the voice logger."). However, when confronted with more substantial justifications, courts have permitted businesses to monitor without advance notice. See, e.g., Briggs v. American Air Filter Co., Inc., 630 F.2d 414, 420 n.9 (5th Cir.1980) ("Since the specific justification advanced here is so closely tied to a legitimate business purpose, we have no hesitation holding that there is nothing extraordinary about McClure's act of listening in. Were the business justification less compelling, the absence of any company policy or prior warnings concerning use of company telephones might be more significant."); Arias v. Mutual Central Alarm Service, Inc., 202 F.3d 553, 559 (2d Cir.2000) ("Whether notice is required depends on the nature of the asserted business justification, and here, where the recording is at least in part intended to deter criminal activity, the absence of notice may more effectively further this interest."); Berry v. Funk, 146 F.3d 1003, 1009 ("[If] covert monitoring is to take place it must itself be justified by a valid business purpose, or, perhaps, at least must be shown to be undertaken normally.").



Investigator Faust was present during the calls. The Wiretap Act does not prohibit electronic eavesdropping where one of the parties has consented to the monitoring. See 18 U.S.C. § 2511(1)(c) (“It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”). See § 17-30-30 (B) (“It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given **prior consent** to the interception.”). Courts have determined that such consent may be explicit or it may be implied from the surrounding facts. See, e.g., United States v. Workman, 80 F.3d 688, 692–94 (2d Cir.1996); United States v. Van Poyck, 77 F.3d 285, 292 (9th Cir.1996). If the party has received advance notice of monitoring, then that party may ordinarily be said to have consented to the subsequent monitoring. See Amati, 176 F.3d at 955 (“If there is actual notice, there will normally be implied consent. So if the ‘ordinary course’ exclusion required proof of notice, it would have no function in the statute because there is a separate statutory exclusion for cases in which one party to the communication has consented to the interception.”) (citations omitted).

There was notice on the telephone that the calls would be recorded. As represented by the testimony of Investigator Frink, the telephone that Gaddist made his telephone calls expressly advised him that all calls were recorded. This satisfies the “consent” requirement to allow for the recording to be done. Although Gaddist may not recall the notice, sworn testimony at trial reflects this conclusion is supported by sworn testimony. Arguably, even if Gaddist was found to not have consented to the recording, he consented to have the telephone

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conversation overheard by Investigator Faust who stood that the door within obvious and actual hearing distance.

If Gaddist had been explicitly told that their conversations were not being recorded, it follows that they would have “an expectation that such communication is not subject to interception” and would therefore qualify as an oral communication under the Federal Wiretap Act. See also Amati v. City of Woodstock, 176 F.3d 952, 956 (7th Cir. 1999) (stating that “if the police, in order to trick people into making damaging admissions over the phone, announced that calls to and from the police department were not being recorded, and then recorded them anyway,” it “would not be in the ‘ordinary’ course of law enforcement”). However, there is no evidence that that happened. Instead the presence of the investigator and/or the consent sticker resolved that Gaddist consented to the conversation being overheard and recorded.

See also Amati v. City of Woodstock, 176 F.3d 952, 956 (7th Cir. 1999) (stating that “if the police, in order to trick people into making damaging admissions over the phone, announced that calls to and from the police department were not being recorded, and then recorded them anyway,” it “would not be in the ‘ordinary’ course of law enforcement”). As such, the Court need not determine whether the logistical and architectural facts at issue in this case created an expectation of privacy.

Applicant has not raised any cogent argument that the recording, production, or use of their call on the police station telephone was unlawful.

Any arguable error in the recording would be harmless and therefore non-prejudicial under Strickland had the matter proceeded. Investigator Faust could have testified about what he actually overheard, rather than merely affirming the accuracy of the recordings. Similarly, the

victim's mother was present at trial and could have testified about what Applicant told her on that call as she did similarly on the other calls the Applicant made to her that date, rather than affirming the accuracy of the recording. Finally, the information provided in the recordings was cumulative to the statement the Applicant gave to the Sheriff's Department immediately prior to the telephone calls. The Applicant has failed to show how this alleged deficiency undermined the decision to enter the free and voluntary guilty plea. In hindsight, it had no actual impact on the plea decision after the State had presented its full case when it was made in light of the full record. This assertion must be dismissed.

C. Ineffective Assistance of Counsel at Trial in Failing to Adequately Object to the demonstration of the Applicant's use of the Teddy Bear to describe how he shook the child until she was unconscious.

The Applicant contends counsel during the trial was ineffective in failing to adequately object to testimony by Investigator Isenhoward about the use of the teddy bear by Applicant during the oral confession. This Court finds that Applicant has failed in his burden of proof on this issue under Strickland and Hill.

The record reveals that defense counsel made an objection to exclude any demonstration or mention the shaking of the teddy bear by the Applicant during his statement. Trial Tr. 530-531. The State asserted that during the confession, the investigators handed the Applicant a teddy bear which he grabbed and started violently shaking it for a period of time to describe the length of time he shook the child. Trial Tr. 531. The trial judge found that the investigator "can described what he observed," but the court was not going to let him recreate what the Applicant did. Trial Tr. 531-532. Counsel Pinnock noted the objection was further based on the fact the teddy bear was not an appropriate example of a human child. Id.

During Investigator Isenhoward's testimony, he initially described the Applicant's oral statement. Trial Tr. 952-953. He described the Applicant telling him how he shook the child. He stated he wrapped his hands around the child and shook her for several minutes. Trial Tr. 952. Investigator Isenhoward questioned the amount of time because it was a long time, but Gaddist was firm on it. He said Gaddist initially demonstrated by putting his hands up "like this" and started shaking and kept shaking and said he shook her until she went unconscious. Trial Tr. 953-954. Isenhoward testified that he wanted to see how he held her and went to get a teddy bear that he felt was roughly the size of the child. He gave the bear to Applicant and asked him to show him what he did.

He described that Applicant grabbed the teddy bear and could see the pressure he was putting with his hands around the bear and squeezing the bear. Trial Tr. 955.

At that point, counsel Staggs objected. Trial Tr. 955, l. 7-8. Judge Barber stated in overruling the objection, "I'm going to let him tell what he observed." Trial Tr. 955, l. 9-10. He stated his squeezing the bear and then he starts to shake which he indicated. Trial Tr. 955, l. 12-14. Isenhoward states Applicant is shaking the bear and the head of the bear is bouncing back and forth, which went on "for a minute or so." Trial Tr. 955, l. 13-19. He described the shaking as "violent." Trial Tr. 955, l. 18-19.

At that point, he was ready to make a written statement. State Exhibit 120. In his statement, he again described that the victim was crying and he tried to calm her down. He stated he shook her for a couple of minutes until she was unconscious. Trial Tr. 960. He stated he held her straight up with his hands front to back under her armpits, face to face. He stated he shook her for a minute until she was unconscious because she was crying. Trial Tr. 961. He confirmed

that the demonstrated with a teddy bear accurately that day. Trial Tr. 961, l. 20-21. Investigator Isenhoward reported that Applicant stated he did not hit the victim before and apologized, did not to do it and was just trying to calm her down. Trial Tr. 962.

Previously, Investigator Faust had testified about the Applicant's statement. Trial Tr. 893-898. Like Investigator Isenhoward, Investigator Faust described Applicant declaring to them that he did not mean to hurt the child and could not get her to stop crying. Trial Tr. 893. Applicant described that he shook the child for a "few minutes" until she lost consciousness. Faust described that he needed Applicant to clarify the time and he counted up to a minute or more in trying to determine the length of time. Trial Tr. 894-896. Investigator Faust described Investigator Isenhoward returning to the office with a teddy bear after a break. He described Applicant taking the bear with the face toward him, putting his hands under the arms with the thumbs around the chest. He describe the "bear shaken violently." Trial Tr. 897-898. He denied it was a "gentle shake", but "it was, if not, harder than I was just shaking." [No objection was contemporaneously made to this testimony]. Trial Tr. 898, l. 3-10. He stated Applicant shook the bear for over a minute. Trial Tr. 898.

During the PCR hearing, counsel Pinnock acknowledged that Judge Barber stated he would allow the investigator to described what he observed, but not re-create, citing Trial Tr. 531. Counsel recalled that the investigator held his hands up like he was holding something, but could not recall to if he made a shaking motion. PCR Tr. 53.

Counsel Staggs testified that he objected to Investigator Isenhoward's demonstration, but his objection was overruled. PCR Tr. p.39, l. 24 – p.40, l 22, citing Trial Tr. p.955. He stated that he did not renew the objection after Isenhoward's testimony. Id.

This Court must deny Post-Conviction Relief because this Court has found that counsel was effective in his advice concerning the entry of the subsequent free and voluntary guilty plea. This determination unnecessary because of the entry of the plea.

Assuming *arguendo* this issue can be addressed in the terminated trial prior to verdict, this Court finds that Applicant failed in his burden of proof. Counsel reasonably objected to potential demonstration of Applicant's actions. Trial Tr. 530-532, 955. Judge Barber overruled the objections after Isenhoward had indicated how Applicant had held the victim with his hands. Trial Tr. 955. Underlying this assertion is that the defense was seeking the trial court to enforce his ruling. However, the trial judge did not find these actions were inappropriate or inconsistent with his ruling where no teddy bear was used in the testimony. This Court does not find that counsel was deficient in failing to object again after the testimony continued. There is no reasonable probability that the result would have been different. Based upon the record before the Court, this Court cannot find the actions during the subsequent testimony were inadmissible under S.C.R.E. Rule 403.

Further, this Court finds that the Applicant failed in his burden of proof to show 6th Amendment prejudice, i.e. that there is a reasonable probability that had the Applicant objected again, that the Applicant would have continued the trial rather than plead guilty until Hill. As noted, the oral evidence of the Applicant shaking the teddy bear for minutes violently as a demonstration during his statement was admissible as relevant and probative. The Applicant has failed to show how any brief physical display of the hands satisfied this burden of proof. It is obvious that the significant admissible evidence of his guilt presented to the jury, including the significant injuries to the child inconsistent with his inculpatory statements, motivated his acceptance of the plea. His suggestion otherwise must be denied.

D. Ineffective Assistance of Counsel in Failing to Get a Consistent Ruling on Evidence of the child's Injuries to Exclude the Child's Prior Injuries.

The Applicant contends that the defense team was ineffective during the terminated trial to get a consistent ruling from the Court about the admissible evidence of the child's injuries. The Applicant contends that they sought the exclusion of evidence of prior injuries. He further asserts that Judge Barber's rulings were confusing and inconsistent which caused his defense counsel to not have a clear understanding of the trial court's rulings resulting in numerous objections. The Applicant asserts that at the outset, counsel should have requested a written order. This Court finds that the Applicant failed in his burden of proof in showing that counsel was deficient. The Court further finds that he has failed to show 6th Amendment prejudice under either Strickland or Hill v. Lockhart.

A review of the trial records reveals prior to the start of the trial, there was a motion to exclude evidence of prior injuries. Trial Tr. 118. The State asserted that they were not going to present evidence of bite marks or a black eye which was not contemporaneous to the charged event. Trial Tr. 118-119. The trial court indicated that they were not going into those. Trial Tr. 118, l. 12-13, p. 119, l. 3-4. The trial court stated that he had ruled unless the State was capable of showing something else. Trial Tr. 119. The State further stated it was not going to introduce any evidence of prior bad acts because they did not know of any. Trial Tr. 121. The trial court then inquired of the parties needed a written order on the matters decided in the pretrial hearing on January 31. Trial Tr. 128. Judge Barber also confirmed with the Court Reporter that she as doing it in "real time" so they would have it if they claim I ruled one way other than I did." Trial Tr. 128. Counsel Pinnock stated they did not need a written order. Id. It is this decision to not seek a written order that the Applicant attacks in hindsight in this proceeding.

During the trial, a number of objections were made when evidence of injuries to the child was presented. After Richland County Corporal Jimmy Wilder testified that he saw the victim unresponsive with some bruises on her leg, counsel Pinnock objected. Trial Tr. 437-438. She mistakenly asserted that in the pre-trial ruling Judge Barber had ruled that there was to be no testimony about bite marks, black eyes or bruising. Judge Barber correctly stated his recollection was that it was concerning injuries of a black eye or bite-marks, and not bruising. Trial Tr. 738, l. 9-11. See Trial Tr. 118-119 (no mention of bruises). The State asserted that the bruises they claim Cpl. Wilder was referring were the results of injuries on that day. Trial T. 739, l. 4-9. Judge Barber ruled that if they're alleging the injuries occurred contemporaneously they have a right to testify as to that, but the defense has a similar right to cross-examine on it. Defense counsel stated she thought his ruling encompassed that, but Judge Barber noted it did not concern bruising. The trial court noted he expected evidence would be presented about bruising on the body in the manner she was held and would allow the testimony if it is their position this occurred as a result of the incident. Trial Tr. 439-440. He then stated: "let's stick to injuries that occurred on the day of the incident." Trial Tr. 440, l. 1-17.

Additional testimony was presented about injuries to the child to reveal evidence inconsistent with the version the Applicant told the mother. There was a brain injury determined to be "non-accidental trauma." Trial Tr. 559-565. There was evidence presented concerning broken ribs, including posterior rib fractures, which counsel Strickler objected based upon the pre-trial ruling, which was implicitly overruled. Trial Tr. 568-569. [On cross-examination, Strickler questioned whether Dr. Mack could state the precise time when the injuries occurred. Trial Tr. 577]

After Dr. Mack's testimony, there was a discussion about the extent of questioning concerning the victim's appearance and injuries. The State confirmed that it was not going to ask questions about bite marks or the bruising of the eye. However, the State confirmed that they would present evidence of multiple points of impact on the child's head and breaks that are acute. Trial Tr. 585-587.

The pediatric radiologist testified about the broken ribs she saw in the imaging. Trial Tr. 597-598. Counsel Strickler again objected to broken rib evidence. Trial Tr. 298, l. 22-24. Dr. Sheila Jones also noted the baby's skull had abnormalities indicating brain swelling but no fracture to the skull. Trial Tr. 599-600. She also testified about the rib fractures noting that they were "acute" meaning that they occurred within a few days of the death and were consistent with the injuries that occurred on May 23rd. Trial Tr. 601, 606-609. Dr. Jones opined the predominant injury was the lack of oxygen to the brain which led the brain death. Trial Tr. 617. The posterior rib fractures were associated with non-accidental intentional trauma. Trial Tr. 618-619. She opined that the combination of the brain injury, the fracture to the eye, and the posterior rib fractures support a finding of abuse. She opined the cause of death was the brain injury which she could not have survived.

The forensic pathologist, Dr. Amy Durso, testified that she initially observed several contusions or bruising and injuries to the head, torso, neck, scalp and extremities during her autopsy. Trial Tr. 647. She further learned of additional injuries. She describe the impact of blunt trauma to the skin. She found significant injuries to the posterior rib fractures and more significant injuries to the child's head. Trial Tr. 650-651. She opined the head injuries indicated blunt force trauma by a hard object which caused the injuries to her brain and death. Trial Tr. 655-666.

Dr. Durso opined that the acute rib fractures were less than five days old, noting that the child had been in the hospital three days. She noted these fractures were seen in a number of child abuse cases.

Inconsistent with the Applicant's Version, Dr. Durso found that the child had "at least twelve (12) blunt blows to the head." Trial Tr. 669, l. 7-14. She found that the child could not have survived the brain injury. Based upon their severity, she opined that the child would have been "almost immediately symptomatic" with a loss of consciousness and even stopped breathing. Trial Tr. 669-670. Contrary to one of the Applicant's version, she would not have been able to eat, sit up, breathe or act normal. She opined it was definitely child abuse. Trial Tr. 670-671. Dr. Durso further opined that the injury to the ribs was consistent with shaking, but the cause of death was the blunt force trauma to the head. Trial Tr. 689-690.¹⁷

An expert in forensic pediatrics, Dr. Olga Rosa, testified about the version she had learned from the mother a version Applicant gave to her that Applicant has seen the child and fed her a jelly sandwich that she was not acting right, and then she was not breathing. Trial Tr. 725-726. Dr. Rosa opined that there was trauma that caused the swelling of the brain and the rib fractures. She pointed out there was extensive bleeding in the eye caused by the trauma. Trial Tr. 733-736. The eye injury was caused by direct impact of an object to the orbit of the eye. Her final opinion was child abuse and physical abuse which was not accidental. Trial Tr. 743. She opined that the child could not have survived, however, if the incident had occurred at 7:30 a.m., she would have not been able to have been revived at 12:30 because she would have been dead and not able to be resuscitated. Trial Tr. 743.

¹⁷ Another pathologist, Dr. Bradley Marcus concurred in the findings. Trial Tr. 700, 708.

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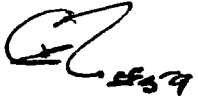
After Dr. Rosa had completed her testimony, counsel Strickler made a motion for a mistrial regarding testimony during the trial about the injury to the ribs. He claimed that there was no testimony that a finder of fact could conclude that the rib injuries were contemporaneous with the injuries that caused death. Trial Tr. 778-779. He claimed that since they could not be dated, the evidence of the rib injuries were inadmissible under a Rule 404(b) analysis and irrelevant to the trial, under Rules 401, 402, 403. Trial Tr. 779. Citing State v. Fletcher, 379 S.C. 17, 664 S.E2d 420 (2008), he claimed the state failed to link up the bruises to the crime. Trial Tr. 779-780.

In response, the state distinguished Fletcher because there the bad acts occurred weeks prior. Here, there was opinion testimony from the doctors that the rib injuries and head injuries were of the same character of healing to be contemporaneous or within a short period of time. Further, she argued the other evidence of Dr. Jones that the rib fractures had no healing, not calcification and were acute and testimony about the orbital fracture were not objected to by the defense. Trial Tr. 780-782.

Judge Barber concluded that the evidence included testimony from the doctors that the injuries occurred within the immediate time of each other and something the jury could consider. Trial Tr. 782-783.

Subsequently, there was evidence presented by Investigator Faust by the defense that the victim's mother did not take her child to day care because of some bruises. Trial Tr.p. 938.

During the PCR hearing, counsel Strickler testified briefing concerning his motion for a mistrial. However, he could not recall why he did not object when evidence was presented by the doctors concerning the timing of the particular injuries. PCR Tr. 32-34. However, counsel



Strickler also testified that he did not recall how the pre-trial ruling played out at the time of his testimony, relying on the transcript. PCR Tr. 33.

Counsel Staggs recalled that at trial they tried to withdraw the motion to exclude evidence as it related to the (pre-event) bruising citing Trial Tr. 795, but could not recall the basis for it. PCR Tr. 41.

Counsel Pinnock testified about a motion to suppress bruising, bite marks and a black eye. She stated at trial the defense had a different understanding of the judge's order kept out because there was not written order. PCR Tr. 74-49. She complained that evidence concerning bruising was introduced and claimed the state never tied them to the crime. In hindsight, she claimed the witnesses should have been questioned about the timing of the bruises. PCR Tr. 50.

This Court must conclude that the Applicant has failed to show deficient performance as it relates to the questioning of the state's witnesses with respect to the injuries. First, it is clear that in the pre-trial motion, Judge Barber only addressed that the evidence of the bite marks and black eye were not admissible. It is unclear how a written order stating the same would have further clarified it, particular once the rulings were available in real time by the court reporter. The defense team then did what reasonable counsel should do under Strickland to object when testimony they considered irrelevant about the injuries were presented. They did this specifically concerning the rib injuries as stated above throughout. Although the defense may have disagreed with the conclusions and opinions related to the contemporaneous timing of the injuries, Judge Barber addressed these concerns in his rulings and did not rely upon any failure to object to any particular portion. Further, Applicant notes that counsel had not objected to portions of the testimony that suggested the evidence that the orbital injuries were consistent with the other

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facial and rib injuries. Although counsel did not contemporaneously object to when the pathologists and pediatrician gave ultimate opinions that the lack of healing of the injuries to the ribs, the orbital trauma and head traumas reflected a close time period of trauma, the Applicant has failed to suggest a sound legal basis to object to the opinions or exclude them. To make a conclusory assertion does not satisfy the burden of proof. Counsel cannot be deemed deficient and acted reasonably, even in hindsight.

Further, Strickland and Hill prejudice has not been proven. The Applicant did not present a basis 6th Amendment prejudice due to because the trial court declared the extent of his injury evidence ruling in addressing specific objections during the trial. Applicant has not sufficiently presented through this claim, that had counsel acted differently, that there is a reasonable probability that he would have continued with a trial rather than plead guilty. As stated above, the Applicant has failed to show a reasonable probability that any significant trauma evidence presented in the case in chief would have been excluded. At best, the trial court's ruling was a motion in limine subject to reconsideration throughout the trial as relevancy of evidence became more apparent. Nevertheless, he has not shown that any evidence should have been excluded concerning the child injuries that was introduced.

Further, at the stage the plea decision was made, the defense and Applicant had heard the State's evidence and had defenses witnesses available that it intended to present in the defense case, including a forensic pathologist who would have likely testified about the injuries that Applicant was aware of which was revealed in his pre-trial decision to proceed to insure his availability. This is unlike most guilty plea scenarios when the defense had to guess about the state of the prosecution. Contrary to the current assertion, Gaddist failed to show this alleged deficiency of not seeking a written order impacted on the plea decision other than required them



to make specific objections during the trial were overruled or sustained by the trial judge. He had the ability to assess the impact of the same evidence that would have been presented to him since had not shown that the admitted evidence would have been different had the trial court put his decision in writing rather than orally. He is not entitled to Post-Conviction Relief on this assertion when after the voluntary guilty plea, he has failed to show how the failure of the defense to have a written order and had to rely on objections, some successful and some not, created a satisfactory showing of 6th Amendment prejudice. To the contrary it supports the fact that the guilty plea was knowingly and voluntary entered.

Due Process Violations

Applicant also alleges due process violations in a conclusory fashion in his application. These allegations appear to be merely recitations of his grounds for ineffective assistance of counsel. Therefore, this Court finds that these allegation are without merit and incorporates its conclusions set forth above.

CONCLUSION

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

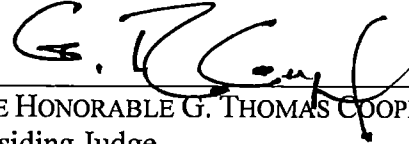
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

appellate review, current PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 10TH day of NOVEMBER, 2020.



THE HONORABLE G. THOMAS COOPER
Presiding Judge
Fifth Judicial Circuit

Cluson, South Carolina