THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jan 30 2024

S.C. SUPREME COURT

APPEAL FROM
SPARTANBURG COUNTY

The Honorable J. Mark Hayes, II
Circuit Court Judge

Case No. 2019-CP-42-01605

Stephanie Irene Greene, # 359489

Petitioner,

v.

State of South Carolina

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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1. Did the PCR Court err in holding that although trial counsel was ineffective for failing to investigate, develop, and offer an alternative theory of causation (renal failure) to rebut the State's theory that the morphine level measured in her daughter was explained by transmission of the drug through her breast milk, Petitioner suffered no prejudice because presentation of the alternative theory would not have changed the outcome of the trial?

2. Did the PCR Court err in holding that although trial counsel was ineffective for failing to object to multiple improper leading questions from the State that suggested that the State's scientifically unsupported theory of the case was "obviously" what happened, Petitioner suffered no prejudice?

3. Did the PCR Court err in holding that trial counsel was not deficient for failing to move to exclude or otherwise challenge the State's experts' testimony related to the synergistic effect of medications measured on the toxicology report or present rebuttal testimony on this point?

4. Did the PCR Court err in holding that appellate counsel was not deficient where counsel correctly argued that the convictions for involuntary manslaughter and homicide by child abuse were inconsistent, yet failed to advocate for the appropriate remedy?

5. Did the PCR Court err in holding that new medical literature repudiating the only study cited at Petitioner's trial to support the theory that a lethal level of morphine could be transmitted through breast milk did not constitute evidence of material facts not previously presented and heard?

6. Did the PCR Court err in holding that South Carolina law does not recognize the cumulative error doctrine and that the cumulative error did not rise to the level of prejudice in any event?

Statement of the Case

I. Criminal Trial

The underlying criminal matter concerned the death of Petitioner's infant daughter ("L.G."). Petitioner was charged with homicide by child abuse, unlawful conduct toward a child, and involuntary manslaughter. Petitioner pled not guilty to all charges. Attorney C. Rauch Wise represented Petitioner both at trial and on appeal.

At trial, the State contended that Petitioner's approximately seven-week-old daughter died from morphine poisoning. The State's theory of the case was that Petitioner consumed prescription morphine while breastfeeding, which caused transmission of a lethal level of the drug through her breast milk and ultimately led to her daughter's death from morphine poisoning. However, the State never tested Petitioner or her breast milk, and none of the State's expert witnesses testified to a reasonable degree of medical certainty that morphine poisoning through breast milk was possible.

The State also presented evidence and testimony at trial contending that the morphine acted "synergistically" with other medications identified on the toxicology report for L.G. to enhance the effects of the morphine.

When asked if there were any reported cases of a lethal dose through breast milk, the State's toxicology expert, Dr. David Eagerton, cited a singular study out of Canada.[1] As detailed below, Petitioner established at trial that this case was not analogous to Petitioner's since it involved a different medication that is metabolized differently by the body.

Trial counsel did not rebut the State's evidence and testimony that a lethal level of morphine could be transmitted through breast milk. Moreover, trial counsel failed to investigate,

[1] *See* Parvaz Madadi, et al., Safety of codeine during breastfeeding. Fatal morphine poisoning in the breastfed neonate of a mother prescribed codeine, Can Fam Physician, 53:33-5 (2007) (A. 1644-46) (the "Canadian study").

develop, or present any testimony or evidence (expert or otherwise) that would provide an alternative cause for L.G.'s death. At trial, counsel called one expert witness, Dr. Stephen Karch, who was qualified as an expert in pathology and toxicology. Dr. Karch did not opine that it was impossible for a lethal level of morphine to be transmitted through breast milk and, in fact, conceded that it was possible this could have occurred.[2]

The matter was tried to a jury between March 27, 2014 and April 4, 2014, which found Petitioner guilty on all charges. The court sentenced Petitioner to twenty years on the homicide by child abuse charge with five years concurrent on the unlawful conduct toward a child charge and five years concurrent on the involuntary manslaughter charge.

II. Direct Appeal

Petitioner appealed and the matter was *sua sponte* transferred to this Court. After two oral arguments, the Court affirmed Petitioner's convictions and sentences for homicide by child abuse and unlawful conduct toward a child in a 4-1 decision issued on May 23, 2018. The Court, however, vacated the involuntary manslaughter conviction and sentence, finding that Petitioner could not be found guilty for both homicide by child abuse and involuntary manslaughter without running afoul of double jeopardy.

The U.S. Supreme Court denied Petitioner's petition for a writ of certiorari.

III. Post-Conviction Relief

On May 2, 2019, Petitioner timely filed a *pro se* petition for post-conviction relief (PCR). This petition was amended on three subsequent occasions.

An evidentiary hearing was held on September 19 and 20, 2022, before the Honorable J. Mark Hayes, II. Petitioner presented testimony from three witnesses: Dr. Anthony Scialli, Dr.

[2] Dr. Karch speculated that L.G. could have had a "genetic defect" but offered no explanation on what sort of defect could have caused this outcome and did not testify to a reasonable degree of medical certainty that L.G. had a genetic defect.

Katherine Twombley, and C. Rauch Wise, Esq. The State did not call any witnesses and limited its presentation to cross-examination and argument of counsel.

a. Dr. Scialli's Testimony

Dr. Scialli specializes in reproductive and developmental toxicology and has extensive experience treating pregnant and breastfeeding women, particularly those with issues involving exposure to medication. He was qualified as an expert without objection. (PCR Day I, Tr. 8:16-23, 20:15-22; A. 1242, 1254.)

Dr. Scialli offered four critical opinions at the PCR trial. First, he opined that the morphine concentration measured in L.G. could not have been explained due to breastfeeding alone. (*Id.* at 32:1-6; A. 1266.) Second, he opined that the morphine concentration measured in L.G. was most likely explained by the inhibition of excretion of morphine and its metabolites, almost certainly due to renal failure. (*Id.* at 52:3-18, 54:21-25, 56:15-25; A. 1286, 1288, 1290.) Third, Dr. Scialli opined that the reliance of the State's witnesses on the Canadian study was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as the 2020 "Zipursky paper" detailed.[3] (*Id.* at 78:11-16; A. 1312); *see* Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, 108(5) Clinical Pharmacology & Therapeutics (May 2020) (A. 1647-66.) Fourth, Dr. Scialli testified that it was his opinion that testimony of the State's expert witnesses regarding "synergy" was not appropriate because there is no literature support for synergy in this case. (*Id.* at 78:17-20; A. 1312.)

[3] Following publication of the Zipurksy paper, two of the journals that published literature about the Canadian study issued a retraction. (*Id.* at 67:15-24; A. 1301); *see also* Pimlott & Tsuyuki, Risks of maternal codeine intake in breastfed infants: a joint statement of retraction from Canadian Family Physician and the Canadian Pharmacists Journal, Can Fam Physician (2020) (A. 1667-68.)

Dr. Scialli testified that he has personally treated patients who were taking morphine and prescribed it to pregnant and breastfeeding women. (*Id.* at 35:7-36:12; A. 1269-70.) He explained that it is within the standard of care to do so where appropriate, and Petitioner's fibromyalgia would be one such scenario. (*Id.* at 36:8-12, 37:09-24; A. 1270-71.) It is also within the standard of care to prescribe morphine to neonates and infants directly if the circumstances warrant it. (*Id.* at 36:13-37:04; A. 1270-71.)

b. Dr. Twombley's Testimony

Dr. Katherine Twombley is a pediatric nephrologist at the Medical University of South Carolina ("MUSC") and also was qualified without objection. (*Id.* at 181:21-182:02; 191:15-192:13; A. 1415-16; 1425-26.) She has specific training and experience in treating renal failure. (*Id.* at 187:7-10; A. 1421.) She came to MUSC in 2012 and agreed that there have been competent pediatric nephrologists with experience in treating renal failure in the South Carolina area since that time. (*Id.* at 208:10-21; A. 1442.)

Dr. Twombley opined to a reasonable degree of medical certainty that L.G. suffered from acute renal failure and this was the cause of her death. (*Id.* at 198:12-17, 212:2-9; A. 1432; 1446.) As she explained, L.G. had a normal well visit at two weeks of age and was completely fine until she developed an illness a few days before she passed. (*Id.* at 198:18-22; A. 1432.) Dr. Twombley noted that this visit was important because there were "absolutely no concerns by the pediatrician" and the child was "healthy." (*Id.* at 201:14-20; A. 1435.) Second, L.G.'s medical records noted she had a cold on Wednesday, November 10th (around two days prior to her death) and was "congested, not eating well, and somewhat lethargic." (*Id.* at 203:2-15; A. 1437.) The nurse informed Petitioner that if L.G. did not have a fever, she did not need to come in to the office. (*Id.*) Dr. Twombley explained that this was significant because "[w]hen

babies get congested, they can't breathe well and so they don't typically take in the amount of formula or breast milk that they need." (*Id.* at 203:16-204:1; A. 1437-38.) The failure to take in the appropriate amount of milk or formula caused by illness can lead to dehydration, which is "one of the most common causes of renal failure." (*Id.* at 205:3-23; A. 1439.)

Based on these facts, Dr. Twombley concluded that renal failure was likely the cause of death and that, **to a reasonable degree of medical certainty, L.G. would not have died absent renal failure**. (*Id.* at 207:10-13; A. 1441.) **As she explained, the morphine that was in L.G.'s system was not the cause of the renal failure**. (*Id.* at 206:3-15; A. 1440.) Renal failure could cause morphine or other toxins to build up and rapidly (within 24 hours even). (*See id.* at 206:3-15, 213:3-11; A. 1440.) Dr. Twombley noted that even if no morphine had been present in L.G., potassium would have built up and caused her death. (*Id.* at 206:19-207:9; A. 1440-41.) Thus, renal failure could have caused her death regardless. (*Id.* at 234:15-21; A. 1468.) However, even if morphine toxicity was a factor, it would not have occurred absent the renal failure. (*Id.* at 234:10-14; A. 1468.) Dr. Twombley also opined that renal failure would not have been reasonably foreseeable to Petitioner. (*Id.* at 207:14-20; A. 1441.)

Like Dr. Scialli, Dr. Twombley had also prescribed morphine to infant patients, typically post-operative or for pain management such as where an infant has a kidney stone. (*Id.* at 193:18-194:4; A. 1427-28.) She has had infant patients that receive morphine for longer than six weeks, with some even taking it for months at a time. (*Id.* at 221:5-23; A. 1455.)

c. Attorney Wise's Testimony

Petitioner's final witness was Attorney Wise. He conceded that he did not present renal failure as the alternative cause of L.G.'s death and was not aware of this possibility until contacted by PCR counsel. (PCR Day II, Tr. 36:20-37:2; A. 1506-07.) He acknowledged that he

did not consult with an expert in reproductive and developmental toxicology or pediatric nephrology at the time of the underlying trial. (*Id.* at 37:4-11; A. 1507.) Attorney Wise emphatically agreed that it was an error to not present the alternative cause of renal failure and there was no strategy reason for not doing so. (*Id.* at 38:2-41:4, 50:20-25; A. 1508-11, 1520.) He believed that this alternative cause of death could have changed the outcome of Petitioner's trial. (*Id.* at 41:5-42:11; A. 1511-12.)

Attorney Wise also conceded that none of the State's witnesses testified to a reasonable degree of medical certainty that a lethal dose of morphine could pass through breast milk, and he did not challenge their testimony on this point.[4] (*Id.* at 46:7-48:5; A. 1516-18.)

Attorney Wise then admitted that he failed to object to several leading questions posed by the State to their expert witnesses. (*Id.* at 48:18-49:7; A. 1518-19.) He agreed that he could have objected to the leading questions and the failure to do so was not a strategy decision. (*Id.* at 52:7-12; A. 1522.)

Attorney Wise further acknowledged that he failed to object to the State's testimony about the synergistic effect of the medications on the toxicology report for L.G., and had he discussed the issue with someone like Dr. Scialli, he would have presented some testimony supporting that synergy cannot be presumed. (*Id.* at 49:8-50:7; A. 1519-20.)

Finally, Attorney Wise agreed that the Zipursky paper's repudiation of the Canadian study would have been extremely helpful and could have easily made a difference in the outcome. (*Id.* at 42:12-43:8, 44:16-23; A. 1512-14.)

[4] Attorney Wise agreed that the expert he did call, Dr. Karch, was not an expert in renal failure in infants. (*Id.* at 112:4-15; A. 1582.) Dr. Karch never raised the possibility that renal failure was the cause of death either in his trial testimony or in his pretrial discussions with Attorney Wise. (*Id.*) Attorney Wise agreed that although Dr. Karch testified as to a genetic defect being a "possible factor," he could not offer an opinion to a reasonable degree of medical certainty that it was the cause of L.G.'s death – contrasted with Dr. Twombley who could testify as such regarding renal failure. (*Id.* at 112:21-113:9; A. 1582-83.)

The State did not call any witnesses. Petitioner and the State both submitted post-trial briefs at the court's request on December 1, 2022.

d. The PCR Court's Findings

On February 1, 2023, the PCR Court entered a preliminary Form 4 Order outlining its anticipated ruling. The PCR Court's formal order of dismissal followed on May 8, 2023, which denied Petitioner's PCR application and dismissed it with prejudice.

Although the PCR Court found that trial counsel was deficient for: (1) failing to investigate and present an alternative theory of renal failure and (2) failing to object to the State's leading questions, the court nevertheless held that Petitioner was not prejudiced by counsel's deficiencies under *Strickland*.

The court also found that although there was no evidence to support the State's theory of "synergistic effects," trial counsel was not ineffective and Petitioner suffered no prejudice because counsel convinced the trial judge to instruct the jury that the cause of death needed to be a Schedule II drug and morphine was the only Schedule II drug found in L.G.

Finally, the court held that: (1) appellate counsel was not ineffective; (2) South Carolina does not recognize the "cumulative error doctrine" and that, even if it did, it would not apply here; and (3) the Zipursky study did not constitute new evidence.

Pursuant to SCRCP 59(e), PCR Counsel filed a motion to reconsider and amend the order of dismissal on May 22, 2023. On July 18, 2023, the PCR Court held a hearing on Petitioner's motion. On November 30, 2023, the PCR judge issued an order denying Petitioner's 59(e) motion. Petitioner timely filed a notice of appeal.

Standard of Review

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101-02 (2013). "[C]ourts evaluate allegations of ineffective assistance of counsel using a two-pronged test." *Id.*; *see also Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Id.* "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* (quoting *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989)). "Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." *Id.* "As reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694). For guilt or innocence issues, this means whether there is a reasonable probability that, absent the errors, the fact finder would have had reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

Argument

I. Ineffective assistance of counsel regarding counsel's failure to present the alternative cause of renal failure and challenge the lack of scientific support for the State's breast milk transmission theory and associated prejudice.

A. The PCR Court erred in finding that although trial counsel was ineffective for failing to investigate and present the alternative causation theory of renal failure, Petitioner nevertheless suffered no prejudice because this would not have changed the outcome.

As noted, the PCR Court acknowledged that Petitioner's expert testimony regarding renal failure established a highly persuasive alternative theory as to the cause of death and found that counsel was deficient for failing to present this theory. (Order Den. Mot. at 3; A. 1825.)

However, the court held that there was not a reasonable probability that the theory would have changed the outcome of trial, and therefore, Petitioner suffered no prejudice. (Order of Dismissal, at 7; A. 1829.) This was an error. At the underlying trial, the jury heard extensive testimony that morphine was dangerous for Petitioner to consume while breastfeeding and that it could transmit through her breast milk at a lethal level (which Petitioner's own expert conceded was possible). The trial cried out for some explanation from the defense – if it was not because of the breastfeeding, then what happened? Petitioner provided that explanation at PCR. There is no scientific support for the theory that a lethal level of morphine can pass through breast milk.[5] However, where a child is suffering from renal failure, it can cause an inability to excrete toxins and, to a reasonable degree of medical certainty, this was the cause of death. This evidence and testimony would have demonstrated that Petitioner's actions did not manifest a mental state of "extreme indifference" because L.G.'s death was not a reasonably foreseeable result of her conduct. There is a high likelihood that the jury would have found this evidence and testimony highly persuasive just as the PCR court did, and it could have changed the verdict.

The PCR court erred in a number of respects. First, it asserted that the "facts in the record" related to the elements of extreme indifference are "not contested," but this is not accurate.[6] Although Petitioner did not dispute the accuracy of the level of morphine measured in L.G.'s system identified on the toxicology report, that Petitioner consumed morphine, or that

[5] As Dr. Scialli detailed, L.G. would have had to consume many gallons of breast milk in a 24 hour period for the expected morphine transmission to reach the level measured on the toxicology report.

[6] Note that the PCR Court relied extensively on this Court's description of the facts in its Opinion from the merits appeal. As Petitioner argued at the motion to reconsider hearing, this was improper. The issue before the Court on the merits appeal was whether the trial court should have granted directed verdict, which requires reviewing the evidence in the light most favorable to the State. *See, e.g., State v. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 452 (2016) (explaining that while the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt). Therefore, the Court's description in the facts was set forth in the light most favorable to the State and should not have been repurposed here.

Petitioner was breastfeeding, Petitioner vehemently disputed that these actions satisfied the *mens reas* of homicide by child abuse.

As the evidence and testimony elicited at PCR supported, morphine is generally safe and effective for breastfeeding mothers and is often prescribed directly to newborns where appropriate. (PCR Day I, Tr. 35:7-37:4, 193:18-194:4; A. 1269-71, 1427-28.) As Dr. Scialli detailed, there is no scientific support for the possibility that morphine can transmit through breast milk at a lethal level. (*Id.* at 32:1-6, 41:4-8; A. 1266, 1275.) Dr. Scialli performed calculations determining that, under normal circumstances, L.G. would have had to consume over 50 gallons of breast milk in a one-day period for her body to have a morphine level equal to what was found in the toxicology screening. (*Id.* at 47:19-48:10; A. 1281-82.)

As Dr. Twombley opined, what caused L.G. to die was renal failure—a very abnormal circumstance which Petitioner would have had no reason to suspect. (*Id.* at 198:12-17, 207:14-20, 212:2-9; A. 1432, 1441, 1446.) L.G. could have died of renal failure regardless of whether Petitioner was consuming morphine, and Dr. Twombley opined that it was not reasonably foreseeable to Petitioner that L.G. was in renal failure. (*Id.* at 206:16-207:20; A. 1440-41.)

The PCR Court's reliance on *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016) and *State v. Taylor*, 626 A.2d 201 (R.I. 1993) to support its conclusion that Petitioner suffered no prejudice further demonstrates its error. Those cases each involved situations where the defendant knowingly permitted a child to directly access and consume a controlled substance. The facts here were very different because the controlled substance was only "administered" to the child to the extent a very small portion of the metabolized drug passed through her breast milk. *Taylor* explained that even if the death may have been unintentional, it could be "viewed as reasonably foreseeable in view of the dangerousness of the act or conduct of the accused." *See*

Taylor, 626 A.2d at 203. Here, however, as the testimony and evidence presented at PCR established, L.G.'s death was not reasonably foreseeable.

The PCR Court agreed that Petitioner's experts "established, among other things, the child would not have died but for renal failure." (Order of Dismissal at 8; A. 1769.) The Court also noted that "there is no factual or medical information that causally connects the morphine and renal failure" and that the expert testimony established that L.G. could have died from "renal failure regardless of the high morphine level." (*Id.* at 9; A. 1770) Despite these findings, the Court nonetheless held that this would not likely have affected the outcome of the trial on the merits. (*Id.*) The PCR Court failed to fully consider the inherent conflict between its findings that Petitioner established a highly persuasive alternative theory of causation and trial counsel's ineffectiveness for failing to present said theory, yet that this did not undermine the confidence in the outcome of the underlying trial.

The PCR court largely based its conclusion on the evidence from the underlying trial that a lethal level of morphine was found in L.G. However, the PCR court glosses over the fact that the cause of the morphine level was the renal failure (which itself was caused from dehydration), not Petitioner's consumption of morphine or her breastfeeding. If trial counsel had utilized the evidence and testimony presented by Petitioner at PCR, the jury would have learned that Petitioner was consuming a drug that is: (1) safe for use while breastfeeding and can be administered directly to infants in normal circumstances, (2) does not pass in a lethal level through breast milk, and that (3) L.G. was suffering from renal failure, which could cause substances to build up in her system in a way that would not occur under normal circumstances. It would not have been reasonably foreseeable to Petitioner that her daughter was suffering from renal failure and thus Petitioner took no conscious action to place her child at risk. **Therefore, as**

Petitioner contended, if trial counsel had presented the alternative theory of renal failure, it would have entirely negated the element of intent. It is difficult to see how this would not have had an impact on the jury's consideration of whether Petitioner engaged in "deliberate actions" manifesting an extreme indifference to L.G. as required under the homicide by child abuse statute.

Furthermore, despite concluding that the alternative theory was persuasive and viable, the PCR Court erroneously stated that renal failure was not supported by physical evidence and that "[t]he experts' diagnosis is ultimately based of [sic] [Petitioner]'s hearsay reports of cold-like symptoms Victim had roughly two days before Victims Death." (Order Den. Mot. at 7; A. 1829.) This was incorrect. The deputy coroner read her report into the record at the underlying trial containing a summary of L.G.'s condition prior to the days leading up to her death. This report noted L.G. had a cold and was congested and lethargic, Petitioner had called the pediatrician, and the nurse told her if L.G. was not running a fever she did not need to bring her in. (Trial Tr. 92:20-93:8; A. 0167-68.)[7] Pathologist Dr. David Wren also testified in the underlying trial that he saw physical evidence of congestion in L.G.'s autopsy. (Trial Tr. 448:22-449:02; A. 0523-24.) Finally, the deputy coroner testified about L.G.'s weight loss. (Trial Tr. 524:16-525:10; A. 0599-600).[8] The PCR court's finding does not find footing in the record and was error.

The PCR court's order also conflicts with what it told the State's counsel during the evidentiary hearing. As the court explained, if the State wanted to attack the propriety of the testimony supporting the renal failure theory, the State needed to have its own expert witness to explain why Petitioner's experts were not correct. (PCR Day II, Tr. 162:07-163:07; A. 1632-33.)

[7] Dr. Wren and Eagerton also reference this portion of the report during his testimony. (Trial Tr. 401:21-25; 448:13-25; A. 0476, 0523.) Furthermore, this report was included in records obtained in discovery in this PCR action, including in the coroner's file and L.G's medical records.

[8] Information regarding L.G.'s weight loss was also contained in the medical records obtained in discovery in this case.

The PCR Court also drew a false analogy between Dr. Karch's testimony regarding a possible genetic defect and renal failure. (Order Den. Mot. at 8; A. 1830.) As noted, Dr. Karch did not actually testify that L.G. had a genetic defect or opine regarding a genetic defect to a reasonable degree of medical certainty. His testimony was entirely speculative. Moreover, as Dr. Scialli explained, there was no support in the medical literature for any genetic defect that could have caused the morphine level measured in L.G. (PCR Day I, Tr. 69:16-70:21; A. 1303-04.)

Unless the evidence in the underlying action is "conclusive," it does not foreclose a finding of prejudice. The Court of Appeals' recent decision in *Ryals v. State* is instructive. 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023). In *Ryals*, the PCR court found that trial counsel was potentially deficient but denied PCR because the applicant failed to establish prejudice in view of the "overwhelming evidence" against him. *Id.* at 235, 886 S.E.2d at 242. The Court of Appeals reversed. Importantly, the Court explained that for evidence to be "overwhelming" such that it precludes a finding of prejudice, it must include something conclusive, such as a "confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* (quoting *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018)). The evidence here was far from "conclusive" as demonstrated by what Petitioner established at PCR.

B. The PCR court erred in finding that Petitioner suffered no prejudice from trial counsel's decision to call Dr. Karch and his testimony.

As Petitioner detailed at PCR, Dr. Karch's testimony ultimately agreed with the State's theory of the case and only served to bolster the State's position. Furthermore, Dr. Karch did not opine that it was ***impossible*** for a lethal level of morphine to be transmitted solely through breastfeeding (as Dr. Scialli did at PCR).

Dr. Karch's testimony was intended to undermine the State's theory of the case. However, Attorney Wise was aware that Dr. Karch could not provide any positive proof. ***On direct examination***, Attorney Wise asked Dr. Karch if he thought the morphine level could be explained solely by transmission through breast milk and he replied "yes," which conceded the State's entire theory of the case. The State even pointed out during its closing that Dr. Karch conceded the case. (Trial Tr. 504:19-21, 511:5-10, 513:8-16; 556:21-557:02; A. 0579, 0586, 0588, 0631-32.)

The situation is analogous to *McKnight v. State* where the methodology of the only expert called by petitioner at the second trial "mimicked that of the State's star expert" and served to "bolster the State's theory of the case." 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008). The court found that there was a reasonable probability that this deficiency prejudiced the petitioner. *Id.* at 46, 661 S.E.2d at 360. That is precisely what ended up happening with Dr. Karch's testimony in Petitioner's trial.

Thus, the PCR Court erred in holding that Petitioner was not prejudiced by trial counsel's ineffectiveness in failing to investigate, develop, and offer an alternative theory of causation to rebut the State's theory that the level of morphine tested in L.G. came from breast milk.

C. The PCR court erred by finding that Petitioner was not prejudiced by counsel's failure to seek to have the State's experts' scientifically unreliable testimony excluded or otherwise challenge or rebut this testimony.

The PCR Court erred in holding that Petitioner was not prejudiced despite trial counsel's failure to challenge scientifically unreliable testimony that the morphine transmitted in a lethal level through Petitioner's breast milk (which Petitioner established at PCR as noted above).

At trial, Attorney Wise stated that he intended to request a hearing if the State's witnesses offered testimony that morphine could be transmitted at a lethal level through breast milk. (Trial Tr. 19:11-21; A. 0094.) The trial court agreed to have such a hearing if necessary. (*Id.* at 20:2-3;

A. 0095.) Inexplicably, however, Attorney Wise never objected or requested a hearing despite several of the State's witnesses offering this exact testimony. (*See* Trial Tr. 358:17-359:4, 361:19-362:2, 439:6-446:5; A. 0433-34.)

Trial counsel was ineffective for failing to submit a motion to exclude or a motion in limine and/or request a *State v. Council* hearing as to the reliability of the testimony and opinions that the State's expert witnesses intended to offer. As Petitioner's trial bore out, none of the State's experts were able to testify in support of this theory to a reasonable degree of medical certainty. Attorney Wise should have moved for a *State v. Council* hearing pretrial to ascertain whether the State could actually support its theory of the case with reliable expert testimony to a reasonable degree of medical certainty. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding that the trial court must assess under Rule 702, SCRE whether evidence "will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable") (applying the *Jones* factors to determine reliability and must determine if its probative value is outweighed by its prejudicial effect). Attorney Wise was likewise ineffective for failing to object to this testimony or, at a minimum, present rebuttal testimony.

Attorney Wise agreed that he did not make any pretrial motions or otherwise challenge or object to this testimony and there was no strategic reason for doing so. (PCR Day II, Tr. 46:24-48:5, 52:4-12; A. 1516-18, 1522.) The only justification he offered was that the State never asked the witnesses if their testimony was to a reasonable degree of medical certainty. (*Id.*) However, if anything, this made the failure to object more problematic since the jury heard speculative, unreliable expert testimony that should have been excluded in the first instance since it could not be offered to a reasonable degree of medical certainty.

Petitioner was prejudiced by this ineffectiveness because if Attorney Wise had mounted a challenge to this unreliable testimony, he could potentially have gotten the entire scientific underpinning for the State's case excluded. At a minimum, the jury should have heard him challenge this testimony and present rebuttal testimony demonstrating that they should not accept the State's theory as "obvious" despite the State's suggestion. Instead, Attorney Wise permitted the State to present its scientifically unreliable theory that breastfeeding alone could cause morphine to transmit at a lethal level to the jury unchallenged (a theory which the jury apparently agreed with considering their guilty verdict), clearly demonstrating its outcome determinative effect and prejudice. But for these errors, the result of the proceeding could have been different.

Therefore, the PCR Court erred in holding that trial counsel's failure to exclude this testimony did not prejudice Petitioner. Furthermore, the PCR Court erred in holding that this did not prejudice Petitioner by depriving her of a potential appellate ground if the trial court denied a motion to exclude or overruled Attorney Wise's objections to this expert testimony.

II. Ineffective assistance of counsel for failing to challenge or rebut the State's expert testimony related to the synergistic effect of the medications found on the toxicology report for L.G.

The PCR Court acknowledged that Petitioner made a persuasive case at PCR that the "medical science does not support the idea of 'synergistic effect' of the other drugs taken by [Petitioner]." (Order of Dismissal at 12; Order Den. Mot. at 3-4; A. 1773, 1825-26.) However, the PCR Court erroneously found Petitioner suffered no prejudice because the trial court only charged Schedule II substances (meaning only morphine) and the State did not argue this to the jury.

The PCR Court overlooked Petitioner's argument that the fact that synergy was not supported by the medical science demonstrated the need for trial counsel to seek to have any such evidence and testimony excluded prior to trial or, at a minimum, to present testimony

rebutting this point. Although the trial court ultimately agreed that the issue should not be charged or argued to the jury in closing, multiple State witnesses had already testified about the concept and its applicability here. If anything, that made this testimony more prejudicial since the damage was done and the bell could not be unrung (particularly considering the trial court did not give the jury any instruction to disregard that testimony).

Attorney Wise was on notice that the State intended to present testimony as to the "synergistic effect" of the medications listed on the toxicology report. At the pretrial hearing, Attorney Wise noted the State appeared to have "tweaked" its case to the theory that "not only morphine but the other drugs in the system could have helped kill the child." (Trial Tr. at 24:4-7; A. 0099.) At that hearing, Attorney Wise acknowledged that he had never discussed the "relevance of the other drugs" with Dr. Karch because they had been focusing on the morphine. (*Id.* at 24:11-12; A. 0099.) As the Solicitor pointed out, however, Dr. Wren's report included the synergistic "force of the different other drugs on the morphine" and described it as a "one-plus-one-equals-three theory." (*Id.* at 24:18-22; A. 0099.) He noted this was "not a surprise to the defense" since it had been given in discovery and all of the State's experts agreed that synergy would be a "factor of the morphine increasing the effects of the morphine on the child." (*Id.* at 24:22-25:3; A. 0099-0100.) The trial judge expressly told Attorney Wise that he would need to "have that conversation with your expert to determine if that creates an issue in this trial." (*Id.* at 25:6-8; A. 0100.)

Despite this exchange and the trial judge's statements, Attorney Wise made no effort to investigate the theory and assess its merit before trial, seek to prevent the State's experts from testifying about this concept, or present rebuttal evidence on this theory. Dr. Karch was an expert in toxicology and should have been able to assist Attorney Wise in understanding this concept

and why it would not apply here. If Dr. Karch could not, as Petitioner established at PCR, Attorney Wise could have consulted with an expert such as Dr. Scialli who could offer an opinion as to a reasonable degree of medical certainty. At PCR, Dr. Scialli emphatically testified that synergy was not applicable here and would have been able to offer such testimony at the time of Petitioner's trial to a reasonable degree of medical certainty. Counsel's deficient investigation, preparation, and trial preparation significantly prejudiced Petitioner because the jury heard this scientifically unreliable testimony multiple times throughout the trial—testimony that should never have been allowed in the first place had Attorney Wise mounted a proper challenge.

Attorney Wise also failed to object or otherwise challenge the State's witnesses when they offered this testimony. Five expert witnesses for the State testified about the supposed "synergistic effect" of the medications found in L.G. on the morphine.[9] Three additionally opined that it could have contributed to L.G.'s death.[10] This was prejudicial to Petitioner because, again, there was no scientific basis for synergy under these facts, yet the only testimony the jury heard was that this was an established concept applicable in this case. The prejudice was compounded by the fact that none of the State's experts testified that synergy applied to a reasonable degree of medical certainty or cited any supporting literature.

The PCR Court erroneously found that Petitioner suffered no prejudice because the trial court charged the jury that it could only return a guilty verdict if it found that Petitioner's consumption of Schedule II substances (of which only morphine qualified) caused L.G.'s death

[9] Quintus Leon Young, III, Dr. Bell, Dr. Kotecha, Dr. Eagerton, and Dr. Wren all testified regarding the supposed "synergistic effect" of the particular drugs that Petitioner was taking and/or that "one plus one equals three" or "one plus one equals five" when analyzing drug interactions. (Trial Tr. 148:13-17, 260:05-261:24, 265:16-21, 322:02-13, 350:02-351:11, 430:25-44:21; A. 0223, 0335-36, 0340, 0396-97, 0425-26, 0505-19.)

[10] Dr. Bell, Dr. Kotecha, and Dr. Wren all offered such testimony. (Trial Tr. 260:5-15, 265:12-21, 322:2-13, 341:3-8, 430:11-433:22, 444:2-5; A. 0335, 0340, 0397, 0416, 0505-08, 0519.)

and, as a result, the State limited its closing argument to this question. (*See* Order of Dismissal at 12; Order Den. Mot. at 3-4; A. 1773, 1825-26.) As Petitioner has consistently noted, if anything, this supports the inverse because the prejudice was amplified by the fact that it was ultimately not even relevant to the question charged to the jury. If the jury was not to consider the effect of the other medications, then Attorney Wise should have made every effort to have the testimony and evidence about them excluded. Instead, the jury heard multiple experts testify about the synergistic effect of the other medications on the morphine. This prejudice tainted the entire trial.

For all these reasons, there is a reasonable probability that but for counsel's deficiencies, the outcome would have been different, and the PCR Court erred in holding to the contrary.

III. Ineffective assistance of counsel for failing to object to the State's leading questions implying that morphine transmission at a lethal level through breast milk and synergistic effect were "obviously" why L.G. died.

As noted, trial counsel failed to object to the State's leading questions regarding morphine transmission through breast milk and synergy "obviously" being the cause of death. (*See* Trial Tr. 113, 234, 249, 262, 265, 298, 347, 351, 358-59, 361, 443-44, 445-46, 439; A. 0188, 0309, 0324, 0337, 0340, 0373, 0422, 0426, 0433-34, 0436, 0518-19, 0520-21, 0514.)[11] The PCR Court found that trial counsel was ineffective for failing to object to at least a portion of the State's leading questions posed to its expert witnesses. Here, again, however, the PCR Court determined that Petitioner suffered no prejudice. This was error.

The prejudicial effect of these unobjected-to questions was significant because it implied to the jury it was undisputed that: (1) morphine can be transmitted in a lethal level solely through breastfeeding was "obviously" a sound scientific principle and (2) other medications identified on the toxicology report had a "synergistic effect" on the morphine, and these points were not

[11] The most notable examples were the questions posed to Dr. Eagerton and Dr. Wren regarding the cause of L.G.'s death. (*See* Trial Tr. 265:16-21; 351:3-11; 358:17-359:4; 444:2-16; A. 0340, 0426, 0433-34, 0519.)

contested by the defense. Dr. Scialli's testimony at PCR demonstrated this was not correct. The State's leading questions were highly prejudicial because they suggested to the jury that the concept that morphine could transmit through breast milk at a lethal level was "obvious" or "certain," yet the evidence and testimony presented at PCR demonstrated this assertion lacked any scientific underpinning.

The PCR Court's findings that "the content of the [witness] answers, such as whether the morphine level was potentially lethal, was not a fact in dispute" only further demonstrates why the questions were so prejudicial. The facts ***should*** have been in dispute at the underlying trial as Petitioner showed at PCR. Renal failure was the reason for the morphine level, not Petitioner's extreme indifference in consuming morphine while breastfeeding. The PCR Court's assertion that the testimony was "admissible" is also not accurate for the reasons detailed herein. It should have been excluded pretrial for the reasons detailed by Petitioner. Trial counsel should have objected to these improper leading questions and sought to have it excluded and the PCR Court erred in holding that Petitioner was not prejudiced by trial counsel's ineffectiveness.

IV. Ineffective assistance of appellate counsel for failing to argue for the appropriate remedy in the event the Court agreed with Petitioner's argument that the convictions for involuntary manslaughter and homicide by child abuse were inconsistent.

As Petitioner detailed to the PCR Court, Attorney Wise correctly argued that the convictions on both homicide by child abuse and involuntary manslaughter violated double jeopardy. However, he did not specifically argue what remedy should result in the event the Court agreed. Counsel rendered ineffective assistance of appellate counsel by failing to contend that the Court should either: (1) reverse both convictions and remand for a new trial or (2) permit only the involuntary manslaughter conviction (which had the lower sentence) to stand.

The Supreme Court agreed on appeal that although it may have been proper to present both charges to the jury, the trial court should have instructed the jury that Petitioner could not be found guilty of both charges. *State v. Greene*, 423 S.C. 263, 282, 814 S.E.2d 496, 506 (2018). Rather, depending on their view of the evidence, the jury could only find Petitioner not guilty of both offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter.[12] *Id.* The Supreme Court reasoned that the jury's guilty verdict on homicide by child abuse precluded a guilty verdict on the involuntary manslaughter charge and thus vacated the conviction for involuntarily manslaughter.

Attorney Wise raised the correct issue on appeal. However, as noted, in the briefing Attorney Wise did not ask for any particular relief for this error. Attorney Wise should have requested that the court reverse both convictions and require a new trial with the proper jury instruction. Alternatively, he should have argued that if the Court was going to let one conviction stand, it should be the one with the lower sentence (involuntary manslaughter). By failing to specify any requested relief, the Supreme Court simply opted to eliminate the concurrent conviction and sentence for involuntary manslaughter, which ultimately had no impact on the total term of Petitioner's incarceration. This significantly prejudiced Petitioner because there was an opportunity to seek reversal of both convictions that was not advocated or pursued.

[12] As the Supreme Court noted, the jury could have concluded that the State failed to prove Petitioner committed "a deliberate or intentional act under circumstances revealing an extreme indifference to human life" as required by the homicide by child abuse statute, yet nevertheless found her guilty of involuntary manslaughter. The Supreme Court elaborated on the distinction between the two charges, noting 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" whereas involuntary manslaughter 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." *Greene*, 423 S.C. at 281, 814 S.E. at 506.

Attorney Wise was also ineffective for failing to seek reconsideration of the Supreme Court's opinion on this basis. Although he filed a Petitioner for Rehearing, this was not one of the grounds raised therein.

The PCR Court held that Attorney Wise did not provide ineffective assistance of counsel because Petitioner "failed to show that the issue contemplated is clearly stronger than the issues raised by Mr. Wise". (Order Den. Mot. at 13; A. 1835.) This misinterprets Petitioner's argument. Again, Attorney Wise made the correct argument. His error was in failing to advocate for the appropriate relief.

The PCR Court erred in holding that appellate counsel was not ineffective and that Petitioner suffered no prejudice.

V. The cumulative error doctrine further supports a finding of prejudice.

The PCR Court held that although it found "counsel deficient for multiple errors, . . . South Carolina does not recognize the cumulative error doctrine" (Order of Dismissal at 15; A. 1776) and that in "[v]iewing the record as a whole" Petitioner was not prejudiced because "the deficiencies do not create a reasonable probability of a different result." (*Id.*) This was also an error.

South Carolina appellate courts have not definitively stated whether the cumulative error of counsel represents an independent basis for granting postconviction relief. *See Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) ("Whether the cumulative of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."); *see also State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985) (cumulation of errors warranted reversal, but the court also found each individual error caused prejudice), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (finding multiple errors, which were not prejudiced

separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together). However, as Petitioner argued to the PCR Court, the doctrine should be adopted.

Attorney Wise agreed at the PCR hearing that all the deficiencies presented by Petitioner, taken together, could have made a difference in the outcome of Petitioner's trial. (PCR Day II, Tr. at 53:22-54:2; A. 1523-24.) The PCR Court erred in refusing to find that the cumulative effect doctrine is consistent with South Carolina law and that Petitioner was not prejudiced by counsel's cumulative errors.

VI. New evidence of material facts not previously heard and presented require vacation of the convictions.

Lastly, the PCR Court also erred in holding that the publication of the Zipursky paper and repudiation and retraction of the Canadian study did not constitute new evidence of material facts that required vacation of Petitioner's conviction or sentence.

As the Supreme Court explained in the PCR context in *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014), to obtain a new trial based on after-discovered evidence, the party must show that the evidence:

> (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.

Id. (quoting *McCoy v. State*, 401 S.C. 363, 368 n.1, 737 S.E.2d 623, 625 n.1 (2013)). The standard test for newly discovered evidence is "properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence." *McCoy*, 401 S.C. at 371, 737 S.E.2d at 627.

The Zipursky paper represents a critical piece of evidence because it flatly disproves the Canadian study. Additionally, it was a significant development that the two journals that published literature about the Canadian study issued the retraction. As Dr. Scialli testified, a

retraction is "very rare" and generally only done where a paper presented "fraudulent data" or where its conclusions are "so erroneous that they represent a risk to the reading public." (PCR Day I, Tr. 69:5-15; A. 1303.) Dr. Scialli agreed that it was fair to say that the Canadian study, the only study cited in Petitioner's underlying trial in support of the State's breast milk theory, had been disproven. (*Id.* at 69:12-15; A. 1303.)

At the time of trial, Petitioner could have, at best, introduced testimony from someone like Dr. Scialli to undermine the Canadian study (which Dr. Scialli did at PCR). However, because Petitioner was not able to exclude reference to it entirely, the Canadian study significantly hampered Attorney Wise's jury argument that the State's theory was "impossible" since the State supposedly had at least one example where it had occurred previously and, unlike Dr. Scialli, Dr. Karch was not able to testify as to why it was inapposite.

Although the PCR Court noted that it "agrees that the Zipursky paper's repudiation of the Canadian study would offer some benefit," the Court held that the Zipurksy paper was not evidence sufficient to grant a new trial based on after-discovered evidence because "the study was primarily used by Mr. Wise" and that "the retraction, at best, is evidence that is impeaching." This was error because the Zipursky study directly contradicted the State's theory of the case and the only medical literature cited in support of that theory at trial.

Therefore, the PCR Court erred in finding that the Zipursky paper and the retraction of the Canadian study did not satisfy the standard for granting a new trial based on new evidence.

Conclusion

Based on the above, certiorari should be granted, the order of the PCR Court reversed, and the case remanded for a new trial.

Respectfully submitted,

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January 30, 2024