STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable Carmen Tevis Mullen, Circuit Court Judge
Appellate Case No. 2011-194506

THE STATE,

Respondent,

vs.

PARIS AVERY,

Petitioner.

RESPONDENT'S PETITION FOR REHEARING

On June 12, 2013, this Court issued an opinion in which it reversed an earlier decision of the Court of Appeals affirming Avery's conviction. State v. Avery, Op. No. 2013-MO-016 (S.C. Sup. Ct. filed June 12, 2013). In reaching that result, a majority of this Court concluded that the Court of Appeals incorrectly affirmed the denial of Avery's directed verdict motion after finding the State failed to present evidence establishing Avery acted with extreme indifference to human life when she killed her fifteen-month-old child. Pursuant to Rule 221(a), SCACR, Respondent ("the State") respectfully petitions for rehearing.

In seeking rehearing, the State respectfully submits that the majority of this Court misapprehended the required elements of homicide by child abuse as previously recognized in South Carolina, overlooked the evidence presented during trial establishing Avery's guilt for each element of the indicted offense, including that Avery caused the victim's death under

circumstances manifesting extreme indifference to human life, and misapplied the directed verdict standard in evaluating the sufficiency of the evidence presented. Contrary to the conclusion reached by the majority of this Court, the evidence and testimony presented during Avery's trial, when viewed in a light most favorable to the State as required, satisfied all of the necessary elements of homicide by child abuse as the elements of the offense have previously been defined and applied in our state. See State v. Brown, 402 S.C. 119, 124, 740 S.E.2d 493, 495 (2013) ("On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State.").

Pursuant to the statutory definition of the offense, the crime of homicide by child abuse has been committed when a person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life[.]" S.C. Code Ann. § 16-3-85(A)(1). Therefore, in order to prove the offense of homicide by child abuse in Avery's case, the State was required to prove: (1) Avery caused the death of a child under eleven years old; (2) Avery caused the death while committing an act of child abuse or neglect; and (3) the victim's death occurred under circumstances manifesting an extreme indifference for human life. Id.

In interpreting the statutory definition of homicide by child abuse, our courts have previously instructed: "[I]n the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002). Additionally, this Court has explained that 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. State v. McKnight, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003). Thus, extreme indifference

to human life has previously been 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' " in South Carolina. Id. (citation omitted); see McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) ("[T]he references in the criminal intent charge to recklessness and indifference are consistent with this Court's [homicide by child abuse] jurisprudence regarding the meaning of 'extreme indifference to human life[.]' ").

In Avery's case, it is unquestionable Avery's actions caused the death of the fifteen-month-old victim. The evidence and testimony presented during trial showed Avery was the only person who had access to both the victim and the victim's medication on the day of his death, and, thus, Avery was the only person capable of having administered the fatal overdose that resulted in the victim's death. Furthermore, there does not appear to be any dispute that Avery caused the victim's death while committing an act of child abuse or neglect. According to the expert testimony offered during trial by Dr. Michael Caplan, an expert in forensic pathology, and Dr. Demetra Garvin, an expert in forensic toxicology, the fatal overdose administered to the victim was too large to have been administered accidently based on the concentration of the medication in the victim's system at the time of his death, and the overdose clearly "cause[d] harm to the child's physical health or welfare" as it directly resulted in his death. 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").

The only dispute in Avery's case concerns whether Avery's deliberate act of administering the fatal overdose to the victim occurred under circumstances manifesting extreme indifference to human life. In finding that it did not, the majority of this Court concluded that the State failed to prove Avery consciously engaged in a life-threatening act with indifference as to

whether the victim lived or died. In support of that determination, the majority of this Court concluded that no evidence was presented demonstrating Avery was personally informed of the risks of overmedication or understood that the prescription she administered to the victim was to be administered as needed but not more than every six hours.

However, the majority of this Court failed to consider that evidence directly proving Avery personally understood the risks of overmedication was not needed in order for the jury to find that Avery consciously engaged in life-threatening behavior or that her conduct manifested an extreme indifference to human life. In fact, this Court expressly **rejected** such a requirement in the highly-similar case of Regina Denise McKnight. In McKnight's case, McKnight gave birth to a stillborn daughter who died as a result of McKnight's consumption of cocaine while pregnant. McKnight, 352 S.C. at 640-641, 576 S.E.2d at 171. McKnight was subsequently indicted for and convicted of homicide by child abuse and appealed her conviction. Id. at 641, 576 S.E.2d at 171. On appeal, McKnight challenged the sufficiency of the evidence proving she had the requisite intent to commit homicide by child abuse, arguing "there [was] no evidence she acted with extreme indifference to human life as there was no evidence of how likely cocaine is to cause stillbirth, or that she knew the risk that her use of cocaine could result in the stillbirth of her child." Id. at 644, 576 S.E.2d at 172-173. Despite McKnight's appellate contentions, this Court determined the evidence establishing McKnight used cocaine while pregnant was sufficient to create a jury issue in regard to whether her daughter's death occurred under circumstances manifesting extreme indifference to human life in light of the fact "that it is public knowledge that usage of cocaine is **potentially** fatal[.]" (emphasis added). Subsequently, McKnight sought post-conviction relief and argued that her trial counsel "was ineffective in failing to argue that there was no evidence on the record suggesting that McKnight knew that

using cocaine risked harming her fetus's life." McKnight, 378 S.C. at 55, 661 S.E.2d at 365. Once again, this Court rejected McKnight's contentions based on the fact that "men of common understanding are familiar with the harmful effects of cocaine." Id. Due to the fact that cocaine's harmful potential is commonly known, this Court concluded "a reasonable jury would certainly not be persuaded by the argument that McKnight did not know that her cocaine use posed risks to her unborn child." Id. at 55-56, 661 S.E.2d at 365.

Critically, when applying the previously-recognized definition of extreme indifference to human life to Avery's case in the same manner that it was applied in McKnight's case, the evidence and testimony presented during trial established the victim's death occurred under circumstances manifesting extreme indifference to human life. That is true because the evidence established Avery deliberately and non-accidentally delivered the overdose of medication to the victim with a reckless disregard for the victim's health or safety and with a conscious disregard for due and ordinary care. Just as in McKnight's case, such conduct constituted circumstances manifesting extreme indifference because the risks associated with all prescription medications are a matter of common knowledge due to the fact that prescription medications are controlled substances and cannot be obtained without a prescription from a licensed medical professional and because it is commonly known that administering overdoses of medication can potentially be fatal, particularly to someone as vulnerable and susceptible as an infant. See Commonwealth v. Walker, 442 Mass. 185, 193, n. 17, 812 N.E.2d 262, 271 (Mass. 2004) ("A person of ordinary intelligence would be aware that there are varying risks associated with all prescription medications. It is a matter of both common knowledge and common sense that a prescription is required to obtain certain medications precisely because they contain drugs that are not safe except when administered and supervised by a physician or other properly licensed

practitioner."); see also Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 770 (Tex. 2007) ("One of toxicology's central tenets is that 'the dose makes the poison.' This notion was first attributed to sixteenth century philosopher-physician Paracelsus, who stated that '[a]ll substances are poisonous – there is none which is not; the dose differentiates poison from a remedy.' " (citations omitted and brackets in original)).

Demonstrating the fact that the risks associated with administering too much medication are commonly known, understood, and accepted, this Court acknowledged, without any need to cite to authority to support the proposition, that even overdoses of non-prescription medication can be fatal, stating: "Certainly, in large enough doses even over-the-counter medication can be lethal[.]" Even more significantly, counsel for Avery readily conceded during oral argument before this Court that the administration of an overdose of prescription medication to a child "absolutely" could constitute conduct manifesting extreme difference to human life while simply contending the size of the overdose that Avery administered to her child was not of a sufficient amount to manifest extreme indifference. Critically though, a consideration of whether the specific overdose administered by Avery was of a sufficient size to manifest extreme indifference necessarily involves weighing the evidence, which cannot appropriately be done when conducting a directed verdict analysis. See State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, **not with its weight**; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (emphasis added)). Accordingly, when considering only the existence of evidence as

required, the evidence presented during trial establishing Avery intentionally administered a fatal overdose of medication to the victim was sufficient to create a jury question as to whether Avery knew or should have known of the risks associated with such an action and, thus, acted under circumstances manifesting extreme indifference to human life when she disregarded the commonly-known risks associated with her conduct. See State v. Sterling, 396 S.C. 599, 617, 723 S.E.2d 176, 186 (2012) ("While severe recklessness is not a common criminal mens rea standard, . . . severe recklessness means simply that one cannot escape liability by 'shutting one's eyes to what would otherwise be obvious.' This is a longstanding tenet of criminal law."); see also McKnight, 378 S.C. at 55-56, 661 S.E.2d at 365 (rejecting the argument that McKnight's trial counsel was ineffective for failing to argue there was no evidence in the record suggesting McKnight actually knew that her cocaine use risked her fetus' life because, due to the fact that "men of common understanding" are familiar with the harmful effects of cocaine, "a reasonable jury would certainly not be persuaded by the argument that McKnight did not know that her cocaine use posed risks to her unborn child"); see, e.g., Walker, 442 Mass. at 192, 812 N.E.2d at 270 (recognizing that a particular defendant cannot escape an imputation of wanton or reckless conduct even if the defendant was so stupid or heedless that he did not realize the grave danger created by his actions if an ordinary person under the same circumstances would have realized the gravity of the danger).

In Avery's case, the jury could have found beyond a reasonable doubt that Avery was consciously aware her act of administering an overdose to the victim could result in the victim's death based on the inherent and commonly-known risks associated with prescription medications and overdoses, and the jury could have further concluded that Avery was aware of those risks based on the warning contained on the prescription medicine bottle, which made clear that the

medication carried risks even when administered properly. See Walker, 442 Mass. at 192-193, 812 N.E.2d at 270 (recognizing an ordinary person would understand the admonitions on a prescription label as a caution that failure to follow the admonitions as directed could potentially be toxic and harmful). Additionally, Avery's own statements to Sergeant Christine Wilson of the Beaufort County Sheriff's Office established to the jury that Avery knew that the medication had to be administered in accordance with the prescription label, with Avery claiming she administered the medicine in roughly six-hour intervals as directed on the prescription label and with Avery further falsely claiming she administered the medicine "to a T."[1] Furthermore, notwithstanding the inferences that could be drawn from Avery's suspicious behavior in refusing to let her neighbor handle the victim as she normally did shortly before the victim's death, Avery's act of making a false statement to Sergeant Wilson about administering a dose of medication to the victim at a time she could not have possibly done so demonstrated that Avery was consciously aware, even before the cause of the victim's death had been medically determined, that her act of administering the overdose to the victim caused his death and that she did not want the officer to ascertain that fact.[2] See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt."); see also Marshall v. State, 85 Md. App. 320, 324, 583 A.2d 1109, 1111 (Md. Ct. Spec. App. 1991) ("Interference

[1] Specifically, Sergeant Wilson testified that Avery claimed she administered one dose of medication to the victim at 9:00 a.m., one dose at 3:00 p.m., and one dose sometime after 3:00 p.m. (R. p. 86). Although Avery's claims regarding the dosage amount and times were ultimately proven to be false, the dosage intervals claimed by Avery were consistent with the directions on the prescription medication label, which stated the medicine was to be administered every six hours as needed. (R. p. 86; p. 112; p. 172; pp. 202-203; p. 222; p. 226).

[2] Establishing the falsity of Avery's statements to Sergeant Wilson in regard to the dosage times, Avery's neighbor, Agnetta Wright, testified that Avery was at work with her when she claimed to have administered the dose to the victim at 3:00 p.m. (R. p. 86; p. 112). However, Avery could not possibly have done so because she was with Wright at their place of employment while the victim was at a daycare center at that time. (R. p. 112; pp. 159-160; pp. 161-162).

with police investigation is recognized as conduct which may evidence a consciousness of guilt.").

Based on that evidence, there was ample evidence in the record from which the jury could logically and rationally have found Avery guilty of each and every element of the offense of homicide by child abuse, including that the victim's death occurred under circumstances manifesting an extreme indifference to human life. See McKnight, 352 S.C. at 645, 576 S.E.2d at 173 (equating the requisite mental state in a homicide by child abuse case 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"). For that reason, the trial judge properly denied Avery's directed verdict motion and submitted the issues raised by the evidence, including the issue of Avery's intent, to the jury for proper resolution. See id. at 646, 576 S.E.2d at 173 ("Given the fact that it is public knowledge that usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life."); see also State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) ("The question of criminal intent with which an act is done is one of fact and **is ordinarily for jury determination except in extreme cases**[.]" (emphasis added)); see, e.g., Walker, 442 Mass. 191, 812 N.E.2d at 269 ("[T]he defendant argues . . . that involuntary manslaughter could not be proved because Restoril is a legally prescribed medication that has numerous legitimate and 'fairly safe' uses. Moreover, he argues, there was no label warning him that his conduct created a high degree of likelihood that substantial harm would result to another. . . . [W]e conclude that his contention concerns the weight and credibility of the evidence, 'a matter wholly within the province of the jury.' " (citations omitted)).

In reversing Avery's convictions, the majority of this Court failed to properly apply the directed verdict standard of review to the evidence presented during Avery's trial. See State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) ("[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law."). Furthermore, this Court also failed to evaluate the sufficiency of that evidence in relation to the elements of homicide by child abuse as the elements of the offense have previously been defined and applied in South Carolina. See McKnight, 378 S.C. at 48, 661 S.E.2d at 361 ("[T]he reference in the criminal charge to recklessness and indifference are consistent with this Court's [homicide by child abuse] jurisprudence regarding the meaning of 'extreme indifference to human life[.]' ").

In essence, the mental state that the majority of this Court determined the State was required to prove in order to establish the offense of homicide by child abuse was that Avery acted with malice when she killed the victim. Compare Price v. State, 284 S.W.3d 462, 466 (Ark. 2008) (explaining that extreme indifference to human life in the context of the crime of **capital murder** "requires actions that evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim"); and 40 C.J.S. Homicide § 42 ("Murders performed with a depraved, extreme or utter indifference to human life, or with a depraved heart or mind, are types of murder proscribed under some statutory provisions. . . . Under some statutes, depraved indifference is an element of depraved-mind murder. Under some provisions, a person is guilty of murder if he or she engages in conduct which manifests a depraved indifference to the value of human life and which causes the death of another human being. Similarly, other provisions define depraved-mind murder as any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life. While intent may not be

necessary under provisions of this nature, something more than mere recklessness is comprehended, and a gross deviation from a reasonable standard of care may not be sufficient."); with State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) ("The conduct of the driver was such as to imperil human life. Although it may be fairly assumed there was no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice [and convict Mouzon of murder]."); State v. Kinard, 373 S.C. 500, 503-504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("[The] four [possible mental states for malice aforethought] are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule)."); and 23 S.C. Jur. Homicide § 16 ("Malice can be inferred or implied rather than express. This sort of inferred malice occurs when the defendant acts so recklessly or wantonly as to show a depravity of the mind or a disregard for human life."). However, by enacting a homicide by child abuse statute separate and distinct from the murder statute, the South Carolina General Assembly clearly indicated that the mental state required to establish the offense of murder, which is express **or** implied malice aforethought, was **not** the same mental state required to prove the offense of homicide by child abuse. Otherwise, the General Assembly would not have enacted a separate homicide by child abuse statute and certainly would not have permitted the imposition of a lower mandatory minimum sentence for a homicide by child abuse conviction than is permitted for a murder conviction. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342-343, 713 S.E.2d 278, 283 (2011) ("Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."); see also S.C. Code Ann. § 16-3-20 (mandating a sentence of

death, life, or no less than thirty years for murder); S.C. Code Ann § 16-3-85(C)(1) (mandating a sentence of life imprisonment to no less than twenty years for homicide by child abuse). Therefore, the majority of this Court erred in defining and applying the elements of homicide by child abuse in a manner inconsistent with the legislature's intent and in a manner inconsistent with the way the elements of the statute have been defined and applied by the appellate courts of South Carolina in the past, including in the decisions in McKnight's case.

In light of the evidence presented during trial and in light of the similarities between Avery's case and McKnight's case, which the majority of this Court appears to have overlooked, the State believes the majority of this Court erred in concluding the Court of Appeals committed reversible error in affirming the trial judge's denial of Avery's directed verdict motion. For the foregoing reasons, the State asks that this Court reconsider its decision, rehear the matter, and affirm Avery's conviction and sentence.

Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Brief of Respondent and raised during the oral argument before this Court, the State respectfully requests that this Court reconsider its decision, rehear the matter, and affirm the decision of the Court of Appeals affirming Avery's conviction and sentence.

Respectfully submitted,

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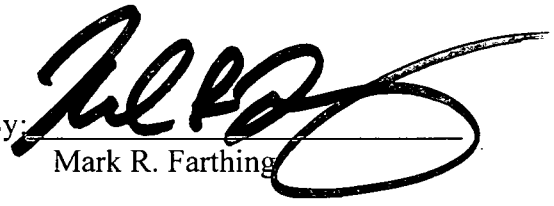
By: 
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June 27, 2013

STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 27th day of June, 2013.

Ellen R. DuBois

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