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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2018-CP-32-4114

Filiberto Garcia Campos, #364268, ...Petitioner,

v.

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

NOTICE OF APPEAL

Applicant, Filiberto Garcia Campos, appeals the order of the Honorable R. Lawton McIntosh, filed May 9, 2022, and received by the undersigned on June 1, 2022.

June 1 ,2022

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Filiberto Garcia Campos, SCDC #364268, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2018-CP-32-4114 **ORDER OF DISMISSAL**

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LEXINGTON SC

I. INTRODUCTION

This matter comes before this Court by way of a post-conviction relief (PCR) action commenced by Filiberto Garcia Campos (Applicant) on December 3, 2018, alleging he is entitled to post-conviction relief based on constitutionally ineffective assistance of counsel. A hearing into the matter convened before the undersigned on December 13, 2021, at the Lexington County Judicial Center. Applicant was present at the hearing and represented by Ashley A. McMahan. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing, as did his trial counsel, Aimee J. Zmroczek, and his co-defendant, Tracy Roach. In addition to the pleadings in this action, this Court had before it a copy of the Lexington County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; the transcript of his co-defendant's plea; and the records of the current PCR action.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any

constitutional violations or deprivations entitling him to post-conviction relief. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on September 12, 2013, following an investigation into the death of his thirteen-month-old daughter. During its May 2014 term, the Lexington County Grand Jury indicted Applicant for homicide by child abuse (2014-GS-32-1347). On June 1, 2015, Applicant proceeded to a jury trial before the Honorable Thomas A. Russo. Aimee J. Zmroczek represented Applicant. Deputy Solicitor Suzanne Mayes and Assistant Solicitor Robert E. McNair, III, of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

Around 9:30 p.m. on September 2, 2013, Applicant called 911 from a telephone located at a store near his home in West Columbia, South Carolina, and reported his thirteen-month-old daughter ("Victim") had died because she was "very sick."[1] (R. 104–05; 212; 530–31). In response, Hunter Reed, a paramedic with Lexington County Emergency Medical Services, quickly responded to Applicant's home along with other emergency personnel. (R. 102–06; 124–25). When he arrived a short time later, he encountered Applicant, who was holding Victim, along with Tracy Roach, Victim's mother. (R. 105–06; 121; 131–32). Applicant then quickly handed Victim to Reed, and Reed immediately noticed Victim, who was not breathing and had no pulse, appeared to be very small, was underweight, and did not look or feel like a typical infant of the same age. (R. pp. 106-110). At that point, Reed moved Victim to his ambulance, began resuscitation efforts,

[1] During the call, Applicant also noted Victim was not breathing and was dry. (R. 531).

took off her clothing for treatment purposes, and noticed she was "profoundly emaciated."[2] (R. 107–09). As he provided her with treatment, Reed further noticed Victim had a "complete lack" of fatty tissue on her body, appeared "skeletal," had "very sunken in" eyes, was dirty, and was wearing a degraded diaper that was stained with urine and nearly falling apart. (R. pp. 109-110). Reed then rapidly transported Victim to Lexington Medical Center, but he and other medical personnel were never able to revive her. (R. 110; 144–45).

As a result of Victim's death, Detective Michael Gooding responded to the Lexington Medical Center to conduct an investigation into the matter, and he went to see Victim in the emergency room. (R. 142; 144–45). Upon seeing her, Detective Gooding was shocked by Victim's appearance and noticed she was extremely thin, her eyes appeared sunken in, her mouth was very dry, all of her ribs were "cleanly and clearly" visible, her shoulder blades were protruding, she had seeping open sores on her body, she was covered in what appeared to be crystalized urine, and she smelled of urine. (R. 147). ~~Moreover, Detective Gooding was unable to detect any features commonly associated with Down Syndrome due to Victim's condition despite the fact Victim had been diagnosed with that genetic disorder.~~ (R. 147; 412). After viewing Victim's condition, Detective Gooding spoke with Roach, who was still at the hospital, and then went to Applicant's residence to speak with him there. (R. 149; 151–54). During his ensuing conversation with Applicant, Applicant stated he had been off from his job for a three-day holiday weekend at the time of Victim's death, woke up around 1:00 p.m. earlier that day, made something to eat in the kitchen, went back to sleep, woke up later, checked on Victim, and found her unresponsive in her crib. (R. 155–58). Additionally, Applicant stated he did not check on Victim when he had woken

[2] While attempting to treat Victim, Reed obtained a medical history from Roach, who reported Victim was behaving normally earlier that afternoon and had been checked on multiple times by Applicant prior to her death. (R. 113).

up earlier because her room was on the other side of his residence, which was a single-wide trailer. (R. 156). Applicant further stated Victim had been sick all day but claimed nothing had been different in the last day or so of her life. (R. 159–60). Furthermore, Applicant asserted Roach, whom he reported had been sick and was sleeping on a couch, usually fed Victim and had not told him anything about Victim on the day of her death. (R. 153–56; 159–60).

Subsequently, in the early morning hours of September 3, 2013, Detective Gooding executed a search warrant at Applicant's trailer. (R. 165). When he did so, Detective Gooding immediately detected the odor of urine and discovered the smell grew stronger as he walked to Victim's bedroom. (R. 166). During his ensuing search of the residence, Detective Gooding located a baby bottle containing crusty and curdled milk in the floor of the living room, two or three more baby bottles containing crusty and curdled milk on the kitchen counter, a highchair that appeared to be used solely for storage in the corner of the kitchen, dusty and unopened bottles of baby food and formula buried underneath other items in the kitchen, a baby bathtub that appeared unused in the master bathroom, and multiple empty beer packages throughout the kitchen. (R. 166–68; 173–74; 176–82; 184–86). Notably, Detective Gooding did not locate any open containers of baby food or any fresh milk or formula anywhere inside the trailer, including in the refrigerator, which only contained food for adults, and he was unable to locate any implements used to clean baby bottles anywhere in the residence. (R. 168; 173; 176; 185–86; 233).

Thereafter, at approximately 10:00 a.m. later that morning, Dr. Jeffrey Welch, a pathologist at Lexington Medical Center and an expert in clinical and anatomic pathology, conducted an autopsy of Victim. (R. 148; 356–59). During the autopsy, Dr. Welch discovered Victim, who was thirteen months old, weighed just nine pounds and two ounces, which was a weight significantly

below the weight expected of a child her age.[3] (R. 360). He further noticed she was extremely thin and her eyes and cheeks were sunken in, which was indicative of chronic malnutrition. (R. 361–62; 364). As the autopsy continued, Dr. Welch noted Victim's ribs and spine were protruding; her scapulas were visible; her hip bones were protruding; her skin was wrinkled; she had pressure sores on her body; and the crown of her head was sunken in, which was a sign of malnutrition and dehydration. (R. 364–66; 372; 374). Additionally, he discovered Victim's stomach was empty at the time of her death. (R. 381). Furthermore, he noted she had no fatty tissue on her body and her liver, thymus, and adrenal glands were exhibiting changes caused by chronic malnutrition and starvation. (R. 366–69; 373–74). Based on his discoveries during the autopsy, Dr. Welch concluded Victim's death resulted from lethal neglect. (R. 375).

Following the determination regarding the cause of Victim's death, Detective Gooding continued his investigation into the matter. (R. 187–89). While doing so, he obtained medical records associated with Victim, and the last record he was able to locate was from November 12, 2012. (R. 194–95). However, he ascertained thirty-seven different medical appointments for Victim were missed, cancelled, or otherwise not kept during her short lifetime. (R. 197). Additionally, he discovered Victim received in-home visits from medical personnel through the Easter Seals program but no in-home visits occurred after 2012.[4] (R. 195). He further discovered Victim received full medical insurance coverage through Medicaid, vouchers for formula and food

[3] According to the medical testimony presented during trial, Victim should have weighed between eighteen and twenty pounds at the time of her death. (R. 432).

[4] Regarding those in-home visits, Melissa Juergens, an early intervention specialist with Easter Seals of South Carolina, testified during trial she visited Applicant's home six times between September and December of 2012 to provide developmental training to Victim's family and only stopped doing so when Roach terminated her services. (R. pp. 254–56). Juergens further testified she weighed Victim during a visit on December 5, 2012, and determined Victim weighed nine pounds and five ounces at that time. (R. 257–58).

through the Women, Infants, and Children Program, and $698 per month in Social Security benefits while her family received an additional $526 per month in food stamps. (R. 196–97; 217–19; 321). Furthermore, he spoke with Applicant, Roach, and their neighbors and determined everyone, including Applicant, was home the majority of the time in the days leading up to Victim's death. (R. 192–93; 210).

Based on his discoveries, Detective Gooding arrested Applicant and Roach in connection to Victim's death on September 12, 2013, and executed a second search warrant at the residence.[5] (R. 199–201). During the second search, Detective Gooding discovered the trailer had been cleaned, the highchair had been uncluttered, and the dusty baby food he had seen during his earlier search had been polished off and stacked neatly on the counter. (R. 201–02). Additionally, he located a bag in the living room containing multiple medications prescribed to Roach along with a pill crusher. (R. 215–16; 222). Furthermore, he located some unused vouchers for baby food and formula along with numerous receipts indicating fast food, beer, and other food items were purchased in the days and weeks leading up to Victim's death, but none of the receipts indicated any baby food or formula had been purchased during that time span. (R. 211–12; 217; 219).

Subsequently, Applicant was indicted for homicide by child abuse, and he elected to proceed to trial. (R. 9–11; 629–30). At the outset of trial, the solicitor indicated she wished to introduce some of the photographs taken of Victim after her death during the course of the trial, and Counsel Zmroczek responded she objected to some of the pictures the solicitor intended to introduce.[6] (R. 12–13; 35–38). In support of her objection, Counsel Zmroczek indicated she wished

[5] At the time of his arrest, Applicant had $484 in cash in his wallet and a reported income of $38,193 per year. (R. 206; 280).

[6] In arguing for the admission of some of the post-mortem photographs, the solicitor noted over one-hundred photographs had been taken in Applicant's case and the majority were not being offered into evidence. (R. 35–36; 76).

to introduce a transcript of remarks made by Judge J. Cordell Maddox, Jr., the South Carolina circuit court judge who accepted Roach's guilty plea prior to Applicant's trial, because Judge Maddox purportedly stated during the guilty plea proceedings he could not remain impartial after viewing the photographs from the case. (R. 38–39). In response, the trial judge inquired as to how Judge Maddox's purported views on the photographs would be relevant to Applicant's case in light of the fact he might have a differing view of the evidence presented to him, and, at that point, Counsel Zmroczek withdrew her request to make Judge Maddox's remarks a part of the trial record. (R. 39–40). Counsel Zmroczek then objected to some of the photographs because Victim's stomach was "all sunk down" in the post-mortem photographs the solicitor wished to introduce while maintaining Victim's stomach appeared different in photographs taken closer in time to her death. (R. 36–38; p. 41). In rebuttal, the solicitor asserted the photographs were highly probative because they were necessary for the medical testimony to be understood and because Counsel Zmroczek intended to challenge the cause of Victim's death along with argue Applicant was not aware of Victim's condition. (R. 42–44).

Upon considering the arguments of counsel and reviewing the evidence overnight, the trial judge ruled one of the photographs the solicitor wished to introduce would not be admissible due to the fact it was cumulative to another of the photographs but overruled Counsel Zmroczek's objection as to five of the post-mortem photographs upon finding their probative value was not substantially outweighed by their potential for unfair prejudice. (R. 62; 73–75). Furthermore, the trial judge determined Victim's condition appeared to be the same in both the earlier post-mortem photographs and the photographs taken several hours later at the time of the autopsy. (R. 44; 73).

Thereafter, as trial proceeded forward, Reed testified about his response to Victim's death and his observations of Victim's alarming condition when he arrived at Applicant's home while

noting Victim's concerning features were readily apparent, and one of the photographs taken of Victim's body – State's Exhibit # 9 – was admitted into evidence over Counsel Zmroczek's objection after Reed confirmed it accurately reflected Victim's condition at the time he placed her into his ambulance. (R. 102–03). Likewise, Detective Gooding testified about the details of his investigation into Victim's death, and he recounted his observations of Victim's shocking condition when he saw her in the emergency room at the Lexington Medical Center.[7] (R. 142–238). Additionally, Becky Kelly, one of Applicant's neighbors, noted Applicant was home every day between June and September of 2013 after he got off work, and Brenda McLain, an accountant and bookkeeper at Applicant's place of employment, confirmed Applicant typically got off work around 2:30 p.m., did not ordinarily work on weekends, and last got off work at 2:31 p.m. on August 30, 2013, prior to Victim's death several days later. (R. 131; 135; 239–50).

As the trial continued forward, Counsel Zmroczek asserted a "juror with . . . shoulder length blond hair" was "crying" and "had visible tears" when State's Exhibit # 9 was published to the jury, and the trial judge noted Counsel Zmroczek's assertion for the record. (R. 270–71). Following that occurrence, Mary Kayse, a pediatric nurse practitioner who saw Victim for wellness checks after her birth, testified about her interactions with Victim and her family. (R. 283–86). During her testimony, Kayse recounted she weighed Victim, who was born in July of 2012, several times between August and November of 2012 and Victim's weight gain was concerning at that time. (R. 286–89). In response, Kayse indicated she spoke to Roach, personally fed Victim, who "greedily" drank two ounces of formula, and recommended Roach increase Victim's calorie intake. (R. 289–

[7] During his testimony, Detective Gooding noted the only change in Victim's appearance between when he saw her in the emergency room and saw her at the time of the autopsy was the medical equipment used in the efforts made to save her life had been removed by the time of the autopsy. (R. 187).

93). After that, Kayse stated Applicant and Roach brought Victim back for one more appointment on November 12, 2012, she weighed Victim and discovered Victim had gained eight ounces in three days, and then Applicant and Roach left with Victim before the appointment could be conducted. (R. 297–98).

In addition to that testimony, Dr. Welsh testified about Victim's cause of death along with his observations during Victim's autopsy, which he found to be "striking," and several more photographs of Victim's condition after her death – State's Exhibits # 3, # 11, # 12, and # 13 – were admitted into evidence. (R. 356–83). Regarding Victim's cause of death, Dr. Welsh explained she died of lethal neglect while noting her death was not caused by drug interaction or a heart condition.[8] [9] (R. 375; 377; 381–82). He further stated Victim's life could have been saved if she had received medical attention when her symptoms were readily apparent. (R. 376). Likewise, Dr. Susan Luberoff, a child abuse pediatrician and expert in forensic pediatrics, testified about her evaluation of the medical records, autopsy findings, photographs, and data related to Victim's death. (R. 396–402). During her testimony, Dr. Luberoff noted Victim was "profoundly emaciated" in a "striking" and "startling" fashion and referred to the various photographs taken after Victim's death to explain the significance of the features depicted in those photographs. (R. 409–14). In order for Victim to have reached the condition she was in, Dr. Luberoff stated she would have had to have been starved for a period of months.[10] (R. 414). Dr. Luberoff further noted the physical

[8] Although drug interaction was ruled out as a cause of Victim's death, three different antidepressants were determined to have been present in Victim's body at the time of her death, and those drugs had been ingested within the last twelve hours of her life. (R. 344–45; 381–82).
[9] Earlier during her opening statement, Counsel Zmroczek had called the jury's attention to the fact Victim had been diagnosed with a heart condition. (R. 101). However, Victim's heart condition had healed by the time of her death. (R. 295–96; 377; 401–03).
[10] Specifically, Dr. Luberoff indicated Victim could have reached the degree of starvation she was experiencing in as little as two months. (R. 421).

features of Victim's chronic starvation, which were depicted in the photographs admitted into evidence, would have been readily apparent to any reasonable caregiver along with a loss of motor skills and strength, which Victim would have been exhibiting in the last days or weeks of her life.[11] (R. 416–18). Following the presentation of that testimony, the State rested.

Counsel Zmroczek offered the testimony of several different witnesses in Applicant's defense. (R. 456; 465; 470; 480; 488; 508). Through those witnesses, it was established Applicant was a "[v]ery good worker" at his job, Applicant understood English, a volunteer for a mentor program made several in-home visits between January and May of 2013 due to a report of neglect involving Applicant's son, and Roach had previously claimed to be Victim's primary caregiver while also falsely claiming she was so because Applicant lived outside of the area. (R. 457; 466; 472–74; 476–78; 485). Furthermore, through those witnesses, it was established a computer recovered from Applicant's home contained nearly a thousand pictures on it, including pictures of Applicant and Victim. (R. 500–01). However, it was further established the computer contained no pictures of Victim taken after April of 2013. (R. 501).

B. Applicant's Testimony

Applicant elected to testify in his own defense. (R 513). During his testimony, Applicant stated Roach, whom he began living with in 2005, became pregnant with Victim during the course of their relationship, and he claimed Roach wanted to have an abortion when they discovered Victim had "problems." (R. 518–21). However, Applicant stated Victim was born anyway and was hospitalized for approximately one month afterwards, and he claimed he visited her in the hospital

[11] During Dr. Luberoff's testimony, the solicitor introduced a photograph – State's Exhibit # 73 – depicting Victim at an earlier point in her life before she was chronically starved, and that photograph allowed the jury to observe the changes in Victim's appearance that were depicted in the other photographs discussed by Dr. Luberoff after Victim had been chronically starved by her parents. (R. 414–16; 433).

daily during that time period and was taught to feed her by her doctors. (R. 521–22). Additionally, Applicant stated Victim was small after she was born and claimed he was concerned by her lack of weight gain during her lifetime. (R. 523). However, Applicant insisted it was Roach's role to take care of Victim while claiming he held Victim every time he saw her up until her death, changed her diapers on some occasions, played with her, and was never not allowed to see her. (R. 527–28).

Applicant further and inconsistently claimed Roach, whom he stated was sick and sleeping on a couch at the time, would not let him see Victim on the weekend of Victim's death while insisting he last saw Victim three days before her death at a time when she was clothed. (R. 532–35; 537). When he saw her at that time, Applicant claimed Victim did not look sick. (R. 534). Furthermore, as his testimony continued, Applicant acknowledged he was capable of feeding Victim but insisted it was not his responsibility or job to feed Victim. (R. 539–42). Instead, he explained that responsibility fell to Roach, whom he characterized as "crazy." (R. 541; 553). Applicant further conceded he was off every weekend during August of 2013 at the time when Victim was starving to death. (R. 539–42).

C. Verdict & Subsequent Proceedings

Following the multi-day trial, the jury convicted Applicant as indicted on June 5, 2015. Judge Russo sentenced Applicant to life without the possibility of parole.

Applicant filed a timely notice of appeal. Appellate Defender David Alexander perfected his appeal by filing a brief with the Court of Appeals on the following issue:

> Whether, pursuant to Rule 403, because the overwhelming prejudice drastically outweighed their probative value, the trial court erred in admitting photographs of an infant's corpse that caused one of the most seasoned trial judges in this state to declare he could not be impartial after viewing them and caused jurors to cry upon their publication by the State?

On March 7, 2018, the Court issued an unpublished per curiam opinion affirming Applicant's conviction. *State v. Campos*, Op. No. 2018-UP-100 (S.C. Ct. App. filed March 7, 2018). The case was remitted back to the circuit court on March 28, 2018.

III. ISSUES BEFORE THIS COURT

In his original application for post-conviction relief, Applicant alleged he is being held in custody unlawfully based on the following (excerpted verbatim):

> 1. Ineffective assistance of trial counsel
>   a. "Counsel failed to request charges on involuntary manslaughter and accident. Counsel[']s conduct was deficient because the Defendant[']s testimony supported and[*sic*] involuntary manslaughter charge by providing evidence of his provided limited care by the victim[']s killer who 'would not let him see' and by his finding and reporting of the victim 'not breathing anymore.' "

The State requested an evidentiary hearing through its return, partial motion to dismiss, and motion for a definite statement on March 29, 2019. On August 20, 2021, PCR counsel filed an amended application pursuant to Rule 71.1, SCRCP, to conform to the evidence presented at the PCR hearing in the event that any new issues arise during the court of the hearing.[12] PCR counsel further amended the application to include the following allegation:

> 1. Ineffective Assistance of Counsel as to Aimee Zmroczek, Esquire
>   a. Failure to request jury charges on lesser-included offense

IV. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

[12] *See Simpson v. Moore*, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); Rule 15(b), SCRCP (pleadings may be amended, even after judgment, to conform to issues tried by express or implied consent but not raised in the original pleadings)

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the

proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard, and failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985). "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,'

a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen*." *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 ("Representation

is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* at 689; *see Mazzell v. Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an

applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In evaluating prejudice, the PCR court must consider the "specific impact counsel's error had on the outcome of the trial" in addition to "the strength of the State's case in light of all the evidence presented to the jury." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *Strickland*, 466 U.S. at 695–96. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial*." *Strickland*, 466 U.S. at 687 (emphasis added). In general, "the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 696) (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Significantly, "the ultimate focus of inquiry must be

on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

V. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the sole claim of ineffective assistance of counsel articulated at the start of the hearing and finds it to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

1. **Failure to Request a Jury Charge on Involuntary Manslaughter**

This Court finds Applicant claim of ineffective assistance of counsel based on Counsel Zmroczek's failure to request a jury charge on involuntary manslaughter is wholly meritless and fails as a matter of law. *See Basham v. United States*, 109 F. Supp. 3d 753, 776 (D.S.C. 2013) (noting that "[i]t is axiomatic that if the claim or claims that counsel failed to raise are devoid of legal merit, a defendant suffers no prejudice and cannot establish a claim of ineffective assistance of counsel" (citing *Strickland*, 466 U.S. at 687)), *aff'd*, 789 F.3d 358 (4th Cir. 2015), and *aff'd*, 789 F.3d 358 (4th Cir. 2015).

As to jury instructions, Counsel Zmroczek testified at the PCR hearing that she requested the "extreme indifference" definition from *State v. Jarrell*, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), which defines extreme indifference as "akin to intent." She explained that she believed the jury could find Applicant less culpable under this definition. However, she testified that she could not request a jury charge on involuntary manslaughter because involuntary manslaughter does not qualify as a lesser-included offense of homicide by child abuse. This Court agrees with Counsel Zmroczek's assessment.

The trial judge is to charge the jury on a lesser-included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996); *State v. Tyndall*, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999) (clarifying that "[a] lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty only of the lesser offense"). The test for determining when an offense is a lesser-included offense of another offense is "whether the greater of the two offenses includes all the elements of the lesser

offense." *McKnight v. State*, 378 S.C. 33, 51, 661 S.E.2d 354, 363 (2008) (citing *State v. Northcutt*, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007)). "If the lesser offense contains an element which is not included in the greater offense, it is not a lesser-included offense of the greater offense." *Id.* (citing *Northcutt*, 372 S.C. at 215, 641 S.E.2d at 877); *see also Knox v. State*, 340 S.C. 81, 85, 530 S.E.2d 887, 889 (2000) ("A lesser offense is included in the greater only if each of its elements is always a necessary element of the greater offense."), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Homicide by child abuse "requires proof of the death of a child under age eleven during the commission of child abuse or neglect and the death occurs under circumstances showing extreme indifference to human life." *Northcutt*, 372 S.C. at 215, 641 S.E.2d at 877 (citing S.C. Code Ann. § 16-3-85 (2003)). In her dissenting opinion in *State v. Fletcher*, Chief Justice Toal examined the legislative intent reflected in the homicide by child abuse statute and unique nature of the offense. 379 S.C. 17, 27–31, 664 S.E.2d 480, 484–87 (2008). Specifically, she noted:

> Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help. It is also not uncommon for child abuse victims to be so young that they are incapable of offering testimony against the abuser.

Id. at 27, 664 S.E.2d at 484–85 (Toal, C.J., dissenting). "In light of the insidious nature of this crime," she explained, the legislature created a separate statute that "incorporates more than just the act that causes the death" by criminalizing "the specific infliction of abuse as well as the failure to protect a child from abuse which results in the death of that child while exhibiting an extreme indifference to human life." *Id.*; *cf. Jarrell*, 350 S.C. at 99, 564 S.E.2d at 367 ("A parent has a

specific and nondelegable duty to serve the best interest of [his or] her child and should make every effort not to knowingly place [his or] her child in harm's way.").

Thus, the homicide by child abuse statute "recognizes and criminalizes both the acts and the omissions that typify the situation in which a helpless child perishes as a result of an adult's actions or criminal ambivalence." *Fletcher*, 379 S.C. at 31, 664 S.E.2d at 487 (Toal, C.J., dissenting); *see* S.C. Code Ann. § 16-3-85(B)(1) (defining "child abuse or neglect" as "an *act or omission* by any person which causes harm to the child's physical health or welfare" (emphasis added)). Specifically, S.C. Code Ann. § 16-3-85(A) provides that "[a] person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven." *See also* S.C. Code Ann. § 16-3-85(B)(1) (defining "child abuse or neglect" as "an act or omission by any person which causes harm to the child's physical health or welfare").

The meaning of extreme indifference to human life in the context of a homicide by child abuse case is consistent with recklessness and indifference in reckless homicide cases. *McKnight*, 378 S.C. at 48, 661 S.E.2d at 361. Thus, extreme indifference to human life can similarly be equated to "a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof." *Id.* (quoting *State v. Tucker*, 273 S.C. 736, 739, 259 S.E.2d 414, 415 (1979)); *see* S.C. Code Ann. § 16-3-85(B)(2) ("'[H]arm' to a child's health or welfare occurs when a person (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment; (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so

causes a physical injury or condition resulting in death; or (c) abandons the child resulting in the child's death.").

In *State v. Greene*, our Supreme Court agreed with Chief Justice Toal's opinion in *Fletcher* to the extent that the "homicide by child abuse statute reflects the legislature's intent to define and target a specific societal problem—child abuse resulting in death." 423 S.C. 263, 281, 814 S.E.2d 496, 506 (2018). In that case, the Court examined the distinction between the detailed elements found in the homicide by child abuse statute and the "broad terms" that comprise the offense of involuntary manslaughter. *Id.* Notably, involuntary manslaughter can exist based on a larger number of factual predicates, and the now codified common law offense covers "unintentional killings from both unlawful conduct that does not naturally tend to place another in danger of death or serious bodily harm and lawful conduct that recklessly places another in danger of harm." *Id.*; *see generally McKnight*, 378 S.C. at 51, 661 S.E.2d at 363 ("Involuntary manslaughter is defined as (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.").

In *State v. McKnight*, a post-conviction relief appeal, our Supreme Court held that counsel was not ineffective for failing to request a jury charge on involuntary manslaughter as a lesser-included offense of homicide by child abuse based on the elements test. 378 S.C. at 51–52, 661 S.E.2d at 363. Specifically, the Court explained that "only the 'unlawful activity' definition of involuntary manslaughter could potentially apply in the arena of child abuse because child abuse is an unlawful act." *Id.* (citing *State v. Mitchell*, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005). Because "child abuse could never be defined as an unlawful activity 'not tending to cause death or

great bodily harm,'" the Court explained, "the elements of involuntary manslaughter *will never* be included in the greater offense of homicide by child abuse." *Id.* at 52, 661 S.E.2d at 363 (emphasis added).

Because our Supreme Court has expressly held that involuntary manslaughter is not a lesser-included offense of homicide by child abuse, Applicant's claim pertaining to Counsel Zmroczek's failure to request a jury charge on involuntary manslaughter fails as a matter of law. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to Request a Jury Charge on Accident

This Court similarly finds Applicant failed to establish Counsel Zmroczek provided constitutionally ineffective assistance by failing to request a jury charge on the defense of accident. *See Arnette v. State*, 306 S.C. 556, 557–58, 413 S.E.2d 803, 804 (1992) (reversing the PCR court's grant of relief based on counsel's failure to consider the defense of accident where there was no probative evidence in the record that the defendant was acting lawfully at the time of the homicide); *see also Palacio v. State*, 333 S.C. 506, 514–15, 511 S.E.2d 62, 67 (1999) (finding counsel was not deficient for failing to make futile argument).

The law to be charged to the jury is determined by the evidence presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). A "trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *Id.* However, "no instruction should be given by the trial judge . . . which tenders an issue which is not presented or supported by the evidence." *State v. Weaver*, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). Further, our Supreme Court has cautioned trial judges "to charge only the law which is applicable to the case," as "the purpose of the jury instructions is to enlighten the jury." *State v. Fair*, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946); *see id.* (noting that "[t]his purpose is accomplished by a statement

of the law which fits the concrete case; it is defeated by a discourse filled with abstract legal propositions having the effect of confusing the minds of the jury."). Providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989); *Fair*, 209 S.C. at 445, 40 S.E.2d at 637.

The defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. *State v. Commander*, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011); *cf. State v. Brown*, 205 S.C. 514, 32 S.E.2d 825, 828 (1945) ("Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. If it be shown that the killing was unintentional; that it was done while the perpetrator was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused on the score of accident."). However, a "homicide is not excusable on the ground of accident unless it appears that the defendant was acting *lawfully*." *Arnette*, 306 S.C. at 557, 413 S.E.2d at 804; *see State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 107 (1999) (noting that the defense of accident fails "if the State proves beyond a reasonable doubt "that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide").

At the PCR hearing, Counsel Zmroczek testified that she could not have requested a jury charge on accident because there was simply no evidence the child's death occurred by accident. Specifically, she explained that none of Applicant's behavior would fall under an accident theory because "you can't say you forgot to feed your child by accident." Applicant failed to provide any basis upon which Counsel Zmroczek could have requested a jury charge on accident, and further failed to point to any evidence in the record that would have warranted a jury charge on accident. *See, e.g., State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999) (affirming the trial

court's refusal to instruct the jury on the defense of accident where the evidence established that the defendant engaged in assault and battery and the defendant presented no evidence that he was acting in self-defense).

Because Applicant failed to meet his burden of proving Counsel Zmroczek's failure to request a jury instruction on accident constituted ineffective assistance of counsel, Applicant's request for relief by way of this allegation is **DENIED.**

VI. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VII. CONCLUSION

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

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

counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 4 day of May, 2022.

R. LAWTON MCINTOSH
Presiding Circuit Court Judge
Eleventh Judicial Circuit

Anderson, South Carolina